



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

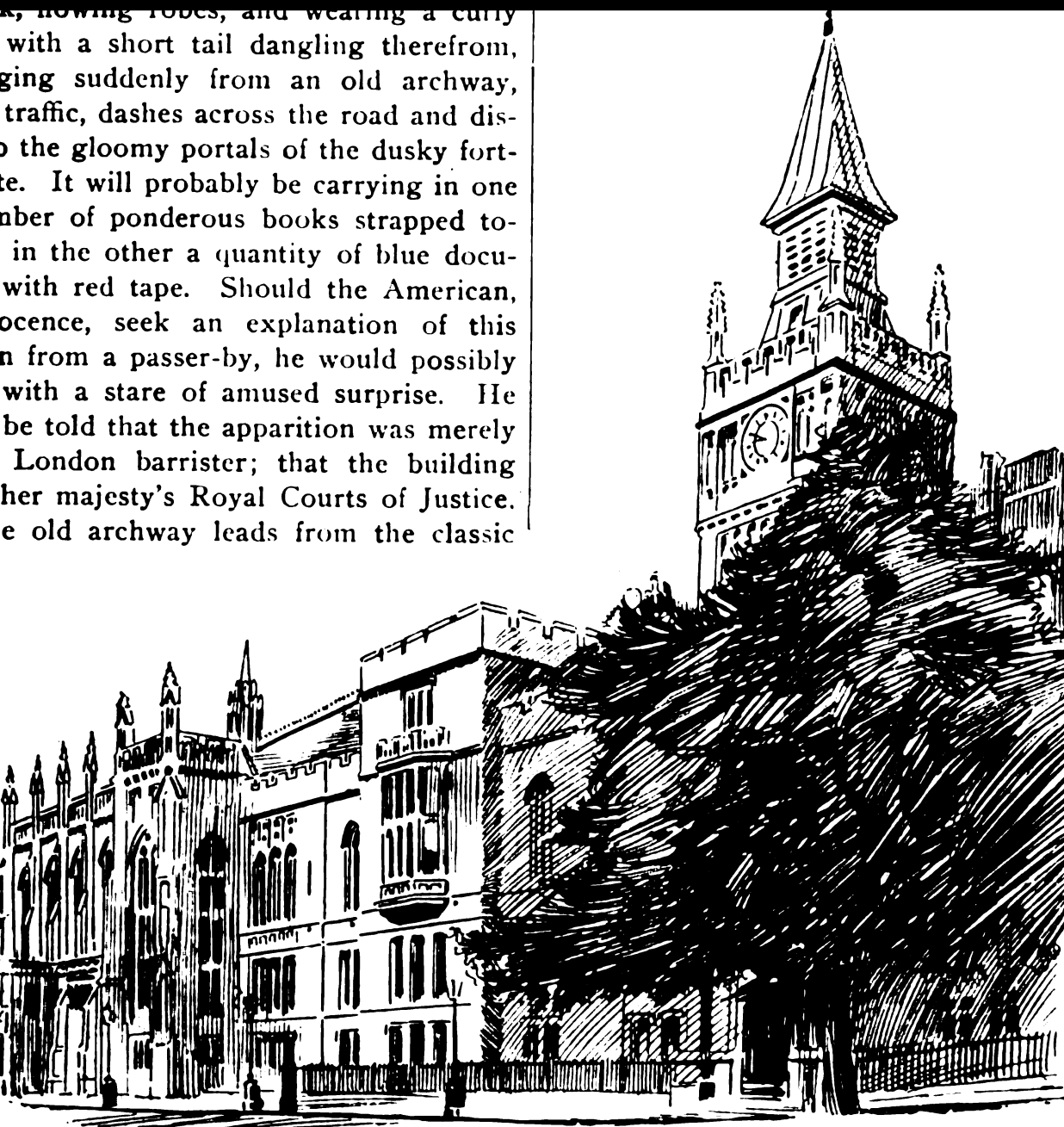
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

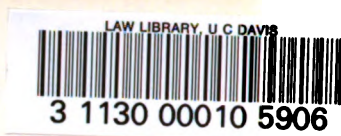
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

k, flowing robes, and wearing a curly  
with a short tail dangling therefrom,  
ging suddenly from an old archway,  
traffic, dashes across the road and dis-  
to the gloomy portals of the dusky fort-  
te. It will probably be carrying in one  
nber of ponderous books strapped to-  
in the other a quantity of blue docu-  
with red tape. Should the American,  
ocence, seek an explanation of this  
n from a passer-by, he would possibly  
with a stare of amused surprise. He  
be told that the apparition was merely  
London barrister; that the building  
her majesty's Royal Courts of Justice.  
e old archway leads from the classic



# *The Albany law journal*





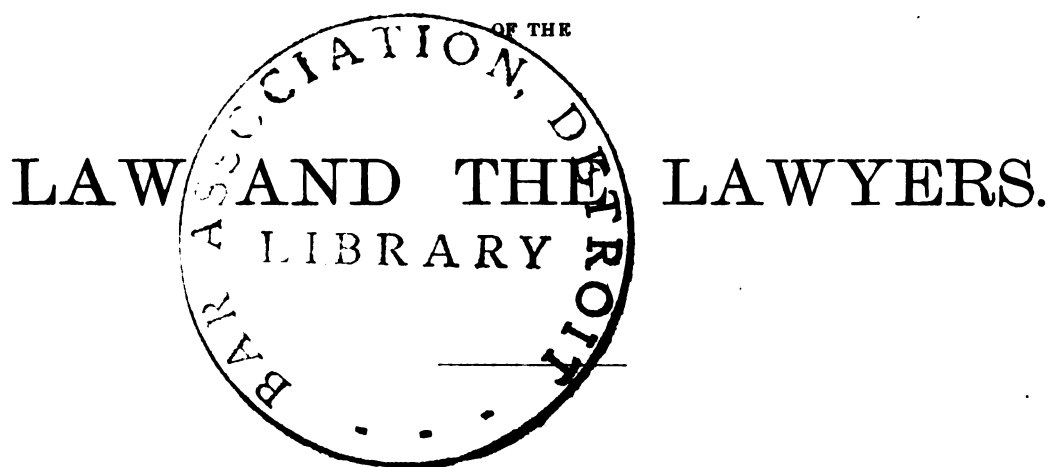


HI

LE

# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD



VOL. LV.

FROM JANUARY TO JUNE, 1897.

10189

ALBANY, N. Y.:  
ALBANY LAW JOURNAL COMPANY.  
1897.

	PAGE.		PAGE.
Ferry v. Cincinnati Underwriters.....	160	Karger v. Karger.....	265
Fiddler v. John.....	109	Keeler v. Clifford.....	274
Filby v. Hounsell.....	16	Kellogg v. Douglas County Bank.....	419
Finlay v. Darling.....	352	King v. Cox.....	109
Fisher v. W. Va. & P. R. Co.....	94	King v. State.....	191
First Nat. Bank of Concord v. Hawkins.....	441	Kingman County v. Leonard.....	27
First National Bank of Indianapolis v. New.....	160	Kirkham v. Attenborough.....	126
First National Bank of Santa Ana v. Erreca.....	258	Kirkman v. Kirkman.....	418
Fitzgerald v. Fairbank.....	369	Knights of Pythias v. Hill.....	110
Flint v. Luhrs.....	15	Koch v. Mayor, etc., of the City of New York.....	182
Forke v. Homann.....	296	Koster v. Seney.....	109
Frost v. Courtis.....	420	Kratzenstein v. Lehman.....	263
Gaither v. Dougherty.....	160	Lafontaine v. Hayhurst.....	221
Garrison v. Burns.....	191	Lane v. Norman.....	16
Gatch v. Garrettson.....	174	Langauer v. Espenhain.....	274
Genz v. State.....	419	Lansing v. Coney Island & Brooklyn Ry. Co.....	429
Germond v. Hermosa Ice Co.....	174	Lazarus v. Artistic Photograph Co.....	333
Goddard v. Creffield Mills.....	15	Leavitt v. Bangor & Aroostook Railroad Co.....	405
Godfroy Moge v. Societe de Bienfaisance St. Jean Baptiste.....	419	Level Land Co. v. Hayward.....	160
Goetzinger v. Rosenfeld.....	237	Little v. Banks.....	113
Goldstein v. Foulkes.....	174	Loewen v. Forsee.....	191
Goldstein v. Vaughan.....	333	Lord v. The Board of Trade of Wichita.....	93
Granger v. Granger.....	296	Louisville & Nashville Railroad Co. v. McElwain.....	48
Gregory v. Chicago & N. W. Ry. Co.....	160	Lovett v. Moore.....	191
Grey v. Holmes.....	79	Lowry v. Insurance Co. of N. America.....	352
Grey v. Northern Accident Ins. Co.....	192	Lozano v. Palatine Ins. Co.....	258
Gross v. Gross.....	15		
Gulf C. & S. F. Railway Co. v. Compton.....	125	Macauley v. Polley.....	421
Gulf, etc., Railway Co. v. Hodge.....	351	MacCullers v. Harkness.....	274
Guy Weber v. Shay & Crogan.....	227	Machado v. Fontes.....	387
		Maine v. Chicago B. & Q. Ry. Co.....	420
Hafner v. Hebron.....	334	Martin v. Bott.....	334
Haizlip v. Rosenberg.....	258	Mason v. Browles.....	208
Halbert v. Gibbs.....	429	Mayberry v. Nichol.....	370
Hale v. Hodson.....	386	McCall v. Hampton.....	93
Hale v. Holkon.....	274	McDole v. Kingsley.....	78
Harrison v. Sutter Street Ry. Co.....	398	McDonald v. John Hancock Mutual Life Ins. Co.....	441
Hauk v. State.....	274	McDowell v. State.....	78
Haun v. Burrell.....	160	McHugh v. City of St. Paul.....	222
Henderson v. Davisson.....	94	McMaster v. New York Life Ins. Co.....	237
Hendrick v. Chicago A. R. C.....	125	McTague v. Finnegan.....	15
Hess v. Preferred Mutual Accident Asso.....	256	Merchants' National Bank of Fort Worth v. Phillip & Wiggs Machinery Co.....	257
Higgins v. Ridgway.....	367	Mersman v. Mersman.....	110
Higgs v. State.....	237	Minot v. Minot.....	418
Holland v. Anthony.....	160	Missouri, K. & T. Ry. Co. v. Johnson.....	334
House of Mercy v. Davidson.....	386	Moore v. Prussing.....	334
Hummel v. Flores.....	274	Moore v. State.....	441
Hutton v. Dewing.....	125	Moss v. Moss.....	442
		Murray v. Reed.....	351
Iasigi v. Van De Carr.....	352	Mutual Reserve Fund Life Asso. v. New York Life Ins. Co.....	126
Illinois Central Railroad Co. v. Hilliard.....	15	Mygatt v. Coe.....	346
Illinois Central Ry. Co. v. Mizell.....	208		
Imbrie v. Manhattan Life Ins. Co.....	15	Nash v. Chicago, etc., Ry. Co.....	315
Imray v. Oakshette.....	421	National Cash Register Co. v. Brown.....	296
Indiana, I. & I. R. Co. v. Masterson.....	43	Nelson v. Atlanta Home Ins. Co.....	419
In re Conway's Estate.....	386	Nevill v. Fine Arts & General Ins. Co.....	142
In re Davis Will.....	237	Newark City Ice Company v. Fisher.....	94
In re Edward Eckart.....	379	New England Safe Deposit & Trust Co. v. Harrell.....	258
In re Hybart.....	109	Northern Trust Co. v. Snyder.....	191
In re Kennedy.....	109		
In re Settlement of Accounts of Smith.....	367	O'Boyle v. McHugh.....	48, 93
In re Weeks Settlement.....	238	O'Connor v. Decker.....	296
International & G. N. R. R. Co. v. Satterwhite.....	221	O'Donnell & Duer Brewing Co. v. Farrar.....	78
		Ogilvie v. Littleboy.....	405
January v. State.....	125	O'Leary et al. v. Merchants & Bankers' Mutual Ins. Co.....	207
Jarvis v. Southern Grocery Co.....	125	Olney v. Lovering.....	441
Jefferson v. Jameson & Morse Co.....	274		
Johnson v. Redwine.....	78		
Johnson v. Travelers' Ins. Co.....	351		
Jules v. State.....	351		

# TABLE OF CASES.

v

	PAGE.		PAGE.
O'Neal v. O'Connell.....	386	State v. Stockman.....	78
Orient Ins. Co. v. Parlin & Orendorff Co.....	174	State v. Wood.....	222
Palmer v. City of Danville.....	370	State v. Worth.....	222
Pattle v. Hornbrook.....	175	Stranahan Co. v. Coit.....	28
People ex rel. Inebriate Home v. Comptroller of Brooklyn.....	346	Stearns v. Lake Shore & Mich. Southern Ry. Co.....	410
People ex rel. Lawrence v. Fallon.....	165	Stone v. Pillsbury.....	419
People ex rel. Manhattan Railway Co. v. Bar- ker.....	346	Stout v. Rayle.....	64
People v. Doris.....	114	Straus v. Hensey.....	94
People v. Hawker.....	218	Stuart v. Harris.....	335
People v. Nelson.....	395	Sullivan v. Beck.....	419
People v. Provident Fund Society Co.....	94	Swan v. Chicago & Alton Railroad.....	79
People v. Ratz.....	109		
Peterson v. Schmidt.....	263	Texas Brewing Co. v. Meyer.....	125
Phillips v. Sherman.....	258	Texas & Pacific Railway Co. v. McManus....	125
Pierce v. Southern Pacific Co.....	237	Texas & P. Ry. Co. v. Jones.....	257
Pike v. McIntosh.....	420	Thomas v. Jennings et al.....	16
Poladori v. Newman.....	352	Thompson v. Bryant.....	351
Queen v. Lillyman.....	126	Thompson v. Deeds.....	430
		Thompson v. Robinson.....	109
Rafferty v. Schofield.....	441	Thorington v. Hall.....	237
Reager v. Kendall.....	370	Thornton v. Taylor.....	351
Re Agudath Hakehiloth.....	24	Town of Salem v. Walker.....	258
Redford v. Coggeshall.....	125	Townsend v. State.....	418
Re New Transval Co.....	15	Traders' National Bank v. Rogers.....	420
Rice v. Bank of Camas Prairie.....	257	Troy Fertilizer Co. v. Zackry.....	315
Riddle v. Dow.....	63	Trustees of Phillips Exeter Academy v. New Parish in Exeter.....	192
Riggen v. Investment Co.....	258		
Roane v. Matthews.....	370	Union Brewing Co. v. Meir.....	78
Roberts v. Security Co.....	126	United States National Bank v. First Nat. Bank of Little Rock.....	441
Rogers v. Ætna Ins. Co.....	100	United States v. Bachelder.....	370
Rose v. Commonwealth.....	441	United States v. Three Friends.....	160
Sann v. H. W. Johns Mfg. Co.....	261	Van Arsdale v. King.....	274
Saunders v. Saunders.....	315	Vining v. New York, etc., R. Co.....	315
Schmalzried v. White.....	93	Viscount Hill v. Bullock.....	405
Scituate Water Co. v. Simmons.....	420	Viscount Hill v. Dowager Viscountess Hill..	238
Scott v. Donald.....	221	Votaw v. Pettigrew.....	125
Sheehan v. St. Paul & Duluth Railway Com- pany.....	15		
Shevlin v. The American Mutual Accident Association.....	64	Wallace v. State.....	351
Shield v. The Union Central Life Ins. Co....	93	Walter Baker & Co. v. Baker U. S. C. C. W. D.....	208
Shultz v. Colvin.....	64	Watson v. Tanner.....	236
Shute v. Sargent.....	222	Ward v. Boyce.....	274
Sickles v. New Jersey Ice Co.....	398	Warren v. Pitts.....	334
Silver Valley Mining Co. v. The N. C. Smelt- ing Co.....	93	Warrior Coal & Coke Co. v. The Mabel Min- ing Co.....	110
Simmons v. Shelton.....	237	Weinhouse v. Cronin.....	174
Singleton v. Hill.....	48	Westenfelder v. Green.....	351
Smith v. Boston & Maine Railroad Relief Asso.....	351	West Seattle Land and Improvement Co. v. Herren.....	386
Smith v. Matthews.....	202	White v. South End Hotel Co.....	334
Smith v. Sherwood.....	356	Whiting v. Dugan.....	296
Smith v. Smith.....	419	Wilcox v. Zane.....	420
Smutzer v. Stimson.....	351	Williams v. Maine State Relief Asso.....	160
Southern Ry. Co. v. American Brake Co.....	110	Williamson v. Nealy.....	78
Springfield Fertilizer Co. v. Tompkins.....	174	Wilson v. Jones.....	109
Stark v. Boynton.....	441	Woodfolk v. Lyon.....	206
Starrett v. Gault.....	274	Woodward Iron Co. v. Andrews.....	258
State v. Dillon.....	109	Wyman v. Gay.....	405
State v. Lutz.....	222		
State v. Namias.....	398	Yale v. Curtiss.....	149
State v. Sarvis.....	62	Young v. Swan.....	160
State v. Scott.....	296		
		Zackery v. Mobile & Ohio R. Co.....	236



# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

---

ALBANY, JANUARY 2, 1897.

---

## Current Topics.

MAYOR THACHER, of Albany, in his annual message to the common council, has done a public service by again calling attention to the fact that real estate is contributing of its resources more than its just share for the protection of property. He points out the fact that while the city of Albany has, in round numbers, \$66,000,000 of resources from which to raise revenue, of these resources but \$6,323,380 represent personal property. Each year finds it more difficult to retain personal property on the assessment-rolls, and the methods resorted to to evade the payment of this class of taxes are as subtle as they are numerous. It is shown that only a little over \$2,000,000 of the \$6,000,000 represents the personal resources of individuals, and a good portion of that sum stands in the names of trustees acting for estates. The mayor's declaration that either all owners of personal property should pay according to their resources, or else none should pay, is sound law and sound sense; but how to accomplish this result is a problem which has puzzled the wisest men in all times and countries. Human ingenuity is great, however, and much can be done by the perfection of legal enactments in preventing the evasions of law which are now permitted to go on unchecked.

Mayor Thacher also does well to call attention to the subject of exemptions with respect to real estate taxation. The aggregate amount in the city of Albany he states to be \$31,751,570, an amount larger in proportion to the total valuation than in any other city in the State,

and actually exceeded by only two other cities, New York and Brooklyn. "For every dollar's worth of property exempted," says the mayor, "there must be a corresponding increase in the amount of the taxes paid on property which still remains on the tax rolls; but I have searched in vain to find authority for exempting at least \$1,425,000 of real estate." While not criticising the liberality of citizens, he very properly urges them to remember that their generosity is a very important element in the making of a high rate of taxation. In these days of confessed over-government and plethora of laws, the legislature might well turn its serious attention to this subject of exemptions, as well as to the question of finding a means of compelling owners of personal property to bear their just share of the burdens of taxation for public purposes.

The attempt to secure a judgment from the Supreme Court of the United States upon the question of the constitutionality of the law intended to suppress the lottery traffic through the interstate commerce act, has failed for the time being, at least. The case in point arose out of the prosecution of Albert L. France et al., indicted for conspiracy to violate the act by trafficking in lottery slips and drawings between Cincinnati, Ohio, and Covington, Ky. The court of the Southern District of Ohio found the defendants guilty, and they appealed to the Supreme Court of the United States. The case was argued by James C. Carter, for the defendants, and by Assistant Attorney-General Whitney, for the government, the arguments being largely devoted to the question of the constitutionality of the law. Justice Peckham, in disposing of the case, in the majority opinion said that the court did



not find it necessary to pass upon the constitutionality of the law, for, in the opinion of the court, the acts complained of — the carrying of papers and books used in the lottery drawings — did not, within the meaning of the statute, constitute an offense therein prohibited. "The lottery," said the justice, "had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. The language, as used in the statute, looks to the future. The statute does not cover the transaction, and however reprehensible the acts of the defendants may be, we cannot sustain a conviction on that ground." The judgment of conviction was, therefore, reversed, and the discharge of the defendants ordered. Justice Harlan dissented. In view of this decision it will be necessary to amend the statute before it can be made effective, irrespective of the question of its constitutionality, and this should be done without delay.

The removal of Inspector-General McLewee of the National Guard of the State within a few hours of the expiration of his term of office, which came as an unpleasant feature of the close of the administration of Governor Levi P. Morton, has brought up the question of the relative powers and prerogatives of National Guard officials under the provisions of the Military Code. The offending officer, it seems, was removed for giving out his official report, in which were contained very severe strictures upon his superior officers, in advance of its presentation at headquarters. By the provisions of the Military Code it is made his duty to report to the general headquarters the condition, discipline, drill and instruction of the National Guard, the condition of military property belonging to the State and all matters pertaining to his department. This he does not appear to have done, but has rather created a scandal at the eleventh hour which ought to have been created earlier, if at all. At the same time the truths he states, if truths they are shown to be by the investigation which is certainly called for, cannot be ignored; and if the net result is reform, the incident will not be in all respects regrettable.

R. W. Shufeldt, of Washington, D. C., has recently contributed to one of the London mag-

azines an article in which he attempts to point out some of the causes that have led to the remarkable increase in the number of divorces in this country, and briefly suggests what he considers to be some needed revision in our laws relating to marriage and its dissolution. Mr. Shufeldt's attention was drawn to the subject by what Marion Crawford, the well-known novelist has recently said in the *Century Magazine*, and by his having observed in the columns of the newspapers for a year or more past the undoubted increase of suits of this nature brought before the Washington courts, Mr. Crawford's contention, that the modern school of socialism should be held primarily responsible for this evidence of the apparent growth of domestic infelicity, is vigorously antagonized by Mr. Shufeldt. The distinguished novelist contends that the teachers of modern socialism rely for their hope of popular success mainly upon their avowed intention to divide property and prevent its subsequent accumulation. Marriage being an incentive of such accumulation, because it perpetuates families, and keeps property together by inheritance, should therefore be discouraged. With this view Mr. Shufeldt takes direct issue, holding that none of the now-existing forms of Socialism have anything to do with the state of affairs under discussion. While not denying that there are many socialists who would be very glad to see any steps taken that would lead to more uniform, and especially to more consistent interstate legislation in the laws of divorce, the writer points out that the present contract governing wedlock, as it is read to the parties who are supposed to be bound by it, has no legal status whatever; in nineteen cases out of twenty when a man marries he has no intention whatever, in the legal sense, of making an endowment of all his worldly goods to the woman of his choice, any more than she has of obeying him fully, or, frequently, at all, when he exacts it. During the past quarter of a century, Mr. Shufeldt concludes, a great change has come over the spirit of the dreams of our coming race of daughters. Women everywhere are striving to become the co-equals of men in all lines of activity in which the latter engage. This applies to the trades, to the professions, to competition in the schools and colleges, and even extends to the majority of athletic sports.

While conceding that such a revolution may have its advantages, in some directions, Mr. Shufeldt concludes that it is unquestionably producing a change in the social organization, in so far as women are concerned, that can but result in a total disappearance of the domestic housewife of former times. To use his own words: "Household duties and household cares have become irksome to them; in a great many cases the charge of children is relegated to others, while the desire for complete independence, pecuniary and otherwise, is now the ruling passion, both prior to and after marriage." Thus it is that such a very large proportion of the suits for divorce are brought by the women, and very frequently upon the most trivial grounds imaginable. Mr. Shufeldt criticises the courts for turning all their legal rigor upon the husbands. Heavily fining the victims of a comparatively new evil he concludes to be but poor law. In conclusion, Mr. Shufeldt urges our jurists to study the cases in their entirety and logically weigh the causes that are responsible for a state of affairs that even the blindest must see is assuming grave proportions, menacing the very existence of true American homes.

Gov. Black has appointed Justice Goodrich, of Brooklyn, presiding justice of the Appellate Division of the Supreme Court, Second Department, and has designated Justice Dykman, of White Plains, who had previously been retired under the seventy-year constitutional age limit, to continue his work in that department.

Ex-Gov. Sylvester Pennoyer, of Oregon, who was, last fall, elected by the Populists mayor of Portland, recently announced that he would not accept more than half the official salary, the remainder being given over to charitable institutions of the city. The claim that such action "comes dangerously near bribery, making it an inducement to keep him in office," is hardly tenable. An incumbent might, if he saw fit and were in a financial condition to warrant such generosity, insist on serving without any compensation whatever, without, perhaps, being accused of any more serious offence than that of demagoguery; but it can be put down as an axiom that any man who considers his services worth less than

he is offered, is very rarely mistaken in his estimate of their value.

Strong opposition is being manifested toward the bill known as H. R. 4566, relating to second-class mail matter, introduced by Mr. Loud, of California, now upon the calendar of the house of representatives. The bill is most sweeping in its provisions, and should it become a law would surely work hardships and disaster to hundreds of thousands of persons engaged in the publishing, printing, paper-making and allied trades, as well as to the public at large. The following are some of its objectional features;

1. It excludes from the mails as second-class matter all "books or reprints of books," by which is meant all paper-covered books issued periodically, which have done so much to popularize cheap and good literature among the masses of the people, placing the choicest works of literature and of science within the reach of the humblest schoolboy, and according to our people an intellectual privilege such as was never enjoyed by the citizens of any other country. The bill proposes to crush this class of literature most completely and effectually.

2. It excludes from the mails as second-class matter "all sample copies" of newspapers and periodicals, thus depriving all publications of one of the most valuable methods not only of extending their circulations, but of securing new subscribers to take the places of those who die or drop out for various causes. It, therefore, means the general depletion of newspaper circulations.

3. It increases the rate of postage upon "returns" to news agents from one cent to four cents per pound, thus seriously crippling the circulation of that large class of periodicals that are sent out "on sale."

4. It permits the mailing of periodicals at the pound rate to subscribers only, and defines a subscriber as one who "voluntarily orders and pays for the same." Under this definition a person whose subscription has lapsed and has not been renewed is not a subscriber, and copies of a periodical sent to other than advance-paying subscribers could be excluded. This is a direct blow at the local country newspaper.

5. It requires publishers who are permitted to mail matter of the second-class to separate the same, before mailing, into United States mail sacks or bundles by States, cities, towns and counties, as the Postmaster-General may direct, thus forcing every publisher to establish in his office a miniature post-office, and entailing great extra expense.

It is estimated that the enactment of this measure will reduce the consumption of white pa-

per to the extent of 100,000 tons annually. That means 100,000 tons less of paper to be made, so much less printing, type-setting, electrotyping and binding. It means that hundreds of thousands of working men and women will be thrown out of employment, entailing distress and calamity the extent of which can hardly be estimated.

The advocates of the bill maintain that its purpose is to reduce the deficiency in the postal revenues. They claim that there is a heavy loss to the government in the carriage of second-class matter. This claim is untenable, because whatever loss there may be upon the carriage of second-class matter is fully offset by the gain upon the carriage of the two profitable classes, the first and fourth, which are a direct outgrowth of the mailing of second-class matter. Every publisher receives large numbers of letters, and mails large quantities of "premiums" (fourth-class matter) to his subscribers and club-raisers, and almost every advertisement is a bid for correspondence by mail, and the consequent mailing of merchandise in filling orders. There are other causes than second-class matter to account for the annual deficiency in the postal revenues, which would still be operative should the bill become a law. How, then, could the enactment of this measure reduce the deficiency?

The real beneficiaries of the measure are the express companies. By the cutting off of competition with the postal service they would be enabled to increase their rates, and thus reap a rich harvest.

THE LAW JOURNAL publishes in full, in this issue, the opinion of the Court of Appeals of the State of New York in the case of *Harry C. Adams, respondent, v. The New Jersey Steamboat company, appellant*, wherein it is decided that the liability of a steamboat company is similar to that of an inn-keeper. The opinion, which is by Judge O'Brien, is clear and explicit, and all the judges of the court concur therein. It settles a long-mooted point as to the liability of common carriers.

With the opening of the New Year it is quite proper to call the attention of readers to the fact that no efforts will be spared to make the ALBANY LAW JOURNAL brighter and better

than ever in 1897. New features will be added, and new departments will be opened, with the constant aim to make this publication more than ever invaluable to every practicing lawyer who intends to keep abreast with the times. The JOURNAL also again invites all who desire to discuss any topic of interest to the profession to use its columns.

State Senator Charles L. Guy has a bill, which he will doubtless introduce in the legislature "by request," providing for the acceptance of a verdict of ten members of a jury in civil actions. The subject being one of great importance to both lawyers and litigants, THE LAW JOURNAL herewith gives the text of the proposed law:

AN ACT defining sufficiency of verdict in civil actions.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

In all actions or proceedings triable in a court of record before a judge and jury, a verdict in which not less than ten jurors concur, shall be received as the verdict of the jury and judgment granted thereon, unless when the case or proceeding is called for trial and before a jury is impaneled, any of the parties to the trial file with the court a notice demanding the unanimous verdict of the jury. A party filing such notice shall not be entitled to any of the peremptory challenges otherwise allowed by law.

This act shall take effect on the third Monday of September, 1897.

Senator Guy is rightly of the opinion that the matter is one requiring serious attention. He asks the opinion of members of the bar of the State as to whether the bill, as drafted, is in compliance with article I, section 2 of the Constitution of the State of New York. The procedure, it may be explained, is analogous to that which now prevails in our Justices' Courts. In accordance with the appropriate suggestion of Senator Guy, THE LAW JOURNAL opens its columns to a discussion of the subject, and the propriety and expediency of making the proposed change in the law, believing that in the multiplicity of counsel there is wisdom.

Playwrights and theatrical managers are rejoicing over the approval, by President Cleveland, of the act recently passed by Congress, providing for the punishment of "play pirates."

The bill, which is in the form of an amendment to the Copyright Laws, was drawn by former Judge A. J. Dittenhoefer, at the request of the American Dramatists' Club. It has become a law after an agitation extending over a period of nearly five years. It makes two amendments to the present law. One of them declares it to be a misdemeanor, punishable by imprisonment for not more than one year or by a fine of \$100 for the first, and \$50 for each subsequent performance, to "pirate" any copyrighted dramatic or musical composition. Under the old law the fine was the only punishment, but as the "pirates" are nearly all irresponsible the fine had little or no preventive effect. The second amendment provides that an injunction granted by a Circuit Court or judge in one judicial district may be served and enforced in any other circuit in the country. Before the amendment was made injunctions could not be served or enforced outside the circuit in which they were granted.

Playwrights and managers seem to be agreed in the belief that the new law will have the effect of driving the "pirates" out of the business completely, and already many of them are writing for terms as to royalties. It will also give a play a real marketable value, something which it has not heretofore possessed, while piracy was so easily practiced with entire immunity. The new law will also be of great benefit to managers of musical productions, preventing the stealing of the best and most popular songs.

One of the serious and pressing problems which the Legislature will be not only called upon, but compelled, to solve at the present session is that of prison labor. Since January 1st no work has been done by the great army of prisoners in the State penal institutions, and the inmates who were sentenced to various terms of imprisonment are idle. Under the constitutional provision, which went into effect on the first day of the new year, the prisoners confined in all the State penal institutions were prohibited from manufacturing any article to be put on the market in competition with free labor. They are allowed to make any and all things needed by the eleemosynary and other public institutions of the State, but thus far no work has been provided for the convicts by the

State Prison Commission, which is charged with the duty of providing them with employment, and up to the present time the convicts have had nothing to do since January 1 but eat, drink and sleep, and take a few hours' exercise daily with a view of keeping them in as good physical condition as possible. This exercise is taken with positive enjoyment by the great majority of the prisoners, to whom anything almost is better than to be locked up in bare whitewashed cells, with nothing to do but to meditate. There are in the Albany penitentiary alone 1,105 convicts, of whom about 550 are United States prisoners. By the cessation of work in this institution, much of which was done by contract, the county of Albany will lose about \$35,000 a year. There is at present a case pending in the Supreme Court in relation to the contract work in this penitentiary. Mr. Hungerford's contract in the laundry department would not expire until next year and Mr. Bronk, the brush manufacturer, had an option of three more years. If the decision of the court is in their favor, there will be plenty of work for the contractors for a long time. The decision is expected soon, and in the meantime, until some work is furnished, the law will be observed.

Gov. Black, in his first message to the legislature had this to say on the subject :

Few subjects are of more importance than the treatment of criminals. Imprisonment is not alone for punishment but for the safety of society and the reformation of the criminal. The last purpose can be accomplished only by the steady employment of the convict. Idleness imprisoned would result always in degradation, and the hope of reformation would be destroyed. Even if the welfare of the criminal were out of the question, society itself cannot afford the blemish that would be put upon it by enforcing a degradation deeper than that resulting from imprisonment. Work must be provided at once. The constitutional provision respecting prison-made goods increases the difficulty of providing it. There are nearly 20,000 persons in our hospitals and charitable institutions. The needs of these inmates should be met as far as practicable by the work of the criminal class, and if necessary in order to increase the opportunity for labor, the use of machinery should be dispensed with; for the saving of money is no part of the problem until the product of the criminal class falls below the reasonable wants of all the inmates

of the State institutions. It is purely a question of State policy which broadens into a question of safety and morals. This subject might be relieved by a system of industrial training, which, in addition to the product made, would afford an occupation upon which the convict when released might rely.

The employment of short-term convicts in the making or improvement of roads may not be impracticable, and the consideration of a plan having that end in view may now well occupy your attention. The suggestions made in the report of the State prisons commission have been carefully prepared, and I commend those suggestions. The subject is urgent and its consideration should not be postponed. Its difficulty will be constantly increased by delay, for without employment the retrogression of our criminals will be marked and inevitable.

The solving of the problem is not easy—on the contrary, it will call for the best judgment and highest wisdom of the law-makers. Existing conditions, above briefly pointed out, also make it incumbent on the legislature to meet the question with the utmost dispatch consistent with a wise and proper solution.

Gov. Black is in favor of biennial sessions of the legislature. On this subject he made the following statement in his annual message:

In many states the legislature convenes once in two years, and wherever that practice prevails I understand that there is no disposition to return to the yearly meeting. This is a large State and its interests are enormous and diverse, but these do not justify or even excuse the large number of confusing, expensive and unnecessary laws passed at every session. They serve no proper purpose whatever, and their tendency is to unsettle and mislead, even if they contain nothing more objectionable. The legitimate needs of this State can be provided for in a shorter time than is generally consumed, and the chief hope arising from protracted sessions and the passage of unnecessary laws is that the people may in their next constitution conclude to correct both with biennial sessions.

Thousands of citizens of New York, more particularly those whose professions bring them to a realizing sense of how much we are over-governed, will say amen to these declarations. The trend of public sentiment in the various States of the Union seems to be unmistakably in favor of fewer legislative sessions, a very large portion of the time of which is consumed in the passage of either useless or positively bad laws.

## LIABILITY OF STEAMBOAT COMPANY SIMILAR TO THAT OF INNKEEPER.

COURT OF APPEALS, STATE OF NEW YORK.

HARRY C. ADAMS, respondent, v. THE NEW JERSEY  
STEAMBOAT COMPANY, appellant.

A steamboat company is liable to passengers for loss, without negligence on his part, of a sum of money reasonable and proper for him to carry upon his person to defray the expenses of his journey, stolen from his stateroom during the passage; and without any proof of negligence on the part of the company.

The liability of the company, in such a case, as an insurer of the property of its passengers, is similar to that which exists on the part of an innkeeper towards his guests.

Decided December 8, 1896.

**A** PPEAL from a judgment of the General Term, First Department, affirming a judgment in favor of the plaintiff.

*W. B. Prentice*, for appellant.

*Westmoreland D. Davis*, for respondent.

O'BRIEN, J. On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer *Drew*, and for the usual and regular charge was assigned to a state-room on the boat. The plaintiff's ultimate destination was St. Paul, in the State of Minnesota, and he had upon his person the sum of \$160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the state-room, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached it through the window of the room.

The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of his journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is in law liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at General Term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or

personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties (*Story on Bailments*, sec. 464; 2 *Kent's Com.* 592; *Hulett v. Swift*, 38 N. Y. 571). The relations that exist between a steamboat company and its passengers, who have procured state-rooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff unless the loss was caused by the act of God or the public enemies, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage (*Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earl*, 29 N. Y. 115; *Elliott v. Russell*, 10 Wend. 7; *Brown on Carriers*, section 41; *Redfield on Carriers*, section 24; *Angell on Carriers*, section 80.)

Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money under the circumstances than for the loss of what might be strictly called baggage.

The question involved in this case was very fully and ably discussed in the case of *Crozier v. Boston, N. Y. & Newport Steamboat Company* (43 How. Pr. 466, and in *Macklin v. New Jersey Steamboat company* (7 Abb. Pr. 229). The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the Court in both actions upon reason, public policy and judicial authority. It appears from a copy of

the *remittitur* attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in *Carpenter v. N. Y., N. H. & H. R. R. R. Co.* (124 N. Y. 53) that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation.

This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation and liability for loss of baggage is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a state-room. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases, and that do not apply in the case at bar, (*Ulrich v. N. Y. C. & H. R. R. R. Co.* 108 N. Y. 80; *Pullman Co. v. Smith*, 73 Ill. 360; *Woodruff Co. v. Diehl*, 84 Md. 474; *Lewis v. R. R. Co.* 143 Mass., 267.)

But aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a state-room of a steamboat, securely locked and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract



and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives to him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect, and it might well be held to be a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey.

The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract before the question of responsibility can arise, whether the passenger be in one of the sleeping berths or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passengers be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest, and it would, perhaps, be unjust to so extend the liability when the nature and character of the duties which it assumes are considered.

But the traveler who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establish legal relations with the carrier

that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

The judgment should be affirmed.

All concur.

#### WHAT CONSTITUTES A VALID MARRIAGE?

MITCHELL, J., In re estate of Nehemiah Hulett, John R. Carey, as administrator, etc., et al., appellants, v. Lucy A. Hulett, respondent, argued before the Supreme Court of Minnesota, at the last October Term, states the rule as to what constitutes a valid marriage to be as follows:

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper, at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth and go to housekeeping, in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret; that they never publicly assumed marital relations or held themselves out to the public as husband and wife, but, on the contrary, conducted themselves so as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged. Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that in order to constitute a valid common-law marriage the contract, although *in verba de presenti*, must be followed by habit or reputation of marriage, that is, as we understand counsel, by the public assumption of marital relations.

We do not so understand the law. The law views marriage as being merely a civil contract, not

differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract, and whenever there is a present perfect consent to be husband and wife the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium* to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti* and remains without cohabitation, or if made *per verba de futuro* and be followed by consummation, it amounts to a valid marriage in the absence of any civil regulations to the contrary. (2 Kent Com. p. 87; 2 Greenl. Ev. sec. 460; 1 Bishop, Mar. & Div. secs. 218, 227, 228, 229.) The maxim of the civil law was "*consensus non concubitus facit matrimonium.*"

The whole law on the subject is that to render competent parties husband and wife they must, and need only, agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows it adds nothing in law, although it may be evidence of marriage. It is mutual present consent lawfully expressed which makes the marriage. (1 Bish, Mar. Div. & Sep. secs. 239, 313, 315, 317.)

See, also, the leading case of *Dalrymple v. Dalrymple* (2 Hazzard Rep. 54), which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. (*Dalrymple v. Dalrymple*, *supra*.)

The only two cases which we have found in which anything to the contrary was actually decided, are: *Regina v. Millis*, 10 Cl. & F. 584, and *Jewell v. Jewell*, 1 Hun (U. S.) 219, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

#### A PRIZE OFFERED.

THE International Association for Comparative Jurisprudence and Political Economy of Berlin offers a prize of 1,600 marks (equal to about \$400), for the best essay on the following subject: "A comparative survey of the principles which prevail in the colonies of the more important countries as to the acquisition and colonization of land by settlers, and of the economical results of such principles." The competition is subject to the following conditions: 1. Competitors must send in their respective essays to the honorary secretary of the association, Kammergerichtsrat, Dr. Kronecker, 241 Kurfürstendamm, Berlin, W., so as to reach him

before the 1st of April, 1898. 2. The treatises must be written in German, French, or English, and Roman characters must be used for the German MS. It is highly desirable that the MS. sent by competitors should be typewritten. 3. The essays must not disclose the name of the author, but must be marked with a motto, and a sealed envelope on which the same motto is shown, and which encloses the author's name and address, must accompany them. 4. The board of judges is composed of the following members of the association: (a) German members—His Highness Johann Albrecht, Duke of Mecklenburg, president of the German Colonial Society (Potsdam); Dr. Paul Kayser, formerly director of the colonial division of the German foreign office, now divisional president of the German imperial court (Leipzig); Dr. Freiherr Carl von Stengel, professor of law (Munich). (b) English member—The Right Honorable James Bryce, D. C. L., M. P., &c., &c. (London). (c) French member—Dr. Charles Lyon-Caen, professor of law, *Membre de l'Institut* (Paris). (d) Italian member—Dr. Attilio Bruniati, counselor of State, professor of law (Rome). (e) Dutch member—Dr. P. A. van der Lith, professor of law, rector of the University (Leiden). (f) Austro-Hungarian member—Dr. Eugen Philippovich Edler von Phillipsberg, professor of political science (Vienna). (g) Russian member—Dr. Fedor Fedorovic von Martens, professor of law, *membre de l'Institut* (St. Petersburg). (h) Spanish member—Marquis de Dalmau de Olivart, late professor of law (Barcelona). (i) American member—Mr. William James Ashley, professor of political science in the Harvard University (Cambridge), U. S. A.

If one of the judges should cease to act before the adjudication of the prize, the other judges have power to appoint a substitute if necessary. The board of judges will decide as to their rules of procedure. The award will, if possible, be published before the 1st of April, 1899. The prize may be divided between several competitors if their essays appear to be substantially equal in merit. The International Association will publish the essay or essays to which the prize will be awarded. If any competing essay, or any part thereof shall be published before the award shall be made, such essay will cease to be included in the competition, and will not be reported on by the judges. The board of judges will not open any of the envelopes accompanying the MS. except such envelope or envelopes as shall accompany the successful essay or essays. The unsuccessful MSS. must be claimed by their authors within a year of the publication of the award, failing which they will become the property of the International Association for Comparative Jurisprudence and Political



Economy, who, in such event, may, in their discretion, publish the same without the author's name, or cause the same to be destroyed. In the event of any MS. being claimed by any person whose right thereto cannot be established by other means, the envelope accompanying such MS. may be opened by any person appointed in that behalf by the said society. Competitors may, when forwarding their MS. for competition, indicate an address to which it is to be returned at the proper time. The copyright in the successful essay or essays, and more particularly the exclusive right to publish the same or any translation thereof, shall, on payment of the prize, become vested in the International Association for Comparative Jurisprudence and Political Economy of Berlin.

#### SOME HINTS ON SPEAKING.

WHEN old George Stephenson, the engineer, was on one of his visits at Drayton, Sir Robert Peel's place, an animated discussion took place between the old engineer and Dr. Buckland, on one of his favorite theories as to the formation of coal. But the result was that Dr. Buckland, a much greater master of tongue fence than Mr. Stephenson, completely silenced him. Next morning, before breakfast, when he was walking in the grounds, Sir William Follett, the eminent lawyer, came up and asked him what he was thinking about. "Why, Sir William, I am thinking over that argument I had with Buckland last night. I know I am right, and that if I had only the command of words which he has, I'd have beaten him." "Let me know all about it," said Sir William, "and I'll see what I can do for you." The two sat down in an arbor, and the astute lawyer made himself thoroughly acquainted with the points of the case, entering into it with all the zeal of an advocate about to plead the dearest interests of his client. After he had mastered the subject Sir William rose up, rubbing his hands with glee, and said, "Now I am ready for him." Sir Robert Peel was made acquainted with the plan and adroitly introduced the subject of the controversy after dinner. The result was that in the argument which followed the man of science was overcome by the man of law, and Sir William Follett had at all points the mastery over Dr. Buckland. "What do you say, Mr. Stephenson?" asked Sir Robert, laughing. "Why," said he, "I will only say this, that of all the powers above and under the earth, there seems to me to be no power so great as the gift of gab."

The "gift of gab," or the art of speaking, must always have an interest for lawyers as professional advocates. It is not merely for a knowledge of law that a client pays his lawyer. He pays him for his power of putting his case persuasively, for his

courage, his address, his conduct of the case, in a word, for his advocacy. When Stephenson called it the "gift of gab," he was using a popular phrase, but one which has an element of truth. It is a gift. The orator—the supreme orator—is born, not made. So John Bright thought, so many others have thought; but those who have read the life of Demosthenes, or Cicero, or Curran, or Lord Brougham, and noted the infinite pains which they bestowed on the cultivation of their natural defects, will see that there is as much, if not more, in art than in nature. We all know the stories of Demosthenes haranguing the wild sea waves to familiarize himself with the stormy Ecclesia, of his putting pebbles in his mouth to cure his stammering; but it is not so well known that his first attempt to speak was a complete failure, that he shut himself up for two or three months together in a subterranean chamber in order to practice declamation, that he wrote out Thucydides eight times to form his style, that he studied all the best rhetorical treatises, that he recited, under the direction of an actor, long passages from Sophocles and Euripides, that he ran uphill daily to strengthen his lungs and his voice. "*Sic itur ad astra.*" Unquestionably, all these things, the whole art of rhetoric, is far too much neglected by modern speakers; indeed, it is not too much to say, that neither in England nor America are there any orators extant as the ancients understood an orator, or even as Pitt or Canning or Brougham understood the word. The Americans, however, without being orators, are good speakers, better, at least, in many points, than Englishmen; less clumsy, less confused. They may not be so superior in invention or in diction, but they possess, as their critic, Mr. James Bryce, admits, more fluency, more readiness, more self-possession. Any American can reel off a creditable, often an eloquent, speech at a minute's notice, to the astonishment and envy of an Englishman. They have more quickness, too, in catching the temper and tendencies of an audience, more weight, animation, and grace in delivery, and crowning all this, more humor. Any rules for speaking, the result of American experience, are, therefore, well worthy of consideration. Here are some:

1. The speaker must be in earnest. He must have something to say, of course; but that is not all. He must have, in Carlyle's phrase, a "message to deliver"—must believe or seem to believe every word he utters. This is what Aristotle calls the power of convincing, and it is as true of the lawyer advocate as of the preacher, the statesman or the prophet. The lawyer must believe in his own case, however bad it may be. This is where sometimes a good lawyer, because he is a good lawyer, fails as an advocate; he cannot argue against his convictions.

Rule 2 is this: Never carry a scrap of paper before an audience. Nothing destroys so much the "magnetic contact" which ought to subsist between a speaker and his audience as reading or reference to papers. Spontaneity is the essence of successful speaking. The late Bishop of Litchfield's advice to his curates on preaching was, "Write your sermon, read it over three times, throw it in the fire, and preach what you remember of it"—a very good recipe for a speech as well as a sermon. Scarlett, the greatest of verdict winners, never prepared his speeches. He thought out his ideas, and trusted to the inspiration of the moment for the language. Had he merely fired off speeches at the jury he would never have got on those good terms with them which led to his being called a "thirteenth jurymen." An eminent judge told a friend that he once lost a case on which he felt very sure, though his successful antagonist was a man not to be compared with him as a lawyer. When asked the reason, he said: "It was very curious; I had all the law and all the evidence, but that fellow Hale got so intimate with the jury that he won the case."

It is all very well to say this: "I never carry a scrap of paper before an audience;" but what is a speaker who has not got a good memory to do—a speaker who has not the copiousness and ordered intellect of a Pitt or a Gladstone? A preacher who had relied on his own resources in this way once got into the pulpit, but when he found himself face to face with his congregation his ideas vanished, his mind was a blank. He tapped his forehead, but in vain; his ideas would not come. "My friends," he said, "I pity you; you have lost a fine sermon," and he descended the pulpit steps. But all have not this equanimity. A speech, on the other hand, learned by heart may be a splendid *tour de force*, but as a speech it must be defective. It dazzles, but does not persuade. Macaulay's brilliant and highly finished orations are an instance. They fell flat in the House of Commons, as Greville tells us, when a light, dashing, vivacious, impromptu speech was applauded to the echo. If, then, you must have, as most must, some mechanical aids, plan out—this is the third rule—a series of a few points as simple and orderly as possible, using catchwords which will suggest the leading thought. This method prompts the memory without overburdening it. It was Mr. Bright's method. The fourth rule is: Plan beforehand for one good fact and one good illustration or anecdote for each point. This brightens a speech, and gives body to it. But the best-laid plans are liable to be disconcerted, and we can sympathize with the dismay of the guest of the evening at an American banquet as he heard his chosen anecdotes retailed one after another by preceding speakers.

Rule 5 is: Speak in a natural voice, in a conversational way. This may be good advice for an

after-dinner speech or the discussion of a bill in committee of the House—rhetorical rhapsodies are then out of place—but it cannot be accepted as a general rule for speaking. It will never do for the highest efforts. The voice is everything in the orator, and to attain elevation in oratory, to touch the deeper springs of feeling, the voice must be nicely modulated; it must vary, as Aristotle points out, with the theme of the speaker; it must rise or fall, sink or swell, vibrating in unison with the orator's moods. Garrick said he would give £100 to say "Oh!" as Whitfield did, and one who heard Newman preach at Oxford could never forget the tone in which he uttered the word "irreparable." The voice is the soul of oratory. But for the genteel comedy of life a natural voice, an easy conversational tone is no doubt the best.

These rules are good, but they omit one rule which Aristotle places in the forefront in speaking. It is to have the good will of your audience. We know how the *Nisi Prius* advocate is accustomed to get this by administering judicious flattery to the jury, but this has to be done adroitly now, not in the Buzfuz vein, or it only disgusts. A jest is, perhaps, the best thing for putting a speaker on good terms with his audience. This was Sheridan's way. He was once asked how it was he got on so well in the House. "I soon found out," he replied, "that nine out of ten were fools, but all loved a joke, and I determined to give them what they liked." The consequence was a glow of pleasurable anticipation, seldom disappointed, whenever Sheridan rose to speak.

"A good speech," said O'Connell, "is a good thing, but the verdict is the thing." It is well for the forensic orator to remember this. Scarlett, perhaps, knew better than anyone how verdicts are won, and Scarlett said, as the result of his experience, that the most useful duty of an advocate was the examination of witnesses.—*London Legal Journal*.

#### FRATERNAL ORDERS AS INSURERS.

It has often puzzled the courts to determine the proper status of fraternal benefit orders. They are usually organized for some alleged humane object, in which sociability and business is so combined as to make them attractive to lay members and exceedingly profitable to those in "Supreme" authority. They adopt a "ritual," and secure a license from some insurance department with authority to carry on the business of life insurance. While they instruct members under the former, they pursue life insurance as their main calling, always assessing, and always asserting that the regular companies complying with State laws and paying their taxes as well as their losses are too expensive and unsafe.

The main purposes of the ritual are apparent enough, as it enables these orders to escape taxes and State supervision. When these orders frame their fraternal laws, they are made, like nets, to catch the incoming assessments, and strong enough to hold them as against claims inconvenient to pay or such as they may wish to avoid. Their principal business is life insurance, and to make money thereby for the "Supremes;" but to the outside public, the State and the courts, they are innocent fraternities engaged in some mysterious way in cultivating the virtues of mankind. Occasionally a court holds them down to business, and judges them by what they are rather than by what they profess to be.

Recently, Economic Council, No. 215, National Union, resisted the claim of Mrs. Arcadia L. Marlow for the payment of a \$5,000 policy on the life of her husband, George W. Marlow, who committed suicide. The defence entered by the company was that it was a fraternal beneficial organization, and as such came under the statutes governing the payment of policies in similar instances. When the case was appealed Judge Thayer ruled that the company was not in reality a fraternal beneficial organization, but an insurance company, and as such liable for the full amount of the policy. The judgment of the lower court was, therefore, affirmed. The defence may have been a good one, and possibly might have been successful but for the false assumption that the National Union was not an insurance company.

It is full time that all fraternal beneficial orders doing a life insurance business, should stand before the law precisely as regular companies in all that relates to their responsibility to members and their due share of the public burdens.—*Rough Notes.*

### LEARNED FEMALES.

#### AN ENGLISH VIEW OF THEM.

THE successful defence by a lady barrister of a man tried for manslaughter at the Sessions Court at Poona, India, has called forth the following interesting remarks from a leading English daily:

"At the bottom of the male objection to female lawyers is the idea that such competition is essentially unfair. Our judges, the lawyers argue, need to be guarded against themselves. They are, as a general rule, a highly susceptible body of men, who would find much difficulty in resisting their natural and chivalrous impulse to give judgment in favor of the side which employed the most engaging advocate. Even now, say those lawyers who have no fear of the penalties of contempt of court before their eyes, a pretty witness or a lady litigant with a winning manner can twist any judge on the bench

around her thumb. What would it be if the judges had a row of lady advocates in front of them? According to this opinion, the corollary of lady barristers must be female judges. Only persons of their own sex will be hard-hearted enough to decide fairly where ladies supply the arguments. Then, of course, in a court so constituted, the male barristers would be an absurdity, and so would the male jurymen. We have not yet got very near the moment when the ramparts of the Temple and Lincoln's inn will have to be manned to keep the feminine invaders out; and counsel will certainly expect the inns of court to protect them from the danger when it does become menacing. Nor will their expectations be disappointed. A desperate resistance may be anticipated in this country, whatever may be the case at Poona; at the bare suggestion of women wig-wearers the benchers may be counted on to tumble over each other on their way to line the last ditch—perhaps the one in Lincoln's inn-gardens. The average legal mind shudders at the notion of a grave queen's counsel referring to 'my learned junior, Miss Fogg,' or of a judge reversing the decision of a 'learned sister.' Incidentally it may be noticed that the most successful lady barristers would certainly have to remain unmarried; the married female pleader, like the wedded curate, would be shorn of half the usual attractions. Then a new and becoming head-gear would have to be devised in place of the hideous horse-hair wig; some bewitching structure of dainty curls, of the particular shade of gold fashionable at the moment. One advantage, if the Poona infection spreads, would arise from the fact that it would undoubtedly solve the jury question; instead of a reluctance to serve, susceptible gentlemen would compete with each other for a chance of getting into the jury-box and being appealed to by all the arts of feminine advocacy. For the same reason the arrival of the lady barrister might increase the volume of litigation; and, if so, the prejudices of the men now in possession of the courts might in course of time disappear."

### PROBLEM OF RAILROAD LABOR.

#### AS VIEWED BY THE RAILROAD GAZETTE.

H. T. NEWCOMB, statistician of the department of agriculture, discussing in *Public Opinion* "The Problem of Railway Labor," recommends that congress, whenever it shall authorize pooling of traffic or earnings, add to the bill a proviso to protect the rights of laborers, and he would do this by guaranteeing them reasonable compensation and treatment, and a reasonable maximum number of working hours daily.

The Interstate Commerce Commission or some other body should, he believes, investigate complaints, and in labor controversies protect men from discharge. Mr. Newcomb would protect the railroads by annulling the charter of any labor organization which should order a strike "during the progress of an investigation." It seems to us that the scheme would find one of its greatest difficulties before it began, if that is not too Irish. How much would the labor unions care for a charter from congress? Without stopping to discuss the constitutional obstacles to a federal law on a matter which is essentially a police regulation, or the difficulty of fitting it to the facts and enforcing it, even if it were constitutional, it is fair to inquire whether the brotherhoods would deem the probable benefit of sufficient value to warrant them in giving up the right to strike whenever they please.

Congress has discussed eight-hour laws and the like times without number, but they have failed because discussion very soon revealed their impracticability, and because, broadly speaking, the workmen had no real grievance which the proposed laws could remedy. The absurd results of the working of the eight-hour law passed by congress in a field where it has full power, that for the benefit of letter carriers in cities, illustrate the kind of "protection" which congress would be likely to afford railroad employes; protection at the expense of efficiency. The article suggests that railroads strenuous for a pooling law ask their employes to assist them in getting the law passed, with the proposed amendment.

One difficulty with this proposition is that some of the railroads are not so very strenuous. When the last attempt was made, some prominent roads were quite lukewarm in their advocacy of pooling. The competitive rate problem is a very difficult one, even with pooling, and since the directors of the principal roads have adopted rational methods of dealing with this problem without a pool, we suspect that some of them are less solicitous about the pooling bill.

As long as "The Problem of Railway Labor," like that of all other labor, is admitted on all hands to be a very difficult one, it would seem the part of wisdom to follow pretty closely the lesson of experience, and every railroad brotherhood has had such a lesson, worthy of careful study, in the organization of the locomotive engineers, directed by Mr. Arthur. Mr. Newcomb, like all the soberer men who tackle this subject, aims to secure prompt and frank discussion between employer and employee when trouble impends, but while government arbitration boards and bureaus nearly always prove to be clumsy instrumentalities in this field, Mr. Arthur has achieved success all by himself.

#### BEFORE THE FINAL BAR.

##### GEN. FRANCIS A. WALKER.

The death of Gen. Francis A. Walker, President of the Massachusetts Institute of Technology, will be learned with regret throughout the country. Gen. Walker was the second son of Amasa Walker, LL. B., one of America's most distinguished orators. The son was born in Boston, July 21, 1840. He graduated from Amherst in 1860, with high honors, and at once entered the law office of Judge Devens and Senator Hoar, who were then in partnership in Worcester, but the breaking out of the Civil war interfered with his plans, the young student entering the army, where he served with bravery and distinction. After the war Gen. Walker for a short time pursued journalism at Springfield, Mass., leaving that work to become chief of the bureau of statistics. He was superintendent of the United States census in 1870, and was later appointed Indian Commissioner. The following year he was elected professor of political economy in Sheffield Scientific School, at Yale. In 1880 he accepted the position of supervisor of the United States Census. Since 1881 he had been president of the Massachusetts School of Technology, and had been president of the American Statistical Association, president of the American Economic Association, was chief of the bureau of awards at the Centennial Exposition in 1876, and was commissioner from the United States to the international monetary conference in Paris, in 1879, and in 1880 he was elected president of the American Economic Association. He had received honorary degrees from numerous colleges, and the International Geographical Congress in Paris, in 1875, gave him a medal of the first class for his Statistical Atlas of the United States. He was a voluminous writer for the periodical press. One of his most important works was "The Wage Question."

##### EDWARD AVERY.

Edward Avery died in Boston December 28, after an illness extending over a year past. He was a lawyer of fine attainments, wonderfully versatile, and possessed of rare oratorical powers. He was a stalwart Democrat and had been one of the leaders of the Massachusetts Democracy for several decades. He was born in Marblehead, Mass., March 12, 1828. He was a Mason of high standing and filled several important offices in that order. In the celebrated Fisher Hill investigation Mr. Avery was one of the counsel for the water board, and managed the case in a masterly manner. He was concerned during his long and honorable professional life in numerous important cases. As a jury lawyer he has been signally successful, his legal arguments having

been clear, incisive, logical and strong. He avoided the usual practice of endeavoring to explain and strengthen the weak points of his case, but gave his attention only to the strong ones, so fortifying them and increasing their strength that the weaker ones were left out of sight, in many cases thus winning the victory. Few campaigns during the last 30 years have passed without the sound of his voice upon the platform and stump, and few conventions, national, state or local, have failed to receive his aid and counsel. In all these gatherings his stirring oratory was a marked feature of the deliberations.

#### GEN. JOHN MEREDITH READ.

General J. M. Read, the well-known American diplomat, died in Paris, Dec. 27, from pneumonia.

Gen. Read was born in Philadelphia, Pa., Feb. 21, 1837, he being a son of a former solicitor-general of the United States. He received his education at a military school and at Brown University, where he received the decree of A. M. in 1866. He was graduated at the Albany Lawschool in 1859, studied international law in Europe, was admitted to the bar in Philadelphia, and afterwards removed to Albany, N. Y. He was adjutant-general of New York in 1860-66, and was one of the originators of the wide-awake political clubs in 1860. He was chairman in April of the same year of the committee of three to draft a bill in behalf of New York State, appropriating \$300,000 for the purchase of arms and equipments, and he subsequently received the thanks of the war department for his ability and zeal in organizing, equipping and forwarding troops.

He was first United States consul-general for France and Algeria in 1869-73, and was acting consul-general for Germany during the Franco-German war. After the war he was appointed by Gen. De Clissey, French minister of war, to form and preside over a commission to examine into the advisability of teaching the English language to the French troops.

In November, 1873, he was appointed United States minister resident in Greece. One of his first acts was to secure the release of the American ship *Armenia*, and to obtain from the Greek government a revocation of the order that prohibited the sale of the Bible in Greece.

During the Russo-Turkish war he discovered that only one port in Russia was still open, and he pointed out to Secretary Evarts the advantages that would accrue to the commerce of the United States were a grain fleet dispatched from New York to that port. The event justified his judgment, since the exports of cereals from the United States showed an increase within a year of \$73,000,000.

While Minister to Greece, he received the thanks of his government for his effectual protection of Americans in the dangerous crisis of 1878.

Soon afterward Congress, from motives of economy, refused the appropriation for the legation at Athens, and General Read, believing that the time was too critical to withdraw the mission, carried it on at his individual expense until his resignation, September 23, 1879. In 1881, when, owing in part to his efforts, after his resignation, the territory that had been adjudged to Greece had been finally transferred, King George created him a Knight Grand Cross of the Order of the Redeemer, the highest dignity in the gift of the Greek government.

General Read was president of the Social Science Congress at Albany, N. Y., in 1868, and vice-president of the one at Plymouth, England, in 1872. Besides contributing to current literature, he was the author of an "Historical Enquiry Concerning Henry Hudson," which first threw light upon his origin, and the sources of the ideas that guided that navigator.

#### ISAAC S. MORSE.

I. S. Morse, an old-time criminal lawyer, who was long and favorably known at the Massachusetts bar, died December 26, in Boston. Isaac S. Morse was New Hampshire born and bred. He was the son of Bryan Morse, who was in his day a noted physician in Western New Hampshire. Mr. Morse was born in Haverhill, N. H., in 1816. He was educated in the old district schools of his native town and finally entered Dartmouth. Here he was graduated in the early '40's. He went to Massachusetts almost immediately and studied law. He was admitted to the Massachusetts bar on the same day as the late B. F. Butler, of whom he was a contemporary. His career at the bar was long and honorable. He was most noted for his conduct of criminal cases. For eighteen years he was district attorney of Middlesex county.

#### Humors of the Day.

"TRUTH."—It was one of the delights of the late Lord Coleridge to profess ignorance of things supposed to be of common knowledge. In a newspaper libel action his lordship, in his most silvery tones, asked, "What is 'Truth'?" "It is a newspaper, my Lord," replied counsel. "Oh!" said his lordship, preserving his simplicity and splendid gravity; "isn't that an entirely new definition?" — *The Legal Adviser*.

#### IN CANADA.

On a motion before O'Connor, J., counsel opened the matter at great length. His Lordship expressed a difficulty in understanding what was being moved for. Counsel—"It is what they call in Chancery 'speaking to the minutes.'" His Lordship—"Hours, you mean."—*The Barrister*.

**Notes on Recent American Decisions.**

**CORPORATIONS.**—Under New York laws, 1892, chap. 687, a foreign corporation failing to procure a certificate will not make a contract by the corporation void. (*Goddard v. Creffield Mills* [C. C. A.], 75 Fed. Rep. 818.)

**EVIDENCE.**—A contract reduced to writing containing the entire agreement parol evidence is not admissible as to what was done during negotiations. (*McTague v. Finnegan* [N. J. Ch.], 35 Atl. Rep. 542.)

**FELLOW SERVANTS.**—A car inspector and the conductor of a freight train are not fellow servants. (*Illinois Cent. R. Co. v. Hilliard* [Ky.], 37 S. W. Rep. 75.)

**FRAUD.**—False statements by a bank as to condition of stock purchased will sustain an action for damages. (*Exchange Bank v. Gaitskill* [Ky.], 37 S. W. Rep. 160.)

**FRAUDULENT CONVEYANCE.**—A conveyance may be valid between the parties, though void as to subsequent purchasers. (*Gross v. Gross* [Wis.], 68 N. W. Rep. 469.)

**GAMING.**—Money deposited as margins in fictitious purchases and sales of stocks by a broker may be recovered from the stake-holder on the ground of an illegal contract. (*Dauler v. Campbell*, [Pa.] 35 Atl. 857; *Godsall v. Boldero*, 2 Smith, Lead. Cas. [8th Id.] pt. 1, p. 319.)

**INJURIES BY RAILROAD TRAINS.—TRESPASSERS.**—A railroad company is not bound to any act or service in anticipation of trespassers on its track, nor is the engineer obliged to look out for them; and a trespasser venturing upon the track for purposes of his own assumes all risk of conditions which may be found there, including the operation of engines and cars. (*Sheehan v. St. Paul & D. R'y Co.*, [U. S. Circuit Court of Appeals, Seventh Circuit, Oct. 1896,] 76 Fed., 201.)

**LIEN ON CHATTEL EXEMPT FROM EXECUTION.**—A horse delivered by owner to keeper of livery stable is subject to keeper's lien for feed, though horse exempt from execution. (*Flint v. Luhrs* [Minn.], 68 N. W. Rep. 514.)

**LIFE INSURANCE — PAYMENT OF PREMIUMS IN NOTES — WAIVER BY COMPANY.**—A life insurance policy required that the premium be paid in cash, and provided that the provisions of the policy could only be waived by written agreement of president or secretary of the company. The note of insured was taken by the company's agent in payment of the premium, and the company, with knowledge of such fact, in settlement with the agent, took the

note, and sent it to insured's town, indorsed for collection. Part of the note was paid, and the balance charged to the agent, who received from insured a renewal note for such balance. Before the expiration of the year for which the premium was so paid, the company notified insured that, unless the premium for the succeeding year was paid by a certain time, the policy would be forfeited. Insured died before the second premium was due.

*Held*, That the company ratified the action of the agent in accepting the note in payment of the premium, and therefore could not defeat a recovery on the policy on the ground that the premium was not paid in cash. (*Imbrie v. Manhattan Life Ins. Co.* [Pa.], 35 Atl. Rep. [Oct. 28, 1896], 556.)

**RELIGIOUS SOCIETIES — CAPACITY TO SUE.**—Trustees of a non-incorporated religious association have legal capacity to sue in equity in behalf of such association, if not as trustees, as members thereof. (*Callsen v. Hope* [U. S. D. C. Alaska], 75 Fed. Rep. 758.)

**Notes of English Cases.**

**COMPANY.**—One of the articles of association of the N. T. Company provided that the profits in each year should be applicable in or towards payment of a dividend of 8 per cent on the amount paid up on the ordinary shares, and the surplus (if any) should be divided as to one-fifth among the holders of founder's shares, and as to the other four-fifths among the holders of ordinary shares in proportion to the amounts for the time being paid thereon. Another article provided that, if the company should be wound-up, one-fifth of the surplus assets (if any) should belong to and be divided among the holders of founder's shares, and the remaining four-fifths among the holders of ordinary shares in proportion to the amount of capital paid on the shares held by them.

The capital of the company was £100,200, in 100,000 ordinary and 200 founders' shares, all of one pound each. The company went into voluntary liquidation, and, after payment of all debts and costs, a sum of about £90,000 remained for distribution among the shareholders.

This was a summons by the liquidators to determine the question as to how the £90,000 was divisible as between the holders of ordinary and founders' shares.

*Held*, that the words "surplus assets" had not such a recognized technical meaning as always they describe the assets remaining after the payment of debts, liabilities, and costs only, and that, on the construction of the articles "surplus assets," here

meant the assets remaining after discharging the debts, liabilities and costs, and recouping the capital paid up on their shares by all shareholders. (Chan. Div.; *Re New Transvaal Co.*, 75 L. T. Rep. 272.)

**MASTER AND SERVANT.**—Where the plaintiff, a schoolmistress of a public elementary school established under a deed of trust, had been dismissed from her employment by an irregularly constituted committee of management, by whom she was appointed, instead of by trustees of the school, she was held to have no right of an injunction to restrain the committee from so dismissing her, notwithstanding the terms of the deed. (*Lane v. Norman*, 66 L. T. Rep. 83, distinguished; *Pottle v. Sharpe*, 75 L. T. Rep. 265.)

**TENANT.**—Tenant's fixtures not removed during the continuance of the tenancy become on its expiration part of the freehold, even though they are on the premises by the parol consent of the lessor; and though such consent might give the tenant a right of action for the value of the fixtures against the lessor if he subsequently refused to permit their removal, it will give no such right as against the lessor's mortgagees who were not parties to it, should they refuse.

A was a tenant of a house and garden for the residue of a term of twenty-one years. Before the expiration of the said term it was agreed verbally with B, A's, landlord, that A should be at liberty to leave certain tenant fixtures annexed to the premises on the chance of their being bought by an incoming tenant, and if not so bought he was to be permitted to remove. After the expiration of the term, and while the tenant's fixtures were still on the premises, C took possession of the house and garden as receiver for certain of B's mortgagees. C refused to permit A to remove the fixtures.

Held, that no action lay against C or the mortgagees. (Q. B. Div.; *Thomas v. Jennings et al.*, 75 L. T. Rep. 274.)

**VENDOR AND PURCHASER.**—For the purpose of satisfying the Statute of Frauds it is sufficient, so far as the parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether the fact of agency can be gathered from the written document or not.

A leasehold house was put up for sale by auction by J. & Co., a firm of auctioneers, but was not sold. On the same day the defendant wrote to J. & Co. as follows: "I hereby offer the sum of \$350 for—and if my offer is accepted I will pay deposit and sign contract on the auction particulars." J. & Co. replied as follows: "On behalf of our client,

Mrs. M. A. F., we beg to accept your offer for—subject to contract as agreed." J. & Co. inclosed for signature by the defendant a draft contract which was substantially the same as that indorsed on the auction particulars, but the defendant never signed this contract. Held, that the written agreement contained the names of the contracting parties so as to comply with the Statute of Frauds, and held, also, that the acceptance by J. & Co. of the defendant's offer, though expressed to be "subject to contract as agreed," was nevertheless absolute, and not conditional, inasmuch as it introduced no new terms and was in accordance with the terms of the offer. (*Filly v. Hounsell*, 75 L. T. Rep. 270.)

## Correspondence.

*To the Editor of the Albany Law Journal:*

In carefully perusing the columns of the Journal of November 28th, I came upon the statement relative to Justice Stephen J. Field of the United States Supreme Court, and his thirty-three years of service upon the bench. The article also states "this to be the longest term of service any man has ever enjoyed there." To those who are earnest students of constitutional law there is one man whose name will be remembered, and revered, so long as the Constitution itself shall endure, and that man is Chief Justice John Marshall. Because of his intimate association with this wonderful instrument of government during the stormy days of its earlier existence, is due largely we, believe, its universal acceptance and perpetuity as the organic law. Chief Justice Marshall was appointed by President Adams, January 31st, 1801, and continued in the capacity of chief justice to the time of his death which occurred in July, 1835. As Bryce in his *American Commonwealth* says: "His fame overtops that of all other American judges more than Papinian overtops the jurists of Rome, or Lord Mansfield the Jurists of England." So too, in the matter of years of service. He still leads. Thirty-four years and six months is the mark set by the great chief justice, and, while I would gladly yield to Justice Field a badge of honor for his many years of service upon the bench, the first place still belongs to that other "under whose mind the Constitution, like a flower, unfolded itself, petal after petal, until it stood revealed in the harmonious perfection of the form its framers had designed" Chief Justice John Marshall, the interpreter of the Constitution.

EUGENE W. HARRINGTON.

BUFFALO, N. Y., Dec. 29, 1896.

# The Albany Law Journal.

ALBANY, JANUARY 9, 1897.

## Current Topics.

IN view of the apparent misapprehension concerning the present status of statutory revision in this State and the work of the Commission, of which the Hon. Charles Z. Lincoln is the head, more especially as to the amount of revision already accomplished and the subjects still remaining for consideration, the LAW JOURNAL, for the benefit of the legal profession, as well as the members of the legislature, which will be called upon to pass upon the work, has taken the pains to ascertain the facts, which are herewith presented :

The Statutory Revision Commission was created in 1889. The following general laws have been enacted :

In 1890:

The general corporation law.  
Stock corporation law.  
Business corporation law.  
Transportation corporation law.  
Railroad law.  
Highway law.  
Town law.

In 1892:

Statutory construction law.  
State law.  
Indian law.  
Election law.  
Public officers law.  
Legislative law.  
Executive law.  
Salt springs law.  
General municipal law.  
County law.  
Game law.  
Banking law.  
Insurance law.

In 1893:

Public buildings law.  
Military code.  
Public health law.  
Agricultural law.

In 1894:

Public lands law.  
Canal law.  
Joint stock associations law.

VOL. 55 — No. 2.

In 1895:

Membership corporations law.  
Religious corporations law.

In 1896:

Tax law.  
State charities law.  
Poor law.  
Insanity law.  
Liquor tax law.  
Domestic commerce law.  
Benevolent orders law.  
Real property law.  
Domestic relations law.  
General repealing act.

The commission intends to present bills for the following general laws to the legislature of 1897:

State finance.  
Village.  
Navigation.  
Labor.  
Personal property.  
Lien.  
Commercial paper.  
Partnership.  
Pawnbrokers.

The following subjects, which form a part of the scheme of revision, are still under consideration by the commission.

Political divisions.  
Enumeration.  
Prison.  
City.  
Civil service.  
Education.

It will be observed from a study of the above statement that very little will be left for future consideration if the present legislature passes all the bills which it is the intention of the commission to propose. The subject of "Political Divisions," among the subjects not yet revised, perhaps needs little attention, and it may not be deemed practicable by the commission to attempt to put into one statute all the boundaries of all the political divisions of the State. The subject of "Enumeration" was originally embraced in the scheme of revision, but the quite detailed provisions of the new State Constitution undoubtedly make such a general law less important than it otherwise would have been. Whether any law upon this



subject will be proposed by the commission seems to be now an open question.

The "Prison Law" was quite generally revised in 1889 by the so-called "Fassett Act," and several important amendments were added in 1895 and 1896. In view of the amendment to the Constitution prohibiting contract labor in prisons, the commission has thought that it may not be worth while to attempt a general revision of the prison law until the State has had further experience under the new constitutional provision. This subject will necessarily receive the careful attention of the superintendent of State prisons and also the prison commission, and whenever they can agree upon a satisfactory scheme of prison labor the revision of the prison law will be comparatively simple.

Another subject not yet worked out relates to a general city law. Probably no general law relating to cities of the first class will be enacted, because when the greater New York scheme is completed, that city and Buffalo will be the only cities in this class, and each will, doubtless, prefer to be governed by special charter. Bills containing general provisions relating to the government of cities of the second and third class were presented in the legislature of 1896, which were the result of the labors of special commissions appointed to consider those subjects. A general bill relating to cities of the third class has already been introduced in the present legislature. It is not probable that these bills, if enacted, will do more than provide general rules for the government of cities in relation to particular subjects, and they will not be complete characters.

Another subject relates to the "Civil Service." The commission has not yet taken up that question. Bills were introduced in the legislature in 1895 and 1896, and a bill has already been introduced in the present legislature. The remaining subject in the scheme of revision which has not yet been fully considered by the commission will be embraced in the "Education Law." The common-school law was revised by the department of public instruction in 1894, and the university law was revised in 1892. An educational law as contemplated by the commission, it is understood, will embrace all the departments of education

and will be somewhat broader than either the common-school law or the university law, including both of them. In view of the recent revision of these two subjects, the preparation of a bill for an education law will not be a difficult task.

Many subjects are still scattered through the statutes which should be classified in some scheme of revision, but they cannot be fairly disposed of except in connection with the revision of the Code of Civil Procedure. The facts herein stated cover, in outline, the subject of revision up to date, and will immediately be of interest to the members of the legislature, the bar association, and others particularly concerned in the subject of statutory revision in this State.

The State Bar Association will meet in this city on Tuesday and Wednesday, January 19 and 20, and the gathering promises in every way to be successful, not alone so far as the enjoyment of the occasion is concerned, but also in the benefits which will be derived from a thorough discussion of the subjects included in the agenda. The president's address will be delivered by the Hon. Edward G. Whittaker, who has been so successful during the past year at the head of the Bar Association, while the Hon. William L. Wilson, postmaster-general, will give his views on "The Length and Number of the Opinions of Our Courts." We are very anxious to learn what valuable suggestions the postmaster-general will give, because we have devoted considerable space during the year to suggestions which were intended to show that opinions might well be curtailed both in length and in number. Hon. Walter S. Logan, of Brooklyn, will speak on "A Few Suggestions on Lord Chief Justice Russell's Address at Saratoga," which will undoubtedly bring up much that is valuable on the Venezuelan and Cuban questions.

These three addresses or speeches will be delivered on the first day, and will be followed by a reception given in the Assembly Chamber of the Capitol to the postmaster-general. The business session will open at 10 o'clock on Wednesday and many interesting papers will at that time be presented to the attention of those present. Hon. Martin W. Cooke, so well known in this State, will speak on "A View of

the New York State Bar Association as seen from the Standpoint of its Twentieth Anniversary," while the distinguished Prof. Charles A. Collin, who had such a success as legal adviser for Governors Hill and Flower, and who was a professor in the Cornell Law School and in the Albany Law School, will give us his undoubtedly excellent suggestions and advice on "Historical Methods of Law Reform." The Hon. John Winslow will read a paper on "How the Battle of Lexington was Looked Upon in a Celebrated Case Before Lord Mansfield;" and Judge Franklin M. Danaher, one of the State Bar examiners, will speak on "Examinations in Law for Admission to the Bar in the State of New York." Judge William H. Johnson, of Oneonta, who is a member of the Statutory Revision Commission, will contribute a paper on "Statutory Revision" which will undoubtedly give a clear insight into the present methods which are followed in the codification of our laws.

The question which will interest the members of the bar perhaps more than all the others is the discussion of the topic: "Are the opinions of our courts too lengthy; what, if anything, is the remedy?" On the evening of the 20th a reception will be held at the Fort Orange Club from 8:30 to 12 o'clock, and invitations will be extended to the governor, judges of the Court of Appeals, federal judges, justices of the Supreme Court, State officers and prominent members of the legal profession in the legislature. The members of the bar who have given so much time and attention to the arrangements which are being made for the reception of the visiting members of the bar are Edward D. Ronan, A. L. Andrews and Samuel S. Hatt of this city. We feel certain that no effort will be spared to make the reception the most successful which has ever been given.

We are more than pleased to find that the Association at its twentieth annual meeting has undertaken to secure opinions from the members of the bar, and perhaps some of the judges of the courts, as to what attempts or efforts should be made to dispense with the present elaborate opinions of the courts of our state. While it will be conceded that questions may arise, even though a better system is adopted, we feel that a great many cases should be de-

cided without a written opinion — especially in respect to the construction of the sections of the Code. It is a fact well known, that a large number of the opinions handed down yearly deal with the construction of some section of the Code, and that this number is by far too large few will be inclined to deny. The JOURNAL would, also, venture to observe that these opinions are altogether too long. We appreciate the disadvantage, in some cases, of not having a written opinion handed down, but it appears to us that the opinions should rather guide us along the line of construction which the courts have placed upon the various sections of the Code than refine and distinguish the complicated questions which are presented. Every broad principle of law naturally has its exceptions, but this increase in adjudicated cases is rather from the process of refining than in following the basic rule which is primarily established. As we have before written, the various sides of this question have much that is reasonable in them, but the number of bound volumes of reports, which is yearly increasing, accentuates the necessity of some diminution. Whatever may be the result of the discussion at the forth-coming meeting of the Bar Association we cannot foretell, but we hope it will lead to a scheme by which a decided decrease in the number of opinions may be accomplished. Such results will certainly bring more benefits to the practice of law than any we know of, except the simplification of our rules of practice.

The Chicago City Council has passed an anti-high theatre hat ordinance which goes to the extreme length in its hostility to this part of women's apparel. The ordinance forbids the wearing of any kind of head-gear by any person in a theatre or other place of amusement, and makes the manager of the theatre or place of amusement responsible by imposing on him a fine of not less than \$10 nor more than \$25 for each and every hat so worn. Heretofore, in cities where legislation has been attempted on this subject, the propositions have contemplated the removal only of those hats which obstructed any person's view of a performance, and the aggrieved person was obliged to make complaint to the manager. This Chicago ordinance is altogether likely to go into effect, as Mayor Swift has announced his intention to sign it, he

having had a recent experience of the inconvenience of trying to witness a play from behind a high hat. It is probable that if the fine were imposed upon the person wearing the offending hat, instead of upon the manager of the place of amusement, the ordinance would be much more effective, provided it stood the test of constitutionality.

Gov. Pingree, of Michigan, in his address to the legislature, at its opening, made some radical recommendations. He favored the abolishment of party conventions which, he asserted, have become the medium of trickery, bribery and fraud, and advocated instead the direct vote and the Australian ballot system in nominating candidates. The governor urged that the property of corporations be taxed in the same manner as other property. Present inequalities of passenger fares in Michigan were argued to be a proper subject for legislative action. The legislature was recommended to consider the question of uniform two-cent fares. The governor urged that the referendum practice of referring legislative acts to the people be required in the granting of quasi-public franchises. He favored the establishment of a State board of arbitration and declared for an inheritance tax and an income tax.

The Supreme Court of Ohio has made a splendid record in disposing of business during the past year. There were 580 cases filed, a net gain of 114 on the docket. The court disposed of 704 cases, compared with 504 the previous year. The year closed with 864 cases not disposed of, compared with 978 one year ago.

Judge Torrey, of Wyoming, who has for the past thirteen years labored incessantly with members of congress to demonstrate the necessity of an intelligent bankruptcy law, is again in Washington, and is apparently more confident of success this winter than for many years. His bill, with some minor amendments, passed the house at the last session and was reported to the senate. The report in the senate was not favorable, and the judiciary committee recommended the substitution of the Bailey-George bill for voluntary bankruptcy. The former report will not make any difference, however, if

a majority of the senate desire the Torrey bill and are able to take it up for consideration. They will simply refuse to adopt the substitute which has come from the judiciary committee, and will send the original bill back to the house, with some minor amendments. Judge Torrey is confident that a majority of the senate are now in favor of a complete bill which will establish a uniform bankruptcy system throughout the United States, and invite capital into some of the poor States by making more certain a uniform and equitable settlement in cases of business failures.

While the Torrens law is effective in Ohio January 11, active operations under it will not be pushed until its constitutionality is decided. The law is optional instead of mandatory, and therefore both systems will exist for some time to come. The New Title Guaranty Company, of Cincinnati, will not become active until the law is tested.

Ex-President Harrison, in the January number of the *Ladies' Home Journal*, in reply to a request from the editor of the *Journal* that he answer a correspondent as to the possibility of making a success at law without a course at law school, writes :

Whatever success I have attained at the bar was attained without a course at a law school. I studied law in the office of a leading firm in Cincinnati. That a course of lectures by able professors upon the law, as upon any other subject, is valuable to the student, I do not doubt. But these professors derive their information from books, to which the student has access, and he may grub knowledge for himself if he has the requisite pluck and industry. The observation and casual instruction which a student gets in a law office are of the first value to a practitioner.

The ALBANY LAW JOURNAL joins with a number of its contemporaries in the hope that the above will not be used as an argument against attendance at law schools, for this, combined with practical work in a law office, is pretty generally conceded to be the best of all methods of acquiring such a knowledge of the law and its practical application as is necessary to the new practitioner.

The present session of congress — the short one — is not usually fruitful of important legis-

lative enactments, but there is a good prospect of the passage of at least one needed law, viz. : That for the restriction of immigration. The measure referred to will be more far-reaching than any heretofore passed. It applies an educational test to all persons over sixteen years of age who come from foreign countries, and denies admittance to those who "cannot read and write the language of their native country or some other language," except that an admissible immigrant over the age of sixteen may bring in with him, or send for, his wife, parent, grandparent, minor child, or grandchild, notwithstanding the latter's inability to read and write. The House passed the bill in substantially the same form at the last session, the only changes made by the senate being the substitution of sixteen for fourteen as the age limit, and the addition of an *ad captandum* provision allowing Cuban refugees to enter the United States, even though they be illiterate. The lower branch will doubtless accept these changes, and the president's approval of the bill may be expected. The enforcement of the new law will put an immediate and effective check upon the immigration of undesirable immigrants from the countries of southern Europe in particular.

Governor Altgeld, of Illinois, again showed his special penchant for pardoning murderers in the closing days of his administration by exercising the prerogative of clemency with kingly liberality. Of nine absolute pardons and six commutations equivalent to pardons during the month of December, 1896, six were granted in cases of conviction for murder. The list includes the following:

Kate Ford, La Salle county, 1891; sentence, fourteen years.

Charles Richter, Cook county, 1889; sentence, seventeen years.

Henry Schwartz, Grundy county, 1887; life sentence.

Willis E. Morgan, Pike county, 1894; sentence, fifteen years.

Charles C. Meyers, Christian county, 1882; sentence, ninety-nine years.

Edward J. Warren, Cook county, 1894; sentence, twenty years.

"In not one of these cases," says the Chicago Post, "has the governor given more than a formal reason for the exercise of the high prerogative of clemency. He has generally con-

tented himself with an expression of doubt as to the guilt of the prisoner — a question upon which he has no right to pass — or a statement that the convict has been sufficiently punished — which is a usurpation of the office of the jury in determining the nature of the sentence. If there is one murderer in the above list less entitled to executive clemency than his fellows, it is Henry Schwartz. He was the principal in the murder of Express Messenger Nichols on the Rock Island train near Morris. He was a brakeman on the train and conspired with Newton Watt, a fellow train hand, to overpower Nichols and capture \$22,000 in his keeping. Nichols made an unexpected resistance, and Schwartz brained him with a poker after he had been shot in the shoulder by Watt. There was no doubt of Schwartz's guilt, and a death sentence ought to have saved Governor Altgeld from exhibiting his fondness for pardoning murderers in his case. Probably Governor Altgeld will answer these strictures with a long list of the pardons by his predecessors. But he cannot excuse his seeming predilection for pardoning notorious murderers by comparing it with the pardons of lesser criminals by other governors. It is the character and not the number of his pardons that has been an offence to criminal justice in Illinois."

The estimate of the cost of governing New York city for 1897 shows what a decided tendency municipal expenses have to increase. Last year the budget aggregated \$46,496,571 and this year it sums up \$49,486,297, or an increase of very nearly \$3,000,000 in one year. At that rate of increase and with the addition of Brooklyn and its suburbs it will not be many years before the annual expense account of Greater New York will reach \$100,000,000. The most expensive department is the police, which asks for \$6,983,939, and the next is the Bureau of Education, which wants \$5,931,239. These two departments absorb more than one-fourth of the total revenue of New York city. Not many years ago the sum either one of these departments needs would have been considered an extravagant amount of money for a city in this country to spend in one year, a fact which shows what enormous sums are now absorbed in governing municipalities in the United States.

## VERDICTS BY LESS THAN UNANIMOUS JURY.

ON Wednesday last we printed a communication from Senator Charles L. Guy, inclosing a proposed legislative bill defining sufficiency of verdict in civil actions, and asking for opinions as to its constitutionality and desirability.

We think it at least doubtful whether such legislation would be constitutional. Section 2 of Article I of the Constitution of 1894 provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

"The trial by jury" is not defined or described in the Constitution, and the form and requisites of such trial which are constitutionally guaranteed have been usually taken to be those existing at common law before the adoption of a written Constitution. Such a jury is one consisting of twelve men (*People v. Justices*, 74 N. Y. 406), and there must be a unanimous concurrence for a valid verdict. (Cooley on Constitutional Limitations, 6th edition, pp. 390, 391, 392, 504, 505.) So, also, certain rights of challenge existed at common law and are constitutionally protected. (Cooley on Constitutional Limitations, *supra*.) If the right of challenge could be materially impaired or entirely legislated out of existence, the essential nature and practical safeguards of trial by jury would be destroyed. The true theory would seem to be that the right of challenge as it historically existed is insured against legislative invasion, because such right is an organic feature of the jury system itself. The question is, where the historical line is to be drawn. At common law, certain grounds of challenge, which are grouped under the head challenges for cause, existed as matter of right in civil actions. The right of peremptory challenge existed only in criminal cases. (Blackstone's Commentaries, book 3, chap. 23, book 4, chap. 27.) The Constitution of 1846, adopted in November of that year, did not guarantee the right of peremptory challenge in civil cases. However, in 1847 the legislature passed a statute, which is the basis of section 1176 of the Code of Civil Procedure, granting to each party to a civil action the right of two peremptory challenges. (Laws 1847, chap. 134.) Now comes in the Constitution of 1894, and, by literally repeating the provision of the Constitution of 1846 on the subject of trial by jury, makes the same speak from the date of November, 1894. In one of the opinions in *Wynehauser v. People* (13 N. Y. 378-427), discussing a question arising under the Constitution of 1846, the following language is used:

"When jury trial was given for the first time in such cases, it was bestowed because the legislature

desired to extend its protecting influences, and when afterwards the new Constitution was adopted, jury trial, in cases where it was then accustomed, received the sanction and protection of the organic law. Writings are to be construed as to the time when they are made; and 'heretofore,' in this clause, means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to the cases which at that earlier period, were triable by jury."

It is true that this language particularly applied to new cases in which the right of trial by jury had been granted by the legislature, and not to new formalities or privileges attached to and made part of the right itself. Still, it may be argued by analogy that when the constitutional convention referred to trial by jury it must have intended trial by jury as existing not at a remote period in the past, but at the time when the new Constitution took effect. If this view be correct—we advance it by the way of suggestion—the legislature would have no more power to compel a litigant to waive his right to peremptory challenges as a condition of insisting upon a unanimous verdict, than it would to absolutely compel him to accept and abide by a less than unanimous verdict.

Aside from the constitutional question, we doubt the expediency of attempting to secure the partial reform contemplated by the proposed law, in view of the consideration that a constitutional amendment providing generally for verdicts in civil cases by three-fourths of the jury could probably be passed and its adoption by the people procured without serious opposition. We are quite sure that such a change would be favored by a majority of members of the bar; it has been recommended by a large number of eminent jurists and text writers. The people could be trusted to ratify it by decisive majorities; the abortive results of many jury trials are a constant theme of popular criticism and ridicule. A provision of three-fourths verdicts in civil cases has already been adopted by the constitutions of several States. This subject is instructively treated in chapter 12 of Mr. M. A. Lesser's work, "The History of the Jury System." The reform in question could, as we believe, be readily accomplished by a constitutional amendment in New York.—*New York Law Journal*.

## CRIMINAL LAW.

THERE is not a little reason for believing, based upon recent experiences, that popular and even professional opinion concerning our criminal law and the enforcement of criminal punishment needs to be revised. It is a legal saying, which has been made use of in frequent criminal trials, where the evidence on one side or the other is not obviously

conclusive, that it is better that ninety-nine guilty men escape than that one innocent man suffer punishment. Better for whom? When this question is asked, the uncertain character of the statement becomes evident. It cannot be denied that it is better for the innocent man himself that he escapes punishment, but such an assertion is a truism. Individually considered, it may be better for the ninety-nine guilty men, but a legal axiom could hardly be formulated on such a basis. The only alternative, then, is that this statement, if it means anything, implies that for society as a whole it is so essential that the safety of the individual should be assured — that his rights should be protected — that, rather than have these unwarrantably invaded by process of law, even in one case in a hundred, it is better that the ends of justice are not secured through the punishment of offenders in ninety-nine other cases.

This conception of social needs had its origin at a time quite different from the present, and as the needs of society must be present and not past needs, it is by no means impossible that the conception of the administration of justice which the quoted maxim conveys has outlived its period of usefulness. It is only a little over a century ago that Blackstone died, and his lectures and writings date but a few years prior to that event. But when he says, as he does, that "among the variety of actions which men are daily liable to commit, no less than 160 have been declared by act of parliament to be felonies, without benefit of the clergy, or, in other words, to be worthy of instant death," one obtains a realizing sense of the difference that exists between the present administration of criminal law, so far as concerns punishment, and its administration a century ago.

At that time offences or misdemeanors which would now subject the one guilty of them to a month's confinement in the house of correction, were then looked upon as crimes meriting the punishment of death. Those who read the history of any civilized community, our own not excepted, will find that prior to three or four generations ago not only was there a tendency in the way of criminal punishment to take human life upon the smallest provocation, but there was also a tendency in the arbitrary administration of the law to give society the benefit of all doubts by the prompt execution of the offender.

Under such circumstances, it is not strange that the sacredness of personal rights should be insisted upon. Society was compelled to protect itself against attacks upon its integrity, for it was possible, or seemed possible, that if there was indiscriminate punishment, if men were hung or beheaded for small offences and without the clearest,

proof of their guilt, those around society might be obliged to do possible work of social defence. If a man visited with a punishment such as that, no reparation was possible, punished not only for offences which they had committed, then a man would have to give place to terrorism, for a man could be sure that his life was in jeopardy. Under such circumstances, it is not strange that society should have obtained a sound theory of criminal law.

At the present time conditions are quite different. Sympathy and humanity have become developed in the community, and the first, to reduce the death penalty to a single crime; and, second, to enforce the law as a means of the benefit of the suspected. The result of this is that whereas the law was so drastic and tenacious in its application, it was difficult to escape from punishment in a manner of social pressure to ameliorate its operations, now the chances are large that a man will escape from punishment of murder. It is notorious that the statistics for murder in the United States are high.

How far a man is prevented from crime of murder by the fear of punishment may be a matter for discussion, but when society, for whose benefit alone, our laws are made, believes that the laws are a means of crime will not be administered in too many parts of the country, and recourse to the rough and ready operations of vigilance committees, or lynching parties, is manifest that the old maxim is no longer under changed conditions.

A whole new system has to be considered in such a technical spirit that it is not even known to be, guilty, because of some little which does not permit the proof as clearly as the factor position, is to demoralize society by its members to take the law into their own hands. Innocent are much more likely to be under the most barbarous of conditions.

Society will defend itself legally if it can, illegally if



better calculated to drive it to this illegal excess than the assumption that under existing conditions it is better that any number of murderers should be let loose on the community than that one innocent man should suffer. It is better, even if looked upon as a vicarious sacrifice for the good of mankind, that as a rare exception a man should suffer what might turn out to be an unjust punishment, than that a large number of offenders should escape punishment. In other words, present conditions require a reversal of the maxim, which should now read: That it is better that one innocent man suffer punishment than that ninety-nine guilty escape unpunished.—*Boston Herald*.

**APPROVAL OF CERTIFICATE OF INCORPORATION REFUSED—ANNUAL MEETINGS APPOINTED TO BE HELD ON SUNDAY.**

NEW YORK SUPREME COURT—SPECIAL TERM,  
PART II—DECEMBER, 1896.

In the matter of the application of the Agudath Hakehiloth of New York for a certificate of incorporation.

The "approval" of the certificate of incorporation of a "membership corporation," appointing the annual meetings to be held "on each and every second Sunday of January of each and every year," refused, on the ground that the holding of corporate meetings for the transaction of secular business on Sunday is contrary to the public policy of this State.

PRYOR, J.—The "approval" of the certificate by a justice of the Supreme Court is an indispensable requisite to the creation of a "membership corporation." (Ch. 43 G. L., sec. 31.)

Whether such approval shall be conceded or denied is not to be determined arbitrarily or capriciously, but upon reasons of public policy and by considerations of public interest.

In the certificate submitted to me I observe that the annual meeting of the proposed corporation is appointed to be held "on each and every second Sunday of January of each and every year." It is not a religious corporation (section 30), and its annual meetings are for the performance of precisely such secular business as is transacted by other civil corporations. (Sections 8-11.)

The question is not whether such meetings on Sunday are illegal, but whether they should be *approved* by a justice of the Supreme Court. A thing may be lawful and yet not laudable.

"In the State of New York the Sabbath exists as a day of rest by the common law, and without the necessity of legislative action to establish it; and may be protected from desecration by such laws as the legislature, in its wisdom, may deem necessary to secure to the community the privilege of undisturbed worship, and to the day itself that outward

respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt." (*Lindenmuller v. The People*, 33 Barb. 548.) "The Christian Sabbath is one of the civil institutions of the state, and the legislature, for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration." (*People v. Moses*, 140 N. Y. 215.) That "the first day of the week is by general consent set apart for rest and religious uses," is an express statutory declaration. (Penal Code, sec. 259.) This sanctity of the Christian Sabbath is sanctioned and secured by repeated acts of legislation extending from the colonial period to the present year (*People v. Havnor*, 149 N. Y. 195, 201; *Laws of 1896*, vol. 1 ch. 112, sec. 31); and as well by the impressive deliverances of the Court of Appeals. (*Neuendorf v. Duryea*, 69 N. Y. 557, 561-3; *People v. Moses*, 140 N. Y. 214 215.) As justice of the Supreme Court, I may not approve that which the immemorial and uniform policy of the State condemns.

Although not explicitly stated, it is nevertheless an inference, from the face of the certificate before me, that the members of the proposed corporation are of a race and religion by which not the first but seventh day of the week is set apart for religious observance. The fact might be of decisive importance were a desecration of their holy day contemplated; but the act intended is an aggression upon the Christian Sabbath. The law which scrupulously protects them in the observance of their ceremonial gives them no license, as I am sure they have no desire, to affront the religious susceptibilities of others. True, to a prosecution for work or labor on the first day of the week, the defendant may plead that "he uniformly keeps another day of the week as holy time and does not labor on that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time" (Penal Code, § 264); but otherwise the legislation of the State against profanation of the Christian Sabbath is operative and imperative upon all classes of the community. (*In re King*, 46 Fed. Rep. 905, 912; *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768, and cases collected in note, p. 772; *Cooley on Const. Lim.* 476-7; *Anonymous*, 12 Abb. N. C. 455, 457; *Quinlan v. Conlin*, 13 Misc. 568.)

Because the holding of corporate meetings on Sunday is contrary to the public policy of the State, if not to the letter of its law, I decline to approve this certificate.

Application refused.

## RIGHT OF HUSBAND TO ALIMONY.

THE commonly accepted definition of alimony is, that it is an allowance out of the husband's estate to the wife, in recognition of his common-law liability to support her, and the courts generally hold that in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted him. In some of our States there are statutes providing that alimony, or an allowance out of the wife's estate, in the nature of alimony, may be granted the husband. In *Somers v. Somers*, 39 Kan. 132, the court denied alimony to the husband from the property of the wife, because no case could be found authorizing it, and legislative action was necessary before such a claim could be entertained by the courts. The Nebraska Supreme Court, in the recent case of *Green v. Green*, 68 N. W. Rep. 947, based its holding that a husband cannot, in that State, whether he or the wife be granted the divorce, recover alimony, to be paid out of the divorced wife's separate estate, upon the absence of any statutory provision for such an allowance. It was argued by counsel for the husband that he was entitled to recover alimony by virtue of the provisions of section 10, chapter 25, Comp. St. Nebraska, 1895, which read as follows:

"A petition or bill of divorce, alimony and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony and maintenance, when personal service cannot be had, service by publication may be made as provided by law in other civil cases under the Code of Civil Procedure."

The court says that, as before the enactment of the quoted section, a wife was obliged to commence the action by a representative, by her next friend, the additional words "as well as the husband" were but used as descriptive of the action which the legislature gave the wife the right to institute in her own name, and that it would be strained construction to interpret these words as reaching back and connecting with the words "alimony and maintenance," and thus confer upon the husband the right to "alimony and maintenance" which he could not obtain in the action of divorce unless given by this section.

Is it not a "strained construction" which makes the additional words quoted reach over the words "alimony and maintenance" and connect with the word "divorce" which precedes them? Does not the simplest, and therefore the correct, construction make the additional words refer to and connect with the three preceding connected words, "divorce, alimony and maintenance?" How can

a "wife in her own name" exhibit "a petition or bill of divorce, alimony and maintenance" "as well as a husband," unless he may exhibit such bill also? It is rather a *restrained* construction to limit the application of the additional words to a change in procedure, and thus defeat the evident intent of the "lawmakers."

Legislation has so materially changed or "readjusted" the relations of husband and wife, so far as the latter's personal and property rights are concerned, that the latter is now in these respects on an equality with the former, and the bestowal and acceptance of such equality impose upon the wife an equal share of the duties and obligations which before rested wholly upon the husband. — *Chicago Law Journal*.

## WOMAN'S VOTE IN THE WEST.

IN the election of last November women participated in the choice of a President in three Western States. These States are Colorado, Utah and Wyoming. This is the second time women have voted for President in Wyoming, but it is the first time only in Colorado and Utah. In the first State the male and female vote is given separately, but in the two other States no distinction of sex is made in compiling the returns. For this reason it is possible to tell accurately in one State and in the two other States approximately only whether women will vote if admitted to the ballot-box.

The total vote in Wyoming was 21,797, and the woman vote was 7,122, or very nearly one-third of the whole. According to the census of 1890, there were 39,343 males and 21,862 females in Wyoming. The population has increased during the past six years, but it is likely that the proportion of males to females remains about the same. The number of males of voting age is given as 27,044, of whom 17,852 were native born and 9,192 were foreign born. As there were 14,675 votes cast by men in the State, a little over half of the males of voting age cast a ballot. There is no means of knowing exactly how many women of voting age there were in Wyoming in 1890, the census not having investigated that subject, but the ratio of persons over 21 years of age is probably nearly the same in the two sexes.

The males of voting age in Wyoming in 1890 comprised about 70 per cent. of the total males in the State, and 53 per cent. of them voted. If the females of voting age in the State were in the same ratio to the total number of males as the males of voting age were to the total number of males, then there must have been 14,953 females over 21 years of age in the State. As 7,122 women voted, about 48 per cent. of the women of voting age must have



exercised their franchise privilege, or 5 per cent. less than the men. Considering the general reluctance of women to taking part in public affairs, and the long distances to the polls in many parts of Wyoming, and the inconveniences to which many voters had to put themselves in order to go to the polls, the fact that the ratio of women voters to total voters falls only a little below the ratio of men voters is an answer, so far as Wyoming is concerned, to the claim that women will not vote if given the privilege.

The case cannot be represented so clearly with respect to Colorado and Utah, as the vote in those two States is not separated according to sexes. But the fact that the total vote of Colorado increased from 93,842 in 1892 to 189,620 in 1896, or more than doubled, is strong presumptive evidence that the women in that State were nearly as active in voting as the men. The same evidence is given by the vote in Utah. In 1892 there were 34,605 votes cast in the Territory. Last November, when the State first participated in a Presidential election and the women voted, the total poll reached 78,812, or considerably more than twice as large as four years ago. If these three States are to be taken as proofs, it seems to be demonstrated that women in the West, at least, will vote if the franchise is given them. Whether the same rule will apply to women in the East, there is at present no conclusive evidence.—*Philadelphia Press*.

#### ARCHITECTS' CHARGES.

BEFORE HIS HONOR JUDGE LUMLEY SMITH, Q. C.

**I**N the Westminster County Court, in the case of *Skipworth v. Skrine*, the plaintiff, an architect, sued the rector of Leadenham, Lincolnshire, for 82*l.* 14*s.* for visiting the church and making designs in response to a letter from the rector. The plaintiff prepared a drawing of a rood screen, also one of an east end, one of a pavement, and one of paneling. He estimated the total cost at about 1,800*l.* Ultimately, for various reasons, the plaintiff's designs were not carried out. The defendant was willing to pay the amount claimed if the drawings were handed over to him, but the plaintiff was unwilling to part with them. At the hearing both parties, after some discussion, preferred that the plaintiff's remuneration should be assessed on the basis that the plaintiff would retain the drawings and the defendant make no claim to them. The plaintiff said that the work was special, and not subject to any scale applicable to ordinary architectural work, and he based his claim on the time occupied, which he estimated at fourteen days. His honor, in delivering judgment, said that two of the drawings contained much detail which doubtless

took time, but it was not clear that so much was required at that stage. In writing to the defendant's solicitor the plaintiff said that it was only necessary to make diagram drawings sufficient to illustrate the nature of the design, and that such elaborate drawings as his were made on the supposition that he would retain them, and that the drawing of the chancel screen was to be exhibited in the church. In the absence of any agreement between the parties, his honor gave judgment for the plaintiff for 20*l.*, including traveling expenses, the defendant abandoning all claim to the drawings.—In the case of *Ransome v. Castro*, his honor said that the plaintiff, an architect, made plans and obtained tenders for two cottages which the defendant was willing to erect at a cost not exceeding 400*l.* The tenders exceed that sum, and the cottages were not built. The plaintiff received from the defendant the 3 per cent on the lowest tender, which was the ordinary remuneration for what he had done. Some five years afterwards the plaintiff, at the defendant's request, obtained a fresh tender, without result. He also made some slight alterations in the plans. He then suggested to the defendant that, for the purposes of economy, a builder might be trusted to do the work under the control of the district surveyor without the supervision of an architect, in which case he would charge the builder two guineas for a set of tracings. This was not agreed to at the time; but eventually a builder volunteered to the defendant to do them for 400*l.* The defendant applied to the plaintiff for the plans and specifications, and the plaintiff supplied copies, but sent with them a claim for two guineas. The defendant replied that as he had, paid the plaintiff for making the drawings they were his property, and though he was willing to accept copies instead of the original drawing, he would not pay for them. When the plaintiff commenced his action he limited his claim by his particulars to two guineas for making alterations in the drawings and specifications; but those alterations were unsubstantial, and there was no promise, either express or implied, on the part of the defendant to pay anything for them. The claim therefore failed.—*London Law Journal*.

#### RECEIVER AND MANAGER'S INDEMNITY.

**I**T would be an unfortunate day for receivers and managers if they were to lose their right of recouping themselves because they carried on the business at a loss. Yet this was what was, in substance, gravely argued in *In re Strabb*, the latest phase of a long litigation. It was a case in which a receiver and manager had been appointed in a debenture-holders' action to complete certain

building contracts entered into by the insolvent company with the London school board, and the result of the completing of the contracts was a loss of 9,000*l.* The total assets to be fought for were only 4,500*l.*, so that the debenture-holders' only chance lay in postponing the receiver. They put it in this way: A receiver and manager ought not to advance moneys without the sanction of the court. If he chooses to do so it is at his own peril; he must lose the money, at least, he must show that the expenditure has been beneficial. But how on this theory is a receiver and manager to carry on the business? He has to buy materials, pay weekly wages, and so on; and for this he must put his hand into his pocket. The true test of his right of indemnity is not whether the expenditure is beneficial, but whether it has been properly incurred. A receiver cannot possibly tell what the result of his trading is till he balances his books. If it proves unprofitable, it is not his business to discontinue it, but the debenture holders'. Default in completing such contracts, it must be remembered, means a heavy claim against the company for damages, which would come round to the same thing.—*London Law Journal.*

#### LANDLORD'S LIABILITY.

THE judgment of the Court of Appeal in *Lane v. Cox*, affirming the decision of the Lord Chief Justice, lays down two rules. One is, that the landlord of a house let on a weekly tenancy is under no liability to the tenant to let or to maintain it in good repair. As to this, no lawyer probably felt any doubt. The other is, that the landlord is not responsible to a person who is in the house on the tenant's business for injuries caused by a structural defect in the premises which existed at the time of the letting. It must, however, not be supposed that a landlord who lets a house on a weekly tenancy is never responsible to a stranger for the results of the non-repair of the premises. He may, no doubt, be answerable when he has agreed to keep the house in repair, and *Bowen v. Anderson*, L. R. (1894), 1 Q. B. 164, shows that he can be sued for an injury to a passer-by on the highway due to a defect which dates from the time when the house was let. In *Sanford v. Clarke* (57 Law J. Rep. Q. B. 507), the court held that the landlord was liable to a stranger on the highway for injuries caused by a defect in a coalplate, which was not proved to have existed at the beginning of the tenancy, on the ground that there had been a re-letting at the end of each week, that is, after the nuisance was created, but in *Bowen v. Anderson* Mr. Justice Wills, who was a party to the judgment in *Sanford v. Clarke*, admitted that a weekly

tenancy does not determine every week without notice, and that the case has been decided on wrong grounds. Fortunately, for the public, the owner of a building the different floors of which are let separately as offices chambers, is in a somewhat different position from the man who lets a whole house. When the staircase is in his possession and control, there is, at any rate, a duty on his part to the persons who come to the premises on business, to keep the staircase in a reasonably safe condition.—*London Law Journal.*

#### TAXATION.

##### JUDGMENT IN FAVOR OF NON-RESIDENTS — KANSAS STATE LAW — TAXATION UNAUTHORIZED.

IN *Board of Commissioners of Kingman county v. Leonard*, decided by the Supreme Court of Kansas in December, 1896 (46 Pac. R., 960), it was held that, under the statute law of that State, the assessment and taxation of judgments rendered by the courts of Kansas in favor of and owned by citizens of other States, are not authorized. The court said in part:

It will be observed that the provisions with reference to what property shall be subject to taxation are very sweeping, and that judgments as well as other forms of intangible property, are not only included within the general terms used, but are specifically mentioned as included in the term "personal property." Sections 9 and 10 of the act require the owners of property subject to taxation to make lists thereof, and section 10a provides that the statement shall set forth the number of the school district or districts in which such property was situated on the 1st day of March. It is ably and earnestly argued that the common-law rule embodied in the maxim "*Mobilia personam sequuntur*," applied with full force in this case, and that the situs of the intangible property evidenced by the judgment is at the domicile of the owner, and subject to taxation there only. This rule of law is subject to so many exceptions and limitations that it is quite as liable to mislead as to furnish a correct guide, when considered alone. In the distribution of the estates of deceased persons, it is generally, if not universally, given full force and effect, both as to tangible and intangible property; and, from comity, nations foreign to each other generally recognize the law of the place of the owner's domicile as controlling in the distribution of the personal estate of the deceased owner. To questions of taxation the maxim has very little application.

Every sovereignty asserts the right to levy taxes on persons and property within its protection, and the ground on which all taxation is justified is that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in pro

fecting persons and property. (1 Desty, Tax'n, 59; Cooley, Tax'n, 19 *et seq.*; Story, Conf. Laws, 543, note A, and cases cited.) We think it now quite well settled that choses in action belonging to a non-resident, in the hands of a managing agent within the State, are taxable. (City of New Albany v. Meekin, 56 Am. Dec., 522, note page 530, and cases therein cited; 1 Desty, Tax'n, 64; Finch v. York Co., 19 Neb. 50, 26 N. W., 589.) The power to tax residents of the State on credits due from citizens of other States is often upheld. (Kirtland v. Hotchkiss, 42 Conn. 426.) And this even where it results in duplicate taxation. (Dyer v. Osborne, 11 R. I., 321; note to People v. Worthington, 74 Am. Dec. 95, and cases cited.) The cases upholding the power to tax promissory notes and other written securities held within the State, though owned by a non-resident, sometimes lay stress on the fact that the securities are, in a certain sense, property, and are subject to seizure for debt, and that a title may be made to the intangible debt by delivery of the written evidence of it.

We perceive no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this State, or other States or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of this State. The question here, however, is whether the legislature has expressed a purpose to tax judgments in favor of a citizen of another State, rather than as the power to do so. Judgments are included, by the express provision of section 2, in the term "personal property." Does this mean judgments owned by citizens of this State or those rendered by courts within the State, without reference to ownership? In answering this question, some weight, at least, should be given to the rule that credits are generally regarded as residing with the creditor. The case of Fisher v. Com'rs (19 Kan. 414) is an extreme one, and has been criticised.

A resident of this State may undoubtedly be taxed on moneys due him from citizens of other States, and this would be equally true after the claim is reduced to judgment in a foreign jurisdiction. Under the provisions of section 7, where the owner of a domestic judgment resides in this State, it seems clear that it must be taxed at the place of his residence, provided it does not pertain to a business located at some other place. Where the owner is a non-resident, if taxed at all, it must be taxed in the township, school district, or city in which it is located, and to be taxable, it must be held to have a situs of its own. The authorities with reference to the situs of a judgment are not numerous, and no case is called to our attention where the precise point now under consideration has been decided in

an action where the owner of the judgment resided out of the State. But, in cases where the owner resided in the State, it has been held that the situs of the judgment for purposes of taxation is at the residence of the judgment-creditor. (Meyer v. Pleasant, 41 La. Ann. 645, 6 South. 258; People v. Eastman, 25 Cal. 601.)

When this case was first considered the writer was strongly inclined to the opinion that a judgment should be held to have a situs of its own at the place where the record of the court rendering it is kept; but it seems quite clear that, if the owner be a resident of this State, its situs is with him, at his place of residence, and there is no purpose expressed by the legislature to give judgments in favor of non-residents a situs for the purpose of taxation. If the legislature wishes to change the rule and establish a situs for taxation for all judgments rendered by the courts of this State, it ought to employ language expressive of its purpose to do so. The natural implication from the language in fact employed would seem to be that, as to the situs of credits for taxation, the rules generally recognized were intended to be followed.

#### THE STRANAHAN BROTHERS CATERING CO. V. FRANK R. COIT.

SUPREME COURT OF OHIO.

*Agency — Master and servant — Malicious act of servant against master — Liability of master for injury of such act to third persons — Rule as to damages.*

1. A master is liable for the malicious acts of his servant whereby others are injured, if the acts are done within the scope of the employment and in the execution of the service for which he was engaged by the master.

2. Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master.

3. Where a master is under contract to deliver to the proprietor of a cheese and butter factory pure milk, and has knowledge that the milk so delivered is to be mixed with the milk of other patrons, and entrusts the delivery to a servant who, in the course of such employment, delivers adulterated milk, the master is liable for damages necessarily and directly resulting by reason of such delivery, and it is not a defence to show that the servant, without authority and purposely, to gratify his malice towards his

employer, and with intent to injure him, adulterated the milk so delivered by mixing it with water, and that the master had no knowledge of such adulteration. In such case the rule of damages is compensation for the injury.

Decided December 8, 1896.

Error to the Circuit Court of Portage county.

#### NOTES OF PERTINENCE.

The New York *Times* comes to the defence of Adjutant-General McAlpin, who was accused by the bumptious member of Governor Morton's staff of displaying his ignorance by referring to the governor as the "chief executor," instead of the "chief executive." The *Times* points out that the word "executive" is, properly speaking, an adjective. "Chief executor," as a matter of fact, is right, and "chief executive," unless followed by some such word as "officer" or "magistrate," is wrong.

The January disbursements of interest on bonds and dividends on stock in New York on January 1 aggregate \$78,391,390.

The students of the College of Laws of Syracuse University have adopted the following descriptive yell:

"Agency, contracts, bills and notes,  
Equity, pleadings, sales and torts,  
Domestic relations, raw! raw! raw!  
Syracuse Varsity, College of Law!"

The losses by fire in this country and Canada in December, 1896, were about \$1,000,000 larger than in 1895 or 1894, but for the year 1896 they were much below either of those years. Since May the monthly reports have shown continuous decreases as compared with 1895, up to November, when the difference amounted to nearly \$5,000,000. The total losses for the year aggregated \$115,600,000, which was \$7,000,000 less than in 1895, and more than \$12,000,000 less than in 1894. These changes are large enough to favorably affect the year's business of most insurance companies.

Two of the most unique cases of thieving on record are being investigated in Haverhill. One is the stealing of 15,000 live fish, and the other the theft of a big stone wall surrounding the cemetery of the Hebrew Burial Association. This is believed to be the first instance ever chronicled of the larceny of a stone wall from a graveyard.

The next Maine legislature must consider putting further restrictions into the game laws. There are said to have been 50,000 men in the State hunting big game since September 10. It is stated that in this time 800 caribou, from 1,000 to 2,000 moose, and 20,000 deer, beside bear and other animals, have been killed. It further appears that the fall hunters now exceed the summer boarders in number,

and are an equally fruitful source of profit. The railroads and hotel interests are in favor of letting things go on as they are, but the more far-seeing consider that it won't be long at this rate before the game supply will be swept away, and the present advantage to the State lost beyond recall.

An Indiana farmer, closing his front doors against the entrance of two strange and armed men, goes to the rear of his house with a shotgun, presumably for the defence of his home. There the strangers meet him, order him to throw up his hands, and when he fails to do so shoot him dead, and claim they did so in self-defence. The Kentucky officers who were the actors in this tragedy are likely to learn that, outside their jurisdiction, they were without authority of law and that the man shot was the party upon the defensive.—*Louisville Commercial*.

Chairman Austin's bill to regulate the height of buildings in the city of New York is similar to the Austin anti-skyscraper bill of 1896, with the exception that the basis for estimating the height to be permitted is in the present bill taken as twenty times the square root of the width of the street, instead of fifteen times, as in the bill of last year. This amendment was decided upon by Mr. Austin just before submitting the bill.

The Supreme Court has decided the Fort Edward police measure unconstitutional, and ordered the board of supervisors of Washington county to assemble and audit Deputy Sheriff Ryan's bill for services and disbursements in detecting and arresting burglars and recovering stolen property. Judge Stover, in writing the opinion, says: "The act would be better entitled, 'An act to relieve the town of Fort Edward from the expense of the administration of justice in criminal cases.'"

I. Townsend Burden, whose home in New York was robbed of \$50,000 worth of jewels in July last, has refused to pay the bill for the freight on his stolen gems from London, where they were taken from the two thieving servants of the Burden household. The bill amounts to \$531.78. Morton, Bliss & Co. had charge of the gems, after they were confiscated, and incurred the expense. When the firm asked Mr. Burden to pay the amount he refused, saying that the county was liable for it. District Attorney Olcott, of New York, audited the bill, when it was presented, under the misunderstanding that his predecessor had approved of it, but Comptroller Fitch refused to pay it, and says he will not settle until he is ordered to do so by the courts.

The decision of the Appellate Division, in Brooklyn, sustaining an order refusing a writ of mandamus to the Inebriates' Home, at Fort Hamilton, requiring the comptroller of the city of Brooklyn to pay over 15 per cent of excise moneys, passes upon

interesting questions under the provisions of the new Constitution in reference to charitable institutions. The Inebriates' Home, from its reorganization in 1867, has been in part supported by excise moneys. The court holds that the rules adopted by the State Board of Charities, in pursuance of the Constitution, and these acts, with the Constitution, cover the whole question and establish a uniform, harmonious system which it was the purpose of the Constitution to accomplish. The effect of the constitutional provision is held to operate upon statutes then existing, and that its effect was to modify the act under which this application was made by striking out the command to pay, leaving simply in force the authorization to pay.

### BENCH BADINAGE.

"A little nonsense now and then,  
Is relished by the wisest men,"

and it is sometimes really restful to find the solemn and stilted paragraphs of an opinion parenthesized with quaint observations, felicitous expressions, or pungent pleasantries—particularly so when the proprieties are not impinged nor the gravities trifled with. But when the subject-matter is serious, and the relations of the parties are sacred, involved in a cause, judicial playfulness seems as much out of place as a jest at a funeral, or a prayer at a political caucus. A reading of the opinion of the Massachusetts Supreme Judicial Court, in *Smith v. Smith* (45 N. E. 52), will emphasize the pertinence and justice of the above observations.

The case was libel for divorce brought by the wife, upon the grounds of cruel and abusive treatment. Evidence for libel showed that the libelee was in the habit of throwing eggs, chairs, books and lighted lamps at her, occasionally knocked her down, kicked her in the bowels, pulled her out of bed and dragged her around the room by the hair, and administered cold shower baths to her while she was in bed. The libelee admitted most of these matters to be true, but said they were done in fun.

(1) Instead of the court sharply reproving the libelee for speaking of his brutalities as frivolous, the incongruous idea which he entertained as to what constitutes merry-making, seemed to appeal to the court's sense of humor, as it, in the exuberance of its facetiousness, said: "How far the libelee's actions were mere *bucolic pleasantries* was for the judge who heard the evidence, to say."

The Smiths lived in the country. Had they dwelt in the city, would the court have characterized the cruelties complained of as urban gayeties? The covert sneer as well as the unseasonable airiness of the phrase render it unworthy of a place in a judicial pronouncement upon a controversy involv-

ing the most serious affair and most sacred relation that are known to human existence. Such misfit, humor and ill-timed jibes, courts may well leave to penny-a-liners or playwrights. — *Chicago Law Journal*.

### VERDICT OF A HUNGRY JURY.

NEARLY three hundred years ago Alexander Pope wrote:

"The hungry judges soon the sentence sign,  
And wretches hang that jurymen may dine."

This ancient couplet has received a great illustration in Boston in the case of Thomas M. C. Bram, tried for the murder of Captain Charles Nash of the bark *Herbert Fuller*. According to the *Boston Herald*, it has been stated, and probably not without truth, that the jurors agreed to convict because they were hungry. While certain members of this famous twelve deny such to be the fact, it is nevertheless true that all of the dozen were hungry, and all desired to get away from their tedious and monotonous duty. Officers of the court state that the failure to order a dinner for the twelve arguing men was an oversight, and was altogether unintentional on the part of the interested parties; yet it is certain that the rumor which circulated and gained much credence throughout the jury room, that there was nothing more to eat until a verdict was arrived at, hastened the decision of some of the doubtful ones. The last of the twelve to hold out for a disagreement remarked, as he cast his last ballot for conviction: "May God forgive me and have mercy on my soul if I have done wrong." The verdict came as a surprise to almost everybody, the general opinion of those who had read the evidence being that the jury would either acquit or disagree. It was one of the maxims of Lord Stowell that "a dinner lubricates business," and Lord Byron tells us:

"All human history attests  
That happiness for man,—the hungry sinner! —  
Since Eve ate apples, much depends on dinner."

—*Albany Argus*.

### Notes on Recent American Decisions.

TELEGRAPH COMPANIES — CIPHER MESSAGES — DELAY IN DELIVERY. — In *Ferguson v. Anglo-American Tel. Co., Limited*, decided by the Supreme Court of Pennsylvania in November, 1896 (35 Atl. R. 979), it was held that a telegraph company's liability for delay in delivering a cipher message, whose importance is not disclosed, is limited to the amount paid for its transmission. The court said in part:

The rule on this subject is stated in 25 Am. & Eng. Enc. Law, 842, 843, as follows: "The rule already set out as to the measure of damages confines the plaintiff's recovery in actions against the

company for negligence to such as may fairly be supposed to have been in contemplation of the parties at the time of making the contract. This being true, it follows as a logical and necessary sequence that, where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company had no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages, or at most the price paid for transmission. And this is the rule which has been adopted by the English and American courts almost without exception." Many decisions of the courts of this country and England are cited as sustaining the rule above stated. The numerous decisions of the courts of many States will be found to be opposed to the decisions of the courts of only three States, those of Virginia, Georgia and Alabama. Florida has recently reversed an earlier case, and thus joined the majority of the States on this question.

The reasons advanced in support of the decisions which support the ruling of the court below have been various, the one most commonly applied being the rule of *Hadley v. Baxendale* (9 Exch. 341). It is earnestly contended by the appellants that the rule of *Hadley v. Baxendale* has no application to the case in hand; that the word "contemplate" is there used as contradistinguishing what is proximate and direct from what is remote and speculative, as in *Pennypacker v. Jones* (106 Pa. St. 237,) and *Express Co. v. Egbert* (36 Pa. St. 360). They also call our attention to the fact that the view of *Hadley v. Baxendale*, contended for by the defendants, has been unsuccessfully urged upon this court at least twice before, namely, in *Telegraph Co. v. Wenger* (55 Pa. St. 262,) and *Telegraph Co. v. Landis* (Pa. Sup. 12 Atl. 467), and that, therefore, this question is not an open one. We do not concede that the rule of *Hadley v. Baxendale* has no application to this case, nor that the decision of this court in *Telegraph Co. v. Wenger* or in *Telegraph Co. v. Landis* is opposed to the ruling of the court below. The message in *Telegraph Co. v. Wenger* disclosed to the agent of the company the nature of the business to which it related, and there was uncontradicted evidence that the sender "notified the operator that he would look to the company for damages if they failed in transmitting the message." In *Telegraph Co. v. Landis* there was enough on the face of the message "to indicate to the operator that it referred to sheep, to be shipped to Philadelphia, and their price." It was a case not of delay, but of error in transmission, and Paxson, J., speaking for this court, said:

"It seems reasonable that, where damages are

claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company on its guard. A delay of a day or even a few hours might cause a heavy loss." This suggestion is applicable to the case now before us, and in harmony with the view taken in *Abeles v. Telegraph Co.* (37 Mo. App. 554), in which the Court said: "Aside from the reasons which support the rule of damages in *Hadley v. Baxendale*, there is here a question of public policy, to which we could not shut our eyes if we were in doubt upon the question. Upon any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it, or a total failure to deliver it, the door is open to unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They may construct any meaning they choose, and upon the meaning thus constructed they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit." That the measure of damages contended for by the appellants might produce such results is obvious. Under it a telegraph company may receive for transmission a cipher message which on its face is absolutely unintelligible to them, and was intended by the sender to be so, and for the slightest delay in transmitting it they may be charged with damages which cannot reasonably be supposed to have been in the contemplation of both parties, when they received it. Surely such a message furnishes no tangible ground for an inference that it relates to an important business transaction, or that the slightest delay in the delivery of it might subject the company to liability for such damages as are claimed in this case.

In *Candee v. Telegraph Co.* (34 Wis. 471), Dixon, C. J., said: "It cannot be said or assumed that any amount of damages or pecuniary loss or injury will naturally ensue or be suffered, according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling or unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a

breach of the contract on his part." To subject the company to the same liability for mistake or delay in the transmission of such a message that it might be subject to for a like mistake or delay in the transmission of an intelligible message would open the door to the perpetration of fraud, and disregard the well-settled rule of *Hadley v. Baxendale*. We find nothing in *Express Co. v. Egbert*, or in *Pennypacker v. Jones* which can be considered as a repudiation or qualification of that rule, or in the way of its application to the case at bar.

### New Books and New Editions.

[The LAW JOURNAL will, in future, make a special feature of this department, fully and fairly reviewing all new works and editions promptly upon receipt of copies from the publishers.]

A Treatise on the Law of Fire Insurance, with a Philosophical and Analytical Discussion of Leading Cases, by D. Ostrander, of the Chicago Bar. Second Edition, revised and enlarged. St. Paul, Minn., West Publishing Co.

The second edition of this work, one of the really valuable text-books on the particular branch of the law of which it treats so clearly, ably and fully, indicates its appreciation by those for whose use the book was intended. Mr. Ostrander has well succeeded in presenting in a familiar manner the more complicated and less understood questions which, in the construction of the insurance contract, will sometimes call for consideration, with the illustration of legal rules and principles afforded by a large number of instructive cases carefully analyzed and decided by the English and American courts. Especial attention has been given to pointing out the use of certain important conditions found in all insurance policies which are the cause of dispute and litigation under a great variety of unlooked for contingencies. With much painstaking, the author has endeavored to point out the rocks on which the insured's confidence of protection may be wrecked. The writer says: "The 'policy' is primarily for the benefit of the property-owner. The interests of all others are only incidental. To him it is of the highest importance that the contract is one of mutual covenants; that there is something for both parties to perform; that his duty is not ended with the payment of the premium. In a clear understanding of all these duties the policyholder will find his greatest security." Realizing that many lawyers and others, non-professional men, who may frequently have occasion to consult a treatise on the subject of fire insurance law, have only limited opportunity to refer to libraries for the purpose of examining authorities cited, the author has endeavored to relieve their embarrassment, so far as possible, by incorporating

into the pages of his book as much of the text of leading cases as will enable the reader to understand intelligently the principles of law relating to each particular case under discussion.

In his introduction to the work the author points out the fact that for a long period insurance was confined to marine risks, and when the business was extended to the protection of property-owners against loss by fire, it was in opposition to much prejudice on the part of the general public, because of the popular belief that it would increase crime and cause even honest people to relax in the watchful care which every property-owner should exercise to prevent accidents by fire. This expectation, he concedes, has been realized to a degree that suggests a doubt whether, in the interests of property and morality, the business of insurance should not be so regulated by statutory law as to prevent insuring in such an amount that the insured will no longer have a substantial interest in protecting the subject from loss. The destruction by fire of property to the value of more than one hundred millions of dollars annually presents an important problem for the consideration of the economist. Notwithstanding the better facilities provided for extinguishing fires, the work of destruction goes on year after year—a destruction in which, he says, fraudulent carelessness and intentional crime have come to be a large element. The insurer, he thinks, is no more to blame than the insured for this condition of affairs, for the latter demands indemnity, in very many cases, upon the basis of greatly exaggerated values. Over-insurance is no less the rule among honest persons than among rogues. When a loss occurs under circumstances that clearly point to incendiarism, it will seldom occur that the general public will manifest any considerable interest in finding out, and bringing to just punishment, the guilty party; the authorities are also frequently indifferent, and thus it will happen that crime is often committed with impunity, and the criminal well remunerated for his clever undertakings; who proceeds with confidence to repeat, under other circumstances, and at other places, a crime that has been attended with so much profit. The writer also calls attention to the fact that insurance companies, as a rule, perform their obligations with promptness, and often with a liberality that frequently suggests more of waste than business prudence. Being accustomed to regard loss as the inevitable incident of the undertaking in which it is engaged, the company seldom seeks an avoidance of the contract, and these liberal methods of dealing arise largely from the nature of the business, as well as from the desire of the insurer to profit from the reputation derived from the liberal treatment of patrons.

Throughout, the work is carefully prepared, indicating conscientiousness in every page, and will be found exhaustive in its treatment of all phases of this interesting and important subject.



## The Albany Law Journal.

ALBANY, JANUARY 16, 1897.

### Current Topics.

ONE of the most remarkable criminal cases ever submitted to a court of justice for solution was recently concluded in Boston by the conviction of the prisoner of the crime of murder in the first degree; but it is generally conceded that the verdict of the jury does not by any means clear up the mystery surrounding the case. To say the least, the testimony adduced on the trial cannot be considered conclusive of the guilt of the accused. It could not be truthfully said to leave no reasonable doubt that Thomas M. C. Bram, the mate of the vessel, killed the three persons who were found murdered at sea on the barkentine Herbert Fuller, in July last. The jury was out twenty-seven hours and took at least twelve formal ballots before coming to an agreement. Although it had been engaged in the trial for three weeks and heard all the testimony in court carefully sifted, presented and argued from every possible point of view, the members occupied themselves for nine hours after leaving the court-room with a study of the case in all its bearings, using the notes taken and the sketches and plans furnished of the scene of the murders, and then, and not until then, was the first ballot taken. This ballot showed nine votes for conviction and three for acquittal. Subsequent ballots showed four jurors in favor of acquittal, and in one there were five in favor of the prisoner. That the final result would have been a disagreement, if there had not been some delay in providing the jurors with dinner, seems not at all improbable. In addition to the non-appearance of their dinner, the verdict is supposed to have been influenced by the refusal of the court to reply to a question from the jury as to whether or not a six-to-six vote on agreeing to disagree was legal. When the court ignored this question and dinner failed to materialize, the jury speedily took a stern view of the subject and determined upon a verdict of conviction. Thus it is once more demonstrated that the vote of individuals, as of nations, may often hinge upon

apparently trivial circumstances. That there was good ground for doubt and perplexity in the minds of the jury, a brief review of the facts brought out on the trial will show. Bram, who was first mate of the Herbert Fuller, was charged with the murder of Capt. Charles I. Nash, the captain's wife, and of the second mate of the vessel, August W. Blamberg. The Fuller sailed from Boston on July 3, with lumber, bound for Rosario, in the Argentine Republic. Captain Nash took with him his wife, who is said to have been young and good-looking, and a young graduate of Harvard University named Lester Hawthorne Monks, who was an invalid and desired to take a long sea voyage for his health. Among other members of the crew who figured in the tragedy was Justus Leopold Westerberg, a Swede, who was registered as Charles Brown, and who, it is claimed, was a man of surly temper and taciturn manner. Sailing from Boston on the 3d of July, nothing occurred to vary the monotony of a sea voyage until the night of July 13, or rather the early morning of July 14. There was nothing, so far as known, to presage the approaching tragedy, no indications of ill-will, no personal collisions or manifestations of bad feeling. The first mate, it is said, did not like the passenger, Monks, but he does not appear to have been thrown very much with him, as the routine work of the ship fell to the first mate, and Monks spent a large part of his time in the evenings in the cabin with the captain and his wife, both of whom had taken a great fancy to the young man.

About 2 o'clock on the morning of July 14, Monks testified, he was awakened by a woman's scream, repeated more faintly a moment later. He sprang from his berth, seized his revolver and made his way to the chart-room, where the captain had been sleeping. He found the captain lying butchered on the floor, and opening the door of Mrs. Nash's cabin found that she, too, had been slaughtered. He immediately rushed on deck and called out to Bram, who was walking up and down the deck, that the captain had been murdered. His revolver was still in his hand, and in his excitement he pointed it at the mate as he called out the fearful information to him. Monks says Bram immediately threw a heavy board at him, which narrowly missed his



head, and cried out excitedly, "No, no, no!" refusing to credit his statement. He accompanied Monks below, however, and there they found the bodies of the captain and his wife almost hacked to pieces. The body of the second mate was discovered later, hacked in the same terrible manner. During the investigation that followed, Bram discovered under a pile of lumber an axe covered with blood, and exclaimed: "Here is the axe that did it. What shall I do with it?" Monks replied: "Throw it overboard, or the crew will use it on us," and in accordance with this suggestion Bram at once threw the axe into the sea. The first theory of the crime appears to have come from Bram. He suggested that the second mate had entered Mrs. Nash's cabin and been discovered by the captain, who struck him with the axe. The second mate, he argued, wrested the axe from the captain, killed him and his wife with it, threw the weapon on deck, crawled back to his cabin, and died of his wounds.

Bram's story was that while on deck a few minutes before two o'clock he saw Charles Brown, the Swede, who had been steering, returning to the wheel, and on approaching him saw him putting on his slippers. Just at that moment Monks came up the companionway pointing a revolver at him. Bram grabbed a board in self-defense, and when Monks announced that the captain had been murdered he threw the board violently down in his excitement, narrowly missing Monks. At Bram's suggestion Brown, who was said to be exceedingly moody and nervous after the murders, was put in irons. Then Monks, Spencer, the colored cook of the vessel, and Bram consulted as to what they should do. Bram insisted that they should make for French Guiana, which was 1,500 miles away, but the others insisted upon going to Halifax only 750 miles off, and Monks took command of the vessel and took the ship to that port. Meanwhile Monks and Spencer became suspicious of Bram and put him in irons. At Halifax the whole crew was arrested and transferred to Boston. The crime having been committed on an American vessel on the high seas, it came under the jurisdiction of a United States court. Here all the prisoners were examined, and all discharged except Bram, who was indicted for murder.

Brown's testimony as to the mate's guilt was

direct and positive. He swore that while standing at the wheel he heard a noise, and looking through a window he saw Bram strike the prostrate captain three times with some heavy instrument. There were inconsistencies and contradictions in Brown's story, and its credibility was further impaired by an affidavit offered by the defence showing that in July, 1891, Brown had attempted to kill a man in Rotterdam; that upon his arrest he was found to be insane, and that when discharged from the hospital he had no recollection of the occurrence. Brown admitted the truth of the affidavit, and medical experts for the defence testified that a man affected as he was said to have been might have committed the murders when insane without retaining any recollection of his act. The prosecution, in its turn, then offered to prove by a witness named Nicholas, of Baltimore, that on a previous voyage on the schooner *White Wings*, of which he was first mate and Bram second, Bram proposed that they should kill the captain of the vessel and then sell her and her cargo. Bram, according to this proposed testimony, said that he had "disposed" of two vessels previously. This evidence was not admitted. Bram himself took the witness stand and, it is said, made a very favorable impression. The foregoing review of the testimony, for which we are indebted to the *Baltimore Sun*, shows that while Bram may be the man who committed the three murders, the evidence of his guilt is far from satisfactory, and the question may still be asked: Who committed the murders for which Bram has been convicted? The case shows that in real life may occur mysteries deeper and more difficult of solution than any which the fertile imagination of the romancer is able to invent.

A somewhat curious suit in which John D. Rockefeller is interested, has been on trial before Judge Pryor in the Special Term of the Supreme Court, in New York. The plaintiff is the Tabernacle Baptist church, which sued Mr. Rockefeller to compel payment of arrearages of interest on \$50,000 Northern Pacific bonds given by him to the church in 1891, and to compel him to pay \$2,500 in lieu of interest until 1901. Mr. Rockefeller claims that he gave the church \$50,000 worth of good interest-bearing bonds, and if they have "depre-

ciated in value he ought not to be responsible for the income that was expected from them. Under some conditions the famous millionaire probably would not hesitate to make up any deficiencies in the receipts anticipated; but it seems that he and Rev. Daniel C. Potter, pastor of the church, had a quarrel of some kind and the pastor was ousted from his place. To sue a benefactor for the purpose of compelling him to make good the profits of his gift is certainly a novel performance in modern church history. A majority of churches would be only too glad to get the principal of such a gift without making a fuss over a default or reduction of dividends. Hereafter Mr. Rockefeller is likely to put in a non-assessable clause when he makes a donation to a church or public institution.

In *Holt v. Holt*, Judge Andrews, in the N. Y. Supreme Court, Special Term, Part V, recently rendered a very interesting decision as to the legal meaning of the word "cohabitation." The action was brought by the plaintiff to secure an absolute divorce on the ground of the defendant's adultery. The defendant admitted the charge of adultery, and also the charge made in the complaint that he contracted a venereal disease, which he communicated to his wife; but he pleaded condonation because, after his wife knew of the commission of the adultery, she lived with him for several weeks. The court in delivering the opinion said:

The learned counsel for the plaintiff, and also for the defendant, and their respective clients, appear to have fallen into the error of supposing that the "cohabitation" referred to in our statutes, and which is made evidence of forgiveness, is synonymous with sexual intercourse. The wife admits that she did live in the same house, and occupied the same bed with her husband, for four or five weeks after she knew about the adultery; but she swears that she had no sexual intercourse with him; while the husband, on the other hand, swears there was such intercourse. If the case turned upon the question whether the testimony of the wife or that of the husband in regard to this matter is entitled to credit, I should believe the wife. But the legal meaning of the word "cohabitation" is not synonymous with sexual intercourse. "To cohabit is to dwell together. So that matrimonial cohabitation is the living together of a man and a woman ostensibly as husband and wife." (Bishop on Marriage, Divorce and Separation, section 1669.) As the evidence is undisputed that the plaintiff did

dwell with the defendant as his wife for a period of between four and five weeks after she knew of the adultery, and as there is some other evidence in the case tending to prove that she forgave him, I am compelled to find that the adultery was condoned by the wife. It does not follow, however, that she cannot succeed in this action. The merits of the case are altogether with her, and the court should grant her relief if it can. It is the settled law, at least in this State, that condonation of adultery on the part of the husband is upon the condition, not only that the offense shall not be repeated, but also that the husband shall continually thereafter treat his wife with conjugal kindness, and that a breach of this condition revives the original right to divorce. This doctrine was settled by the Court of Errors in the well known case of *Johnson v. Johnson* (14 Wendell, 637). In that case the wife sued the husband for divorce on the ground of his adultery, and he set up in defense, and proved her condonation of it; "to take away the effect of which, it was shown on behalf of the wife that though there had been no subsequent adultery, or even actual violence, the husband had totally neglected to attend to her comfort, had insulted her with opprobrious epithets and offensive language, and had otherwise pursued towards her a course of conduct calculated to wound her feelings and alienate her affections. Vice-Chancellor McCoun held that the condoned adultery was thereby revived: Chancellor Walworth, on appeal, reversed this decision; the Court of Errors, on further appeal, reversed the decision of the Chancellor, confirming that of the Vice-Chancellor." (Bishop on Marriage, Divorce and Separation, section 317.)

The learned reporter of the case in 14 Wendell adds, in a note, that when the court came to settle the decree, Senator Kimball, who had voted with the majority, stated the ground of his vote to be that he did not regard the condonation as sufficiently proved, so he had not considered the question of revival, and the reporter drew the inference from this fact that the question was still open in New York. Mr. Bishop, however, commenting upon this note of the reporter and the inference drawn by him, says, "But why, it does not appear, since throwing out the vote of Kimball, for it could not be counted the other way, there would be left 10 to 9," and Mr. Lockwood, in his *Reversed Cases* (page 145), says, "We believe the profession consider the question very well settled by the opinion of Chief Justice Savage." This decision is cited and followed in *Timmerman v. Timmerman* (2 How. [N. S.] 526); and in *Hoffmire v. Hoffmire* the facts were that the wife forgave her husband's adultery, and afterwards he committed a felony for which he was sent to prison; it was held by the Vice Chancellor and, on appeal, by the Chancellor

that the cause of action for the adultery was revived (*Hoffmire v. Hoffmire*, 3 Ed. Ch. 173; 7 Paige 60.) In the case at bar, it appears that, after the husband had confessed the commission of the adultery, he was very penitent, asked his wife to continue to live with him, promised to provide abundant means for her support, and to treat her with kindness. She, having no means, and being unwilling to return to her parents, consented to remain with him, and did so remain for a period of between four and five weeks. According to the wife's testimony, this promise upon his part was not kept; he did not furnish sufficient means to enable her to conduct the household, and on the day when she finally left, insulted her and treated her with great physical violence; and that she thereupon took her child and left the house. The husband contradicts his wife's testimony: claims that he furnished all the means he could afford, denies the insulting treatment, and attempts to excuse his resort to physical violence. I, however, believe the testimony of the wife, and I think that, the condition upon which the adultery was forgiven having been broken by the husband, the cause of action for adultery is revived, and that the plaintiff is entitled to a divorce.

In the suit of Harry P. McGown, son of former Justice Henry P. McGown, of the City Court of New York, for an absolute divorce and the custody of their child, against his wife Mary Emma, who, on the strength of a North Dakota decree married Harry W. Bell, Justice Russell, of the Supreme Court, has handed down a decision in favor of McGown. The defendant, a daughter of Dr. John H. Demarest, a friend for many years of Justice McGown, married young McGown in 1887. Bell, who is a tile manufacturer, had boarded with them in New York city. On April 24th last she left her husband and went to Fargo, N. D., where she got a decree against her husband, who did not appear, not being served with papers in that State. He contended the decree was not binding upon him. McGown is suing Bell to recover damages for the alienation of her affections. After speaking of the claims of the defendant, that the courts here are bound to recognize a divorce which is valid in another State, and to recognize her subsequent marriage to Bell in that State, Justice Russell says:

"These claims are manifestly unsound. The domicile of the wife is the residence of the husband. While there are exceptional circum-

stances which justify the living apart from the husband against his will, and while a residence away from him may be gained with his consent, still, for legal purposes, unless for sufficient causes, the wife's place of residence is at the home of her husband and child, and she cannot acquire a foreign residence for the express purpose of freeing herself from the charge of violation of duty, and exempting herself from its obligations. Nor, if she had gained a residence in the State of North Dakota, would her suit there have been effective. To sever the marriage tie by judicial force, the courts must gain jurisdiction by personal service of process upon the defendant, or by his voluntary appearance. When the defendant went through the form of a marriage on September 26, 1896, to Mr. Bell, she was still the lawful wife of the plaintiff in this action. Her own wrong-doing, therefore, cannot render valid the judgment of a North Dakota court, which, but for that act, would have been wholly invalid. Nor can I agree with the counsel for the defence, that she should have the custody of the child."

The public hearings before the Greater New York Commission on the chapter in the charter draft prepared for the organization and government of the Police Department of the Greater New York, are bringing in a valuable way public sentiment on this subject. It is pointed out as a singularly significant fact that those who champion a bi-partisan police board are identified by their present or past public record with that political monstrosity commonly called "bossism."

Commissioner Roosevelt struck the keynote when he said: "This bi-partisan system means dickers, and it means nothing of good for the police force or the city." This is the head and front of this offensive and odious system. According to the view of the *New York Mail and Express*, "it means dickers, because it was conceived, created and put into operation for that purpose. We have no desire or intention to call in question the motives of the able citizens constituting the Committee on Draft, much less would we cast the least reflection of doubt or disparagement upon the Greater New York Commission in advance of its final action on this critical and vital question. But the statement is

given out with the positiveness of supreme official authority that 'the bi-partisan plan of police organization will remain in the charter draft, no matter what views may be expressed before the draft is submitted to the Legislature.' Now, it would be a direct insult to the intelligence of the gentlemen constituting the commission to assume that they do not appreciate the full significance of this statement. The bi-partisan system of police organization and government is simply a contrivance, most ingenious and hitherto eminently successful, for facilitating political dickers and securing immunity for official corruption. Such a system destroys responsibility, which is always the most essential and potent factor in the maintenance of the purity and efficiency of the public service. In dividing the responsibility equally between the two principal political organizations, there is no possible restraint upon the use of power, and no hope of relief in case of its abuse. Both parties being equally guilty, each is equally anxious for concealment. Under such conditions, corruption is the logical result. The only alternative is a factional fight within the department that cannot fail to result in a deadlock that is as disastrous to the force as it is disgraceful to the city. The provision of this chapter of the charter draft which invests the chief of police with an irresponsible and absolute veto power in the matter of appointments, serves to additionally complicate rather than relieve the difficulty of the situation. The only satisfactory solution of the question will be found in a single-headed police force, with an independent bi-partisan board of elections. Save the Greater New York from this corruption-made-easy system."

The year 1896 was a particularly unfortunate one for the railroads of the country, and during the past twelve months 5,441 miles of road went into the hands of receivers, involving bonds to the amount of \$173,064,000, and stocks to the amount of \$102,533,000. The Louisville, New Albany & Chicago, with 501 miles, and the Baltimore & Ohio, with 2,094 miles, were the chief sufferers. The *Railway Age*, which is good authority on the subject, says that the present era of receiverships began in 1892, when 10,508 miles of road were involved. In 1893 the mileage was 29,340

miles, in 1894 it was 7,025 miles, in 1895 it was 4,089 miles. To find like figures we have to go back to 1885, when 8,386 miles went into receivers' hands, and 1884, when the mileage was 11,038 miles. In the intermediate years the average was little over 2,000 miles. The five years beginning with 1892 broke the record, Foreclosures in 1896 affected 1,373 miles and \$1,150,377,000 of stocks and bonds. Since 1876 the sales under foreclosure have aggregated 89,487 miles, with \$5,440,239,000 of stocks and bonds. Farmers, it seems, have not been the only sufferers in the two decades. The "bloated bondholder" and Wall street have had their losses also, for when one large interest is affected all other interests sympathize with it in a practical way.

Senator Guy has introduced in the New York legislature two bills which have for their object the protection of commerce and of the canals. The measures are advocated by the canal interests.

One of these bills appropriates \$120,000 for the erection of four State grain elevators at Buffalo, by the State superintendent of public works, in order to prevent extortion and combination in transferring State canal grain at Buffalo from lake vessels to canal boats.

The second bill is designed to promote the commerce of the State by preventing railroad discriminations against shipments to places within this State. The bill provides that any railroad corporation, operated in whole or in part within this State, which shall charge or receive a greater sum for transporting flour, grain, meats, lumber, merchandise, oil, ore, iron, coal or any other products than is charged by any railroad for carrying from the same point of shipment to the seaboard to some other port than the port of New York, shall be declared to have abrogated its charter, which shall become the property of the State.

A person violating this act is declared guilty of conspiracy, and upon conviction may be fined from \$5,000 to \$25,000, or imprisoned for from one to five years.

Hornellsville, N. Y., has decided that Curfew Shall Not Ring To-night," or any other night for the present in that city. The resolution and petition of the ladies of the W

C. T. U. praying for the adoption of the curfew ordinance was introduced into the Hornellsville common council about a month ago. The resolution caused much talk and comment, the citizens being about evenly divided as to whether it would be a good thing or not. Corporation Counsel James A. Parsons, to whom the matter was referred, reported that while he could find no constitutional objection to such an ordinance, he was of the opinion that the present state and city laws covered the ground effectually enough for the present. He also said that the police force of Hornellsville was limited by law, and that no patrolman could be spared from his beat to accompany children to their homes who were on the streets after the forbidden hours. He also objected to using the fire bell as the curfew bell, and no other bell in the city was as centrally located. His report was accepted by the council, and the matter laid on the table indefinitely.

Philadelphians are agitating the question of regulating street musicians, and the newspapers of the city of Brotherly Love are calling loudly for the adoption of the ordinance before the councils which forbids this sort of music after 10 P. M., and before 9 A. M. Other large cities, both in this country and in Europe, seem to be in advance of Philadelphia in this respect. New York permits only 300 licenses to issue to itinerant musicians, and stops them at 7 P. M. After warning, they cannot play within 250 feet of a house. St. Louis permits serenades, and nothing else. Chicago's ordinance prohibits all street music, though more or less goes on by sufferance. Philadelphia has no law or ordinance on the subject, and some 3,000 street musicians. France has a code of regulations "*concernant les saltimbanques, joueurs d'organs, musiciens et chanteurs ambulants.*" They are licensed by the police, and are limited in number. The streets are altogether forbidden to them, and they can play only on certain streets named in their licenses. In Vienna, street music is only permitted from noon to sunset on ordinary days, and after 4 P. M. on holidays. Berlin rigorously limits the number of licenses. Madrid permits the guitar, but suppresses the hand-organ. London for thirty-three years

has had an act which enabled a householder to require an itinerant musician to depart, and four years ago this act was extended to the entire kingdom. The restraint of itinerant musicians is little more than legal recognition of the primary rights of life, and will be gratefully accepted by urban residents as a foretaste of the day when the steam whistle shall be stilled, the rattle of iron bars on the dray stopped, the wagon tires muffled, and the combination of other discordant and tympanum-torturing sounds placed in a condition of *innocuous desuetude*.

The Supreme Court of Massachusetts has just given decisions in two cases affecting the use of trap doors, the plaintiffs in each case being employes who sustained personal injuries by falling through trap-door openings. Ellen Hogarth, in her suit against the Pocasset Manufacturing Company of Fall River, testified that she did not know of the trap door, though she passed over it many times a day. The court affirmed a verdict for \$1,150, given in her favor. Fremont Young, in his suit against Oliver A. Miller, of Brockton, testified that he did not know of the trap doors. The court held that the defendant's duty did not extend to giving notice or warning that the doors were open to one who knew that they were liable to be so at any time, and judgment for the defendant was sustained.

If a cobbler always stuck to his last, the American judiciary would have lost some able and useful members. According to the *New York Times*, the Hon. William D. McHugh, the newly appointed Judge of the United States, District Court for the District of Nebraska, was a cobbler only a few years ago, yet he saved money enough at his trade, and also in teaching school, to defray the expenses of his legal education, and now he is a lawyer of high reputation. The fact is noted by the *N. Y. Sun* that Judge Charles Daniels of Buffalo, who sat for so many years as an Associate Justice of the General Term of the Supreme Court, was also a shoemaker for a short time in early life; and he never had a superior among the judges of this State in the combined qualities of industry, ability and integrity of character.

## HOW GREAT LAW OFFICES WORK.

"IF I were a young lawyer again, just striving for my first honors, and looking for a place to settle," said Benjamin F. Tracy to a young attorney the other day, "I am sure I could not do better than begin right here in New York city or in Brooklyn. I have passed through the mill, and my experience has convinced me that there are more openings here, and there is as much chance to get to the top, and when you do get there the rewards are far greater than anywhere else in the United States."

Whether the general is right or not, it is highly probable that he will be supported in this opinion by the greater part of the well-established lawyers of the two cities. Nevertheless, a great deal can be said on the other side of the question.

The remarkable changes that have taken place within the last ten years in all the great cities of the United States, but more particularly in this city, in the organization of great law firms and in the conduct of their business, has compelled the law clerk or the young lawyer to become part of a rigid system that, without doubt, repels the more ambitious.

The old practice of a young man just admitted of "hanging out his shingle," as the saying goes, has become nothing more than a tradition. In this city more than 99 per cent of the young lawyers do not even take desk room as independent practitioners, but become law clerks. That means working under orders, submitting to the drudgery that the older clerks will not endure, and sinking one's identity behind the army of assistants that the members of the firm direct. This, moreover, is not solely the experience of the clerk and the young attorney. There are hundreds of lawyers in this city, men in the prime of life and members of well-established firms, who are never heard of for the simple reason that their names do not appear in the firm's style, and that business is transacted with the firm or corporation (as it might be called), the individual being of little moment.

The conduct of one of these large offices is similar in a great many respects to the management of a great newspaper office. The office staff is usually divided into two general classes. There is the corps of business clerks and there is the corps of law clerks. The business clerks have nothing whatever to do with law matters. They attend solely to the commercial requirements of the firm, and perform their duties under regulations similar to those of any other business establishment. They are directed in their labors by a chief clerk, who is responsible to the member of the firm who takes supervision of the office assistants.

The corps of law clerks is the one of which the

aspiring young attorney becomes a member. They have wholly to do with law matters. These clerks are young men and women who are studying for the bar or have been admitted. Of the latter class it is true the most are young men, but unfortunately it is a fact, and one that often demonstrates the fault of the new system, that a lawyer with fair capabilities never rises above the grade of the law clerk. Just how many of these law clerks there are in this city is not a matter of statistics, and it would be very difficult to make anything like a correct estimate. Their number will reach into the thousands and the tens of thousands. Add to this number those in Brooklyn, and the total will be increased by some thousands more.

The law clerks are captained by a clerk who is dignified by the title of managing clerk. In almost all cases he is a lawyer, and the senior clerk in the office. In many instances he is in the prime of life. In large offices, the managing clerk has usually worked himself up from office boy or student.

So extensive is the tendency toward the consolidation of all the law business with very large firms, to the exclusion of the small practitioner, that some of these managing clerks have from twenty-five to thirty men working under them.

It used to be the general impression, and the fact as well, that when a lawyer had made his reputation he didn't trifle with very small cases. Under the present system, however, this is all changed. One of these large law corporations never finds the case, with certain limitations, that is too small for its attention. This further complicates the duties of the managing clerk.

The under clerks find out what they have to do from the managing clerk, and this dignitary gives out his orders in much the same way that a city editor does to his staff of reporters. The managing clerk has both his case book and his calendar. In his case book are entered all of the cases as they come into the office, classified as to the course in which they arise and sometimes by the nature of the action. This classification having been made, the cases are apportioned by classes to the different clerks who attend usually to those particular cases. After once having been appointed to look after a case, each clerk is expected not only to keep exact minutes of its progress, but to report the same to the managing clerk, who enters the fact upon his records.

The assignments of clerks to the attendance of cases in court or to the other duties in the office are made from the day calendar and usually on the afternoon preceding the day on which the duty is to be performed. If the task to be imposed be the drawing of pleadings, the assignment is usually made before this, but it is not so necessary that the

managing clerk should look after this particular line of work on the day calendar, for it is very rarely that a clerk having charge of a particular case overlooks so formal a matter as that.

The particularity with which the details have to be cared for makes the most rigid system necessary. All of the most interesting parts of the practice are looked after by the junior members of the firm, or by the senior clerks, who are lawyers. The pleasing experience of fame and fortune that the young man dreams of as a student are not open to him in the stern, practical life that he encounters in working for one of these firms. The pay of the clerk ranges all the way from \$3 a week to \$5,000 a year. The man who would command the larger sum must be a well-equipped lawyer. If he had been able to establish himself in business with his ability at the same period of life he ought to be able to net from his practice three times that sum.

Whatever may be said in favor of the present system, it is certain that it is following the consolidation movement in other lines of business. It is very difficult for a young lawyer, unless he is exceedingly bright, to rise from the rank of a clerk to that of a partner in the firm. Such progress is known, and is occasionally noted, but is indeed rare. It is the height of the ambition of every aspiring young lawyer to become an advocate, or what is known in common parlance as a trial lawyer. By working up through a clerkship it will take years of patient toil and the demonstration of ability in many lines before the clerk will have an opportunity to try a case, and thereby have the prospect of membership in the firm held open to him. Many young men who are called to the bar have far more fitness for the trial of cases than for following with scrupulous accuracy the details of a large office. It has been shown time and again that such men frequently develop fair ability on the trial of their first case and in a short while become able to try a case with much more skill than many lawyers with established standing at the bar. It is usually the case, too, that not only are these born advocates more or less unqualified for the routine work of an office, but such duties are positively offensive to them.

Such are the facts that cause the best recruits to the bar to hesitate before they will accept a clerkship in a large office, however alluring the prospect may seem when the offer is made.

The same considerations are driving many young men into the small towns up the State and in the far west. The records of the alumni of the law schools will prove that they have this tendency. The fact is also depriving New York city and Brooklyn of legal timber, of which they are in great need.

Elibu Root is quoted as having said recently that

never before in the history of New York city has the bar been in such dire need of young lawyers of good promise. The judges who preside at the trials in our Supreme Court or in our criminal courts say that in all the host of lawyers in New York city there are not a score who can try a case well. They will say that not one lawyer in a hundred who endeavors to try a case understands the most necessary principles underlying the cross-examination of a witness or the summing up to a jury. One of the best known judges in this State stated not long ago that it was a rare thing in his experience to find one of these so-called trial lawyers who knew how to put in an objection in a strictly legal form or impeach a witness on his cross-examination.—*Law Student's Helper*.

#### EVIDENCE—PRINCIPAL AND AGENT— VARYING WRITTEN INSTRUMENT BY PAROL.

COURT OF APPEALS.

Decided December 22, 1896.

James H. Brady respondent, v. Christopher Nally, appellant.

(Evidence received without objection, although not covered by the pleadings, must be considered in the determination of the case. Under such circumstances the fact are to be considered as proved rather than as alleged.)

One signing a contract as principal may be shown by the other party to the instrument to have been acting merely as agent, and his principal be held liable as such, although his name does not appear upon the paper.

The rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, may be waived by a failure to object to such evidence, or to move to strike it out after the writing has been produced.

Appeal from an order of the General Term of the late Superior Court of the City of New York, reversing a judgment in favor of the defendant, entered upon the report of a referee.

VANN, J. — The referee before whom this action was tried found in favor of the plaintiff upon the claim set forth in the complaint, for labor performed and materials furnished and allowed him the sum of \$3,125 therefor. He found in favor of the defendant upon the third counterclaim set forth in the answer, for labor and materials, and allowed him therefor the sum of \$5,139.68, including interest. He directed judgment in favor of the defendant for the difference between these sums, with costs. The plaintiff alone appealed and the General Term reversed the judgment, upon the ground that "the findings of fact do not sustain the allegations of the answer in respect of the counterclaim."

While it is true that the evidence went far beyond the allegations of the answer, as it was received without any objection based upon that ground, and no motion was made to strike it out as not within



the issues, the case comes under the rule that defects, which, if pointed out during the trial, might have been obviated or avoided, are not available on appeal. *Hofheimer v. Campbell*, 59 N. Y. 269-272; *Knapp v. Simon*, 96 N. Y. 284-291; *Fallon v. Lawler*, 102 N. Y. 228-233; *Wells v. World's Dis. etc.*, 120 N. Y. 630; *Gillies v. Manhattan Beach Imp. Co.* 147 N. Y. 420. If the proper objection had been made upon the trial, an amendment of the answer might have been allowed so as to enlarge the issues by embracing the items which the General Term held were not covered by the pleadings. Under the circumstances it was the duty of that learned Court to consider the facts as proved, rather than as alleged, and to regard the answer as amended by implied consent so as to justify the admission of the evidence objected to upon appeal for the first time.

It is, however, insisted that the judgment entered on the report of the referee was properly reversed because there was no competent evidence tending to show that anything was due to the defendant upon the contract established by him. Upon the trial the defendant testified, without objection, that on the 14th of May, 1888, James Brady, the father of the plaintiff, brought him a paper to sign, saying, "Here is a paper that my boy Jim and I drew up last night, and he wants you to look it over and see what you think about it. Just read it over and see if it suits you," that after examining the paper he said that it did not specify the time when he was to get his pay, and that James Brady then replied, "That will be all right; James will give you money or I will give you money whenever you want it, and I will pay you in accordance to your work, and he will pay you in accordance to the work you have done and as he gets it from the school board." A day or two later the defendant and James Brady signed the paper, which is as follows:

"This agreement made and entered into this 16th day of May, 1888, and between James Brady, builder, of the city of New York, of the first part, and Christopher Nally, plumber, of the second part. Whereas the party of the first part is about to erect a public school building on the southeast corner of Lexington avenue and Ninety-sixth street, for the city of New York, and whereas the party of the second part enters into this agreement to do all the plumbing, gas piping, gas fixtures, sewers and excavating for the same, furnish and put in all manner of piping, both iron and lead, that may be required to complete the said school building, including labor to make a complete finish as laid down by plans and called for by the specifications, and to the satisfaction of the superintendent of school buildings in every respect, and for such work, labor and materials the party of the first part agrees to pay the price or sum of eleven thousand dollars (\$11,000). The party of the second part to

pay for all permits and connections, etc., and to proceed with the work whenever it is ready."

After this agreement had been read in evidence, without objection, the defendant offered to show that James Brady was not, in fact, the party of the first part to the contract, but that James H. Brady, the plaintiff, was the real party, and that James Brady was simply his agent. The plaintiff's counsel objected "to any testimony showing a different agreement than that produced in writing," but the referee overruled the objection and the plaintiff accepted. The defendant then showed that James Brady was merely an agent for his son, the plaintiff, and that, although he executed the contract in his own name as principal he was really acting only as agent. The plaintiff insists that this was an error that required a reversal, but it is well settled, as was said by Judge Andrews, in *Briggs v. Partridge* (64 N. Y., 357-362), "that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as those where a writing is not essential to their validity. (See, also, *Coleman v. Nat. Bank*, 53 N. Y., 393; *Nicall v. Partridge*, 78 N. Y., 580; *Ludwig v. Gillespie*, 105 N. Y. 653.)

In order to fully establish his counterclaim it was necessary for the defendant to show that something was due upon said contract for the partial performance thereof, as he had not fully performed it when this action was brought. As the instrument appeared upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, it was presumed to embrace the entire contract, which, on its face, was indivisible as to the time of payment (*Thomas v. Scutt*, 127 N. Y. 133, 138). Still the defendant had been permitted to show, without objection, that before this agreement was signed James Brady promised, both for himself and the plaintiff, to pay the defendant according to the amount of work done, and as payments were received from the school board. When this evidence was received it had not appeared that there was a written contract, yet no motion was made to strike it out after that contract had been read in evidence. When, however, the defendant attempted to go a step farther and prove the value of the work done and materials furnished by him in partial performance of the contract, objection was made, but only as mentioned hereafter. The following question



was asked by the counsel: "What was the fair and reasonable charge for the labor and materials which you had furnished up to that time?" This was objected to on the ground "that there is a specific contract for \$11,000," but the objection was overruled, the plaintiff excepted and the defendant answered: "The amount I had done was worth four thousand four hundred and ninety-six dollars on the school."

Unless the written agreement is to be regarded as modified by the parol agreement previously made as to partial payments, this evidence was improperly received. The question is whether the parol agreement, although proved without objection, can be given any force after the written agreement was put in evidence. No motion was made to strike out the verbal testimony. No challenge was made to the parol evidence except as stated, unless it was after the close of the trial and the decision of the issues by the referee, by an exception to the finding of fact that "the plaintiff agreed to pay the defendant the sum of \$11,000 in installments, or sums, proportionate to the work done and materials furnished as aforesaid at the time payments were received from the comptroller of the city." When the plaintiff objected to any testimony showing "a different agreement than that produced in writing," it was to a question that was clearly competent, as we have held, to show that the person who executed the written agreement in his own name was an agent and not a principal. That objection should be limited in its effect to the question in respect to which it was interposed and not extended so as to change the position of the plaintiff with reference to other testimony received without objection and allowed to remain unchallenged by a motion to strike out, for, obviously, it was neither designed nor adapted to that end. The same is true of the objection made to the offer to show the value of the labor performed and material furnished in part performance of the contract, for no reference was made to the parol evidence that tended to vary the effect of the written agreement, nor was any claim made that such evidence could not properly be considered by the referee in deciding the case. The exception to the finding of fact, that payment was to be made in installments, was too late to be effective as notice, either to the defendant or the referee, that the plaintiff was unwilling that the parol evidence under consideration should remain in the case, or that it should be regarded or treated as ineffectual for any purpose. We think that the plaintiff waived his right to object to the consideration of that testimony by failing to make objection when it was received, and by neither moving to strike it out nor directly challenging its effect in any way. If he desired the referee to disregard it,

it was his duty to say so before the trial. If he wished to have it out of the case, he should have made a motion to that effect. He could not expect the court, of its own motion, to refuse to consider testimony which he did not see fit to object to when it was received, and which he allowed to remain as evidence, without protest or question.

By failing to take the position during the trial that it was not legal evidence, and hence that it should be disregarded, he impliedly consented that it should be considered and acted upon by the referee, who, indeed, had no right to refuse consideration to anything that the parties had spread before him as evidence to guide him in passing upon their rights.

It is, however, insisted that in view of the conclusive nature of the presumption that the written agreement embraced the entire contract between the parties, the parol evidence, although received by consent, cannot overcome that presumption. The answer to this position is that the parties may, by agreement, express or implied, accept oral testimony instead of written evidence. They have the right to make a rule of evidence for their own case, and they are presumed to have done so when testimony, otherwise incompetent, is received without objection and without any effort to have it stricken from the minutes, or disregarded by the trial court. They may waive the rules established by the courts to govern the admission of evidence, the same as they may waive the rule established by the legislature that certain contracts must be in writing, and a waiver may be inferred from the failure of the party for whose benefit the rule was made to object in due season, or in some way to insist upon compliances with the law. (*Sherman v. McKeon*, 38 N. Y. 266-274; *Vose v. Cockcroft*, 44 N. Y. 415; *Hilton v. Fonda*, 86 N. Y. 339). The general rule upon the subject was so clearly and comprehensively stated by Judge Earl in a recent case that his remarks, although often quoted in our reports, may properly be repeated here: "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce.

"They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and generally all stipulations made by parties for the government of their conduct, or the control of their

rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts" (In the matter of the New York, Lackawanna & Western R. R. Co., 98 N. Y. 447, 458). The plaintiff was entitled to the benefit of the rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. (*Thomas v. Scutt*, *supra*.) It was not unreasonable or against good morals or sound public policy that he should waive that rule if he saw fit to do so. We think that by the course pursued upon the trial he is conclusively presumed to have waived it, and that after the trial had closed, and the case had been decided against him, he could not invoke the rule in order to secure a reversal of the judgment. (*Sterrett v. First National Bank of Buffalo*, 122 N. Y., 659, 662.)

We find no error in the record before us that justifies the action of the General Term, and its order should therefore be reversed, and the judgment entered upon the report of the referee affirmed with costs.

All concur, except Barrett, J., not voting.

#### BRITAIN'S CONSTITUTION.

##### ITS ANTIQUATED FORMS NOT TO BE DISPENSED WITH.

IT IS not on its symmetry that the British Constitution prides itself, says the *London Standard*. It has grown by degrees, adapting itself to circumstances as they arose, and, as must inevitably result from such a process, is full of antiquated forms, which it would be a difficult, and perhaps dangerous, undertaking to eliminate. But it is a mistake to suppose that in every case they are useless, because they are no longer resorted to. They often help to remind us of the original intention of laws and institutions; and sometimes serve to keep alive a principle of which in future emergencies we might find the benefit. Our Constitution before 1832 was, says Mr. Gladstone, the wonder of the world. It was a piece of patchwork, but he maintains that its working was admirable. We might refer to the test and corporation acts in illustration of what we have already said. They were kept in force, though an act was passed every session to relieve dissenters from the penalties imposed by them, because they bore witness to a principle which the great majority of the people of this country for a long period believed to be of vital importance. When they ceased to think so, the acts were very properly repealed. But Mr. Gladstone clearly did not believe that it was wrong to keep them on the statute book. The principle to which they testified might be a wrong one. That is nothing to the purpose. It was con-

sidered to be right at the time. And the retention of these acts only shows the light in which Englishmen sometimes regard forms, even when, to all outward appearance, they are forms and nothing else.

This ancient Constitution of ours was, indeed, made up of fictions and anomalies without number. Yet Mr. Gladstone is perfectly right in describing it as he does. With all its imperfections, it was "the wonder of the world," the model of all other representative governments. Practical statesmen had not taken the trouble to remodel the whole of it as often as a particular law required alteration. Changes were made to meet immediate wants, and the new was left to fit itself into the old as best it could. All our institutions bear traces of this process—the monarchy, the house of lords, the house of commons, the church, and, above all, our legal system. Yet who would exchange any one of them for the corresponding institutions of the continent? To argue that any ancient custom which at the present moment seems effete must necessarily make the institution which retains it effete also, is one of the strangest modes of reasoning to which even political animosity has ever given birth. If that were the case, our whole venerable system, the envy of foreigners and the despair of continental statesmen—who could not conceive by what magical process order and liberty were combined with it—must have crumbled to pieces long ago. It is easy enough to draw up ideal constitutions. The famous Abbe Sieyes was prepared to formulate a fresh one every day. But the English nation has had the sense to see that it is better to leave the British Constitution as it is, correcting abuses as the necessity for doing so occurs, rather than, by striving after symmetry, to gradually undermine its vitality.

#### CONTRIBUTORY NEGLIGENCE.

IN *Indiana I. & I. R. Co. v. Masterson* (Indiana), 44 N. E. Rep. 1004, a railroad company was sued for damages for injuries received by the sudden and unnecessary application of air brakes on a freight train carrying passengers. The negligent application of the air brakes caused the car in which the appellee was a passenger to stop so suddenly as to violently jar passengers from their seats and throw appellee to the floor, injuring her so badly as to cause a miscarriage. In one instance it was shown that while she was getting a drink for her child the negligent and sudden application of the air brakes resulted in her being violently thrown across a car seat, thereby severely injuring her and rendering her nearly unconscious. Competent witnesses for appellee testified that under ordinary circumstances an engineer can stop a freight

train by a proper application of the air brakes without causing the train or caboose to be suddenly stopped or violently jerked or jarred. Although the engineer was not aware of the fact that passengers were being carried on this particular train, yet he knew that the train did carry passengers.

The defence set up by the appellant was: 1. That the appellee was guilty of contributory negligence; 2. That appellee assumed the risks which caused her injury when she took passage on the train; 3. That appellant is not liable, for the reason that the injury occurred in Illinois. As to the first, the court, in substance, said that it was not prepared to say, as a matter of law and under the circumstances, that a passenger who on a freight train leaves her seat for the purpose of getting a drink of water for her child is guilty of contributory negligence. (*Railway Co. v. Klitch* [Ind. App.] 37 N. E. Rep. 560; *Railway Co. v. Carr* [Ind. App.] 37 N. E. 952; *Railway Co. v. Costello*, 9 Ind. App. 462, 36 N. E. 952; *Railway Co. v. Sears* [Ind. App.] 38 N. E. 837; *Wahl v. Shoulder* [Ind. App.] 43 N. E. 458.) As to the second contention the court said: "Conceding that she assumed the risks incident to the usual and ordinary jerking and jarring of the caboose in stopping the freight train, she did not, in our opinion, assume the additional and extraordinary risks growing out of the negligence of the employes on account of the improper application of the air brake in such a manner as to suddenly and violently stop, jerk and jar the caboose, throwing her across the seat, and throwing other passengers from their seats. We know of no principle of law under which the courts would hold that she assumed the risks growing out of the negligent operation of the freight train. The jerking and jarring of the caboose incident to the ordinary operation of the freight train did not cause her injury. The proximate cause of her injury was the sudden and violent stopping, jerking and jarring of the caboose, occasioned by the negligence of the employes in charge of the train in the improper use and application of the air brake." With reference to the claim that the injury occurred in Illinois, it was the opinion of the court that there was evidence of a continuous wrongful act, which occasioned the injury, both in Illinois and Indiana, and the specific wrong causing the injury occurred in Indiana. As that was the finding of the jury, the court would not disturb it. In conclusion the court said: "The gravamen of the action, is the negligence of appellant. The contract gave her the rights of a passenger. The negligence of appellant, which caused the injury, was a violation of the duty which the company owed appellee as a passenger. The fact that the contract was made in Illinois does not support the

proposition that the appellant is not liable for the tort in Indiana. The action was properly prosecuted in Indiana." (*Burns v. Railway Co.* 113 Ind. 169, 176, 15 N. E. Rep. 230; *Railroad Co. v. McMillin*, 117 Ind. 439, 20 N. E. 287).—*The Legal Adviser*.

#### THE LAW OF DIVORCE.

THE CONDITION UNDER WHICH A DECREE GRANTED IN ONE STATE IS VALID IN ALL.

THERE is much apprehension concerning the laws of marriage and divorce, particularly in regard to the latter, says the *Pittsburg Commercial Gazette*.

For a divorce to be valid outside the jurisdiction of the court granting it both parties to the suit must appear before the court. Such a divorce, no matter where granted, is valid in every State in the Union. It has been held valid in England by Justice Denham as "international law." "Full faith and credit" must be given it under the Constitution by all State courts. "A Dakota divorce" of this kind is as valid and sound as a divorce can be made. No divorce granted by any court in Christendom can be any better.

No divorce granted by the court of any State—whether of New York or Dakota—has any validity outside the jurisdiction of the court granting it, or will be recognized as anything more than a piece of blank paper by the courts of other States, where the defendant is a resident of another State and does not appear in the action. Such a decree is not recognized by the Federal Supreme Court as a "judicial proceeding" by which the courts of other States are bound. (109 U. S., 732.) One State, and one alone, New Hampshire, by special statute, is an exception to the rule, its courts recognizing all divorces as valid.

All attempts to belittle or vaunt divorces granted in any particular State is wrong. No courts of any State have any preference. Whether the divorce is valid or invalid in other States does not depend upon the State in which it was obtained, but upon the manner—whether both parties were before the court in person or by attorney. If they were, the divorce is valid by the Federal Constitution in every State and all courts are bound by it. If only one appeared, then it is valid only in the State granting it and in New Hampshire.

This is the fundamental law of divorce.

But what constitutes appearance before the court? Suppose one party to the suit cannot be found? Or suppose he is without the jurisdiction and the papers can be served upon him only by publication? Suppose he refuses to respond? How far will the law presume a constructive appearance?

These are questions to be determined by the court in every case of questioned divorce in which they may be raised.

**EJECTION OF PASSENGER FROM STREET CAR FOR NON-PAYMENT OF FARE—REASONABLENESS OF RULE LIMITING THE AMOUNT FOR WHICH CONDUCTORS MUST FURNISH CHANGE.**

COURT OF APPEALS—DECIDED DECEMBER 22, 1896.

BENJAMIN BARKER, Jr., appellant, v. THE CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY, respondent.

A rule adopted by a street railway company requiring its conductors to furnish change to a passenger only to the amount of two dollars in the payment of a five-cent fare is a reasonable one in view of the convenience of the general public. Accordingly, *Held*, that an action could not be sustained by a passenger against the company for ejecting him from one of its cars for non-payment of fare when his only tender was a five-dollar bill, which the conductor refused to change.

When the facts of a case are undisputed and are of such a nature that reasonable men would not differ as to the inferences proper to be drawn from them, it becomes a matter of law for the court to determine.

Appeal from a judgment of the General Term of the Court of Common Pleas for the City and County of New York affirming a judgment of the Trial Term which dismissed the complaint at the close of plaintiff's case.

*Samuel H. Ordway*, for appellant.

*Henry Thompson*, for respondent.

BARTLETT, J.—This appeal presents a novel question which has not been considered by this court in any case to which our attention has been called.

No opinion was written in the Court below.

The defendant corporation operates a horse railroad in the city of New York as a common carrier of passengers.

On the 13th of January, 1889, the plaintiff entered one of the defendant's cars as a passenger, and when called upon for his fare of five cents found that the smallest amount of money in his possession was a five-dollar bill.

The plaintiff offered the bill to the conductor, who stated, "I am not supposed to change it; you must get off." To this the plaintiff replied: "I won't get off; you must put me off." The conductor thereupon put the plaintiff off the car.

It is not claimed that he used any more violence than was necessary, or that the plaintiff was actually injured in person or property.

The transaction was undoubtedly a technical assault and battery, and the plaintiff seeks in this action to recover his damages therefor. It may be conceded, as was urged by plaintiff's counsel in his very able argument, that if plaintiff was unlawfully

ejected from the car, this is a case for substantial damages.

A number of points were discussed at the bar, but in the view we take of this case there is but one question to be considered.

The plaintiff's counsel asked to go to the jury on several questions, and among others the following:

"Whether the five dollars was in this case and under the circumstances testified to a reasonable amount for the plaintiff to tender the conductor in payment of his fare?"

The complaint was dismissed at the close of the plaintiff's case, and the point is made whether the reasonableness of the tender of five dollars to the conductor is a question of law or a question of fact on the evidence.

It was stipulated at the trial that the defendant had a rule requiring their conductors to be prepared to furnish change to the amount of two dollars, and that such rule was not brought to the attention of plaintiff.

It was further stipulated that there was no regulation forbidding the conductors to make change to a greater extent than two dollars.

On cross-examination of the plaintiff he testified as follows:

"Q. Why did you say to the conductor, before making any tender, 'I have only got a five-dollar bill?' A. Well, because I felt rather apologetic about offering that large amount, because I didn't know whether it might inconvenience him with using up a great deal of his change or not, and, of course, I wouldn't have offered five dollars if I had anything else, and I wanted to explain it."

It thus appears that the plaintiff regarded his offer of the five-dollar bill as unusual and requiring explanation.

There is no evidence of a custom on the part of the plaintiff or the public of tendering to defendant five dollars in payment of a five-cent fare and receiving the change, nor of any rule of the defendant imposing upon their conductors the duty of furnishing passengers with change in so large an amount.

The plaintiff swore to one occasion when he had offered a five-dollar bill for his fare and had it changed, but it was on the car of another line.

There is no evidence which would have warranted the trial judge in submitting to the jury the question whether the plaintiff's tender of the five-dollar bill under the circumstances was unreasonable.

On the evidence as it stands the plaintiff's tender of the five-dollar bill was unreasonable as a matter of law, and the undisputed facts are not of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them.

In this state of the record it is well settled that there is no question for the jury. (*Vedder v. Fellows*,



20 N. Y. 126; *Hibbard v. N. Y. & Erie R. R. Co.* 15 N. Y. 455, 459, 460; *Avery v. N. Y. C. & H. R. R. Co.* 121 N. Y. 21, 44.)

It is quite apparent that a carrier of passengers must make and enforce such reasonable rules as will enable it to discharge its duties to the general public in a proper manner, and if the facts are undisputed and not susceptible of different inferences, the question of their reasonableness ought not to be submitted to a jury who might not readily understand the reasons upon which the rule is sought to be founded. If the question is treated as one of law, uniformity is secured, a matter in which the public are interested quite as much as the corporations who are carriers of passengers.

In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change.

When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars.

It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares.

It is not necessary that a common carrier should bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce; to so hold would render the enforcement of the rule impracticable.

We have been cited to but one case holding with the plaintiff in this action. (*Barrett v. Market St. R'y. Co.* 81 Cal. 296.)

We agree with the learned Supreme Court of California, that a passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount, but we cannot assent to the conclusion that a tender of five dollars is a reasonable sum.

It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece was practically the lowest gold coin in use in that section of the country.

The plaintiff urges that there are several other questions than the one of reasonableness of amount tendered that should have been submitted to the jury. We have considered these questions in the light of the record as it stands, and are of opinion that the dismissal of the complaint was proper.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

#### IS THE PAROL LAW INVALID?

THE parol or indeterminate sentence law is regarded in many progressive States as a beneficent and enlightened provision, thoroughly consistent with social safety and justice. In New York, Pennsylvania, New Jersey, Ohio and other States the law has yielded the best results and has been upheld by the highest courts. Judge Gibbons declares that under the Constitution of this State such a law is void, because a convict is entitled to a specific sentence and because the determination of the duration of the imprisonment is a judicial act and cannot be constitutionally vested in executive officials.

Technically Judge Gibbons may be right, and all that the prison reformer has to say is that if the Constitution renders the adoption of the parol system impossible in this State, the vice is in the Constitution rather than in the parol system. Judge Gibbons cites and analyzes numerous decisions apparently bearing on the case, and arrives at the conclusion above stated, and it is possible that the Supreme Court will agree with him. Whether the constitutions of the States whose Supreme Courts have approved the parol law are essentially different from the fundamental law of Illinois with reference to trial and sentence only a careful and minute examination can disclose, and it is to be hoped that such an examination will be undertaken by the friends of the threatened reform.

But we are free to say that the more general dicta of Judge Gibbons on the subject do not impress us as particularly forcible. He declares that the proposition that the duration of imprisonment shall be measured, not by the circumstances surrounding the commission of the crime, but by the subsequent conduct of the convict, is "inhuman and monstrous." It is the opinion of advanced criminologists that, on the contrary, this proposition is perfectly rational and just. The object of punishment is not revenge, but social safety; and when a prisoner's conduct has shown that his release would be beneficial to him and safety to society, further detention is irrational and inhuman.

Judge Gibbons avers that the system is liable to abuse, and that the warden and prison commissioners might be controlled by improper motives or induced to act in ignorance of the real facts. This merely raises a question of administration. No law on the statute book is insured against perversion through incompetency or dishonesty. We do

not always secure the best prison officials, but it is unfortunately equally true that we do not always elect the best judges.

So far as the alleged moral and social objections to the parol system are concerned, both theory and experience are decidedly against Judge Gibbons' view. But on pure technical grounds his position must be presumed to be sound until the Supreme Court finally rules on the question.—*Chicago Post*.

#### HOW CASES ARE DECIDED.

THE way cases are considered and disposed of by the Supreme Court of the United States was described by Mr. Justice Brewer in the course of his response to a toast at a banquet given by the bar of the sixth federal circuit at Cincinnati, October 8, 1896. On this point he said:

"In my intercourse with the members of the bar, I have found, to my great surprise, that the impression prevails with some, that cases, after being submitted, are divided among the judges, and that the court bases its judgment in each one wholly upon the report made by some one judge to whom that case has been assigned for examination and report. I have met with lawyers who actually believed that the opinion was written before the case was decided in conference, and that the only member of the court who fully examined the record and briefs was the one who prepared the opinion.

"It is my duty to say that the business in our court is not conducted in any such mode. Each justice is furnished with a printed copy of the record, and with a copy of each brief filed, and each one examines the records and briefs at his chambers before the case is taken up for consideration. The cases are thoroughly discussed in conference—the discussion in some being necessarily more extended than in others. The discussion being concluded—and it is never concluded until each member of the court has said all that he desires to say—the roll is called, and each justice present and participating in the decision votes to affirm, reverse, or modify, as his examination and reflection suggest. The chief justice, after the conference, and without consulting his brethren, distributes the cases so decided for opinions. No justice knows, at the time he votes in a particular case, that he will be asked to become the organ of the court in that case; nor does any member of the court ask that a particular case be assigned to him.

"The next step is the preparation of the opinion by the justice to whom it has been assigned. The opinion, when prepared, is privately printed and a copy placed in the hands of each member of the

court for examination and criticism. It is examined by each justice and returned to the author with such criticisms and objections as are deemed necessary. If these objections are of a serious kind, affecting the general trend of the opinion, the writer calls the attention of the justices to them, that they may be passed upon. The author adopts such suggestions of mere form as meet his views. If objections are made to which the writer does not agree, they are considered in conference, and are sustained or overruled as the majority may determine. The opinion is reprinted so as to express the final conclusions of the court, and is then filed.

"Thus, you will observe, not only is the utmost care taken to make the opinion express the view of the court, but that the final judgment rests, in every case decided, upon the examination by each member of the court, of the record and briefs. Let me say that, during my entire service in the Supreme Court, I have not known a single instance in which the court has determined a case merely upon the report of one or more justices as to what was contained in the record and as to what questions were properly presented by it. When you find an opinion of the court on file, and published, the profession have a right to take it as expressing the deliberate views of the court, based upon a careful examination of the records and briefs by each justice participating in the judgment.—*Case and Comment*.

#### INSTRUCTION TO LAND BUYERS.

Lines over 300 years old, copied from the roll in the Manor Court office, Wakefield, England :

First see the land which thou intend'st to buy  
Within the sellers' title clearly lye,  
And that no woman to it doth lay claime  
By dowry, joynture, or some other name  
That may incumber. Know if bond or fee  
The tenure stand, and that from each feoffee  
It be released, that th' sellers be soe old  
That he may lawful sell, thou lawful hold.  
Have special care that it not mortgag'd lye,  
Nor be entailed upon posterity.  
Then if it stand in statute bound or noe,  
Be well advised what quitt rent out must goe,  
What custome service hath been done of old  
By those who formerly the same did hold.  
And if a wedded woman put to sale  
Deal not with her unless she bring her male,  
For she doth under covert barren goe,  
Although sometimes some traffique soe (we know)  
Thy bargain made and all this done,  
Have special care to make thy charter run  
To thee, thy heirs, executors, assigns,  
For that beyond thy life securely binds.  
These things foreknown and done, you may prevent  
Those things rash buyers many times repent;  
And yet when you have done all you can,  
If youle be sure, deal with an honest man.

### Notes of Recent American Decisions.

**ADVERSE POSSESSION — PARENTAL RELATION.**—In *O'Boyle v. McHugh*, decided by the Supreme Court of Minnesota, in December, 1896 (89 N. W. R. 37), it was held, that, as between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive and not adverse; that to make such possession adverse there must be some open assertion of hostile title other than mere possession, and knowledge thereof brought home to the owner of the land. (The court cited 1 Am. & Eng. Enc. Law, [2d ed.], 831; *Burrus v. Meadors*, 90 Ala. 140, 7 South. 469; *Silva v. Wimpenny*, 186 Mass. 253; *Allen v. Allen*, 58 Wis. 202.)

**DEATH BY WRONGFUL ACT — ACTION UNDER STATUTE A BAR TO ACTION FOR LOSS OF WIFE'S SOCIETY.**—A recovery by the husband as personal representative of his wife for her death by the wrongful act of another is a bar to an action by the husband for damages for the "loss of her society" from the time the injury was inflicted until her death. (*Louisville & Nashville R. R. Co. v. McElwain*. Decided by the Court of Appeals.)

**FAILURE OF OBJECTS — CHARITABLE LEGACY — LAPSE — CY-PRES.**—In 1800 a friendly society was established to provide, by subscriptions, contributions and fines, an "invested fund" for the relief, by means of annuities, of members, their widows and children, if in distressed circumstances. By the will of the testator, who died in 1893, a legacy of £500 was bequeathed to the society for the purposes thereof. At that time there were only three annuitants living, being widows of deceased members, and there was only one member remaining, who was also sole surviving trustee of the "invested fund," which was amply sufficient to provide for the three annuitants. Subsequently two of the three annuitants died. On an originating summons by the executors of the will against the sole surviving member, the sole surviving annuitant and the residuary legatees, to ascertain whether the society was entitled to the legacy. *Held* (1), That the society was a "charity;" (2) that it was a charity existing at the testator's death, and therefore the legacy had not lapsed; and (3) that the legacy, not being required for the remaining annuity, was applicable *cy-pres*. (*Cunnack v. Edwards* [1896], 2, ch. 679, distinguished.) [Judgment for the society.] *Bruty v. Mackey*—*In re Buck* (Eng. Ch.) 2 Chancery Division [1896] (Law Reports Nov. 2, 1896), 727.

**LABORER'S LIEN — CHATTEL MORTGAGE — PRIORITIES.**—Where the statute (Rev. St. 1894, sec. 7051; Rev. St. 1881, sec. 5206) provides that when the property of any person engaged in business shall

be seized, or the business suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee, then the debt owing to the laborers (not exceeding \$50 each), which have accrued within six month preceding the seizure, shall be preferred debts, and shall be first paid in full, if sufficient, otherwise paid *pro rata* after paying costs. *Held*, that the statute creates a lien in favor of such laborers superior to the lien of a prior chattel mortgage, and attaches to the chattels though they are transferred by the employer to the mortgagee in payment of the debt. (*Bell v. Hiner*, Indiana Appellate Court.)

**LANDLORD'S LIEN.**—Under a statute giving a landlord a lien "for his rent" on certain personal property of the lessee, the landlord cannot have a lien for rent where the consideration, moving to him under the lease, is for rent and other purposes, and it is impossible to determine what part is for rent. (*Crill v. Jeffrey* [Supreme Court of Iowa], 64 N. W. Rep. 625.)

**MEMORANDUM IN WRITING OF SALE OF LAND.**—A letter from an agent to his principal, conveying the offer of a party to purchase land of the principal, and a letter from the principal to the agent accepting such offer, constitute a sufficient memorandum of the contract of sale to satisfy the statute of frauds, providing that the sale of any interest in lands must be evidenced in writing. (*Singleton v. Hill* [Supreme Ct. of Wis.], 64 N. W. Rep. 588.)

**NEGLIGENCE — PROXIMATE CAUSE — RAILROAD CROSSING.**—A defect in a gate at a railroad crossing is not the proximate cause of an injury received by one who, after passing by the gate, sees a train approaching, but tries to cross the track, and gets his foot caught, and is consequently injured by the train. (*Baltimore & O. R. Co. v. Anderson* [U. S. C. C. of App.], 75 Fed. Rep. 811.)

**POLICY — MISREPRESENTATION AS TO AGE — STATUTE.**—The Ontario Insurance Amendment Act, 1889 (52 Vict., chap. 32), applies to benefit societies, and where a man was admitted to the defendant order on the strength of a representation as to age, which was false, but made in good faith and without any intention to deceive: *Held*, that by virtue of 52 Vict., chap. 32, sec. 6, the contract of insurance is not avoided thereby.

**SAME — SAME — ESTOPPEL.**—If the true age of the deceased had been stated, he could not have effected any insurance. *Held*, that, nevertheless, being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact. [Judgment for plaintiff below. Here affirmed against association.] *Cerri v. Ancient Order of Foresters* (Ont. H. C. J.): 16 Canadian Law Times (November, 1796), 379.

## The Albany Law Journal.

ALBANY, JANUARY 23, 1897.

### Current Topics.

THE treaty of general arbitration with Great Britain, which has just been negotiated, largely through the persistent and well-directed efforts of Secretary of State Richard Olney, has been generally received with great favor by press and people. One leading newspaper has declared it to be "the most significant international event occurring within the second half of the nineteenth century." This, while liable to be regarded in some quarters as somewhat extravagant praise, is perhaps really not so. The most vital and far-reaching incidents are not always those which are the most dramatic, the most loudly heralded, or those which cause the greatest amount of popular excitement. While as to the details of the convention there are sure to be differences of opinion, the object in view—the settlement of international disputes without recourse to war—must and does commend itself to the civilization of the age. Probably this agreement to arbitration will not be claimed, even by its strongest promoters, to be an absolute guarantee of universal peace and brotherhood. It rather assures a period of calm deliberation, a guard against hasty and intemperate action, a pledge of effort to attain justice and mutual satisfaction before resorting to the cruel arbitrament of the sword. The Venezuelan incident, when the two greatest of all English-speaking nations were fiercely glaring at each other and seriously talking of war, is recent enough to afford a most valuable object lesson, and to demonstrate the inestimable value of such an agreement as has now been negotiated, through the persistence and determination of President Cleveland and his advisers. To initiate a great reform is always more difficult than to extend it, and secure further support for it after it has been once established, and hence this first step toward the abolition of war may be even more important and far-reaching in its results than the most enthusiastic supporters of the plan dare to hope. As time goes on and the wisdom

of the plan is demonstrated, other nations are more than likely to come into the peace alliance, until at last may be ushered in the day of "peace on earth, good will to men," the era when right rather than might shall prevail the world over. Reports are already current that the treaty may not be ratified by the senate; that petty opposition may thwart the honest efforts already put forth and prevent the consummation of the plan. It is to be hoped senators will think seriously before assuming any such great responsibility. The public cares little about senatorial dignity, which is said to have been offended by the advance publication of the text of the treaty by consent of Secretary Olney. What it wants is results. This great question should be approached and dealt with from the high plane of enlightened statesmanship. It must inevitably be the case that the plan of arbitration as laid down in this treaty will not strike everybody as the most perfect that could be devised—even its most active promoters make no such claim for it. In a new departure such as this all methods of execution are necessarily tentative, depending upon time and experience to perfect them; but the object sought to be accomplished is so grand and noble that any plan which is not manifestly self-contradictory will be deemed worthy of a trial. Small-souled and petty critics, who are trying to demonstrate that the sly old English lion will, by the proposed treaty, get all the meat, while we shall have to content ourselves with the bones, will receive but scant courtesy, and it is a consolation to know that whether the treaty be ratified or not its moral effect cannot be lost.

The treasury department at Washington has recently been called upon to decide a unique question, involving the ownership of operatic costumes and scenery used by the recently collapsed Mapleson Opera Company. A few months ago the company came to this country from England, bringing costumes and scenery for elaborate operatic performances. These were admitted free of duty, under the customs laws which permit such entry on the filing of a bond for the exportation of the articles after six months use. But the opera company became involved in financial difficulties while in Boston, and the costumes and



scenery were attached for debt and ordered sold. The treasury department is now asked by the bondsmen to interfere for their protection. Should the department not interfere, the bondsmen, who are responsible to the government for the duties, will be the losers. There are also other complications, such as rights of individuals to certain costumes, which further confuse matters. Mr. Eugene Tompkins, of the Boston Theatre, has attached the property in Boston for moneys advanced to the managers of the Imperial Opera Company of England, Limited. This is believed to be the first case of the kind which the treasury department has been called upon to decide.

The list of assembly committees of 1897 has been announced by Speaker O'Grady. Those committees whose composition is of special interest to lawyers are given herewith for information and reference :

*Judiciary*—Scherer, Albany; Armstrong, Monroe; Robbins, Allegany; Marshall, Kings; Bondy, Onondaga; Sanger, Oneida; Warner, Niagara; Perkins, Kings; Peterson, Chautauqua; Mazet, New York; Emmett, Westchester; Hoffman, New York; Green, New York.

*Revision*—Hill, Erie; Costello, Oswego; Fuller, Broome; Philo, Oneida; Ten Eyck, Onondaga; Pratt, Ulster; Garby, Richmond; Benham, Ontario; Bayliss, Kings; Peterson, Chautauqua; Palmer, Schenectady; Hutton, Rensselaer; Maloney, Erie.

*Codes*—Armstrong, Monroe; Robbins, Allegany; Laimbeer, New York; Kelsey, Livingston; Steiner, Erie; Bedell, Orange; Abell, Kings; Brown, L. E. New York; Fish, Madison; McLaughlin, Sullivan; Matthews, New York; Palmer, Schoharie; Dempsey, New York.

*General laws*—Horton, Wayne; Hill, Erie; Tupper, Broome; Marshall, Kings; Burr, Suffolk; Miles, St. Lawrence; Forrester, Kings; Addis, Putnam; Smith, Westchester; Cromwell, Queens; Laimbeer, New York; Sullivan, T. P., New York; Hutton, Rensselaer.

*Ways and means*—Nixon, Chautauqua, Kelsey, Livingston; Horton, Wayne; Sears, Franklin; Wells, Onondaga; Allds, Chenango; Blasdell, Erie; Costello, Oswego; Clark, C. J., Jefferson; Roehr, Kings; Finn, New York; Fitzgerald, New York; Kelly, Albany.

*Affairs of cities*—Austin, New York; Andrews, New York; Wells, Onondaga; Hill, Erie; Reinhart, New York; Abell, Kings; Brennan, Kings; Lewis, Monroe; McEwan, Albany; Philo, Oneida; Finn, New York; McKeown, Kings; Kennedy, Queens.

*Railroads*—Eldridge, Warren; Braun, Erie; Sanger, Genesee; Budd, Schuyler; Cromwell, Queens; Hughes, Kings; Dudley, Niagara; McGraw, Rensselaer; Bedell, Orange; Clark, J., Stueben; Cain, Kings; Coughlin, Erie; Trainor, New York.

*Public health*—Murphy, New York; Eldridge, Warren; Hughes, Kings; Rounds, Cayuga; Schmidt, E. L., Montgomery; Parshall, Kings; Benham, Ontario; McEwan, Albany; Daly, New York; Kennedy, Queens; Palmer, Schoharie.

*Public education*—Sanger, Oneida; Husted, Westchester; Marshall, Kings; Saunders, Cortland; Sweet, Greene; Leversee, Albany; Kavanaugh, Saratoga; Hoes, Columbia; Burr, Suffolk; Sullivan, T. P., New York; Hutton, Rensselaer.

*Excise*—Allds, Chenango; Sears, Franklin; Tupper, Broome; Bedell, Orange; Witter, Tioga; Miller, C. H., Cattaraugus; Hanna, Dutchess; Ives, St. Lawrence; Benham, Ontario; Garby, Richmond; Barry, New York; Tooher, New York; Lennon, Kings.

*Affairs of villages*—Downs, Orleans, Hanna, Dutchess; Anderson, Rensselaer; Harrison, Steuben; Cole, Wyoming; Rounds, Cayuga; Zimmerman, Jefferson; Post, Suffolk; Gott, Monroe; Pierce, Essex; Hoes, Columbia; Zurn, Kings; Andrews, P. J., New York.

*Insurance*—Husted, Westchester; Hobbie, Washington; Adler, New York; Sheldon, Cayuga; Matteson, Cattaraugus; Forrester, Kings; Sweet, Greene; Addis, Putnam; McLaughlin, Sullivan; Van Cott, New York; Bellen, Onondaga; Roche, New York; Donnelly, New York.

*Banks*—Gray, Dutchess; Adler, New York; Wilson, Kings; Saunders, Cortland; Ives, St. Lawrence; Scherer, Albany; Van Keuren, Ulster; Bayliss, Kings; Smith, Westchester; Miller, M. J., Erie; Warner, Niagara; McCabe, New York; Cullen, Kings.

In a suit by Gilbert Newton against the Central Vermont Railroad Company, the Court of Appeals has affirmed a judgment for the plaintiff in a suit for damages for personal injuries. As a train approached a station the conductor announced the name of the station, and the train slowed up, and the plaintiff, with other passengers, started for the door of the car, to alight on reaching the door. The coach was suddenly jerked, and the plaintiff precipitated across the platform between the ends of the guard rails, the chain being unfastened, and the plaintiff fell between the passenger car on which he was riding and a freight car which was hauled in that train, and was injured. The

court holds that the failure of the company to place a chain or similar barrier across the open space was a fact from which the jury might impute negligence to the corporation, and also whether negligence was attributable to the railroad company by reason of the sudden jerk or movement of the car after the conductor had invited passengers to alight by calling out the name of the station. The fact that the person was intoxicated when he sustained the injury was held not to be *per se* evidence of contributory negligence on his part, and the question whether the intoxication contributed to the injury should be submitted to the jury for its determination.

A new calendar for the Court of Appeals has just been published, containing 1,038 cases. The court will begin work upon this calendar as soon as the few remaining cases on the calendar, made up two years ago, are disposed of. The 1,038 cases are all those in which returns have been filed with the clerk of the court since January 14, 1895, when the old calendar was made up. That calendar had 969 cases, and covered fifteen months, and the new calendar, covering twenty-four months is, therefore, proportionately some 400 cases smaller than the calendar made up two years ago.

The Supreme Court of Appeals of Virginia recently held, in *City of Winchester* against *Redmond*, that in the absence of express authority conferred by its charter or by general law, a municipal corporation has no power to offer and pay a reward for the apprehension and convictions of persons violating the criminal laws of the State; and that an offer by the City Council of a reward, which it has no authority to pay, is *ultra vires*, and creates no obligation enforceable against the city.

In the case of *Richard Polson* against *Henry Stewart, Jr.*, the Supreme Court of Massachusetts held that a court of equity in that State would enforce a covenant made by a husband to his wife in another State, where they were domiciled, and whose laws gave her the right to contract, as if she were unmarried, to surrender all his marital rights in land belonging to her in Massachusetts. Chief Justice Field dissented.

#### SOME LEGAL METHODS IN MOROCCO AND CHINA.

Adelbert Cronise's address to the members of the Rochester (N. Y.) Bar Association.

IN contrast with our advanced system of law and practice, it may not be uninteresting to glance at some of the legal methods in an uncivilized country under a despotism.

"Morocco is said to be the most absolute despotism extant. Neither its nearness to southern Europe, nor its location upon a great waterway, nor its intercourse with other nations, has either civilized its people or improved its government. The conditions of life are such as might have been found in the Orient before the time of Christ and have won for it the name of 'The China of the West.' The Moor is as unchangeable as the Chinese. In no other uncivilized country has commercial and political intercourse with civilized nations produced so little change. While its neighbors, Algeria, Tunis, Tripoli and even Egypt have been gradually modernized, Morocco alone has not improved. The Christian religion imposed upon it by Constantine has left no trace. The Arab has occupied the valleys and covered all with the Koran. His descendants, the Moors, have made cities and towns and a government, and, nominally rule all. The rule of the sultan is that of a barbarian, cruel by nature and unrestrained by constitution, laws or usage, and with the power to enforce his will except as to the Berber population of the hill countries and mountains. Being without constitution or law, the only recognized authority other than the will of the sultan is the Koran, which is interpreted with such liberality as to meet the views of the *cadi* or judicial officer. The bar, if such it may be called, is composed of old men as a class, taken from the priesthood. There does not seem to be much practice of any kind. Their occupation is more like that of a notary or scrivener. Each sits upon the floor of his 4x5 or 5x6 box, with its side open to the street. Ink, pen, paper, the Koran and what looks like a low meat block and used to write upon, constitute his office furniture. His business is to make memoranda of agreements, and to give advice guided by the Koran and what he knows of the *cadi*. Occasionally he may be employed to plead a party's cause before the *cadi*, but this few can afford, and most parties appear only in person.

"The *cadi* in each city is the sole judge, except in cases to which an alien or a consular protegee is a party, which may be heard before the consul of the alien's country, if it have one. The *cadi* is, of course, a tool of the sultan. His judgment is final and his power is subject to that of the sultan only. Each morning at 9 o'clock he comes to one of the

principal doors of the casba, or castle, which includes the prisons, treasury, apartments for the sultan and his harem. The cadi sits upon the threshold of the entrance — literally sitting at the gate of justice — and hears all who have any grievance. The complaining party kneels upon one knee before him and tells his story. The defendant, whom he has brought with him, kneels and tells his side of the case, and the cadi either decides at once or sends the parties to bring witnesses to prove their statements. No Christian, however, is permitted to testify. The witnesses kneel in like manner and tell in their own way what they know of the affair, and judgment is given summarily — no taking the papers.

"The punishments ordered by the cadi are arbitrary and barbarous, the principles of the Koran, and the usages of the country being subject to his discretion. For personal injuries the Lex Talionis taught by the Koran is usually enforced, literally an eye for an eye and a tooth for a tooth. Not long ago, but prior to the system of consular protection, an English merchant living in Mogador accidentally ran against and knocked down an old woman and in the fall two of her teeth were broken out. She immediately demanded the two corresponding teeth of the merchant. The cadi, fearing diplomatic troubles, refused, and the woman then walked 300 miles to appeal to the sultan. The sultan, fearing the English government, refused, but later, fearing an uprising of the people in the woman's behalf, he bargained with the Englishman, giving him a valuable commercial privilege, for which the Englishman submitted to having his two teeth knocked out in public.

"For murder the criminal is beaten to death or decapitated or killed in the same manner in which he killed his victim. Any relative of the murdered man has the right to kill the murderer in the same manner. Capital punishment is also inflicted for trading with foreigners contrary to the sultan's restrictions. For theft the usual punishment is to cut off the right hand for the first offence and the left for the second. The hand is chopped off at the wrist and the stump immersed in boiling pitch to cauterize the wound. For small thefts, such as stealing a chicken, the victim is stripped naked to the waist, seated upon an ass and driven through the streets accompanied by a crowd of men who beat him with rough sticks, usually until he is covered with blood. For milder offences the bastinado is applied or the criminal sent to prison upon an indeterminate sentence, to remain until some friend shall buy his release with a bribe or go to the sultan and procure his pardon. If he have no friend of means he will probably remain in prison until he dies, however slight his offence.

"With indeterminate sentences and prisons,

such as those of Morocco, there is little choice between imprisonment and death. Formerly both sexes were imprisoned in a single room. Now, although the sexes are separated, children and old, debtors and murderers awaiting execution, are all huddled in a single room in which they eat and sleep, and which most of them will never leave alive. Mr. Varley, of London, who assisted in the release of prisoners from all the prisons of Morocco, which followed the Consul Matthews scandal, found many old men and women who had forgotten for what they were imprisoned, if they had ever known, who had been imprisoned so long that no one remembered when they were not there, and of whose offences or sentence there was no record. In the prisons in Tangiers the filth and the condition of the prisoners are indescribable, and Mr. Varley states that the prisons in the other cities of Morocco are still worse. The appearances indicate that the prisoners never wash and never remove their clothing. Their sole allowance of food is one loaf of bread a week, and that a loaf not so large as ours. This they can divide in seven parts and eat one each day or eat all at once and starve the rest of the week. The stronger, of course, rob the weaker, and the sufferings from hunger make their life an unending torture. The occasional visitor is always moved to buy out a bakery and stock of figs and give the prisoners a little relief. By feeding the guards the prisoners will be formed in line and pass before the small grated window to receive their portion of bread and handful of figs. The young look old and the old deathly, and yet they are the best off, for they have the least time to endure their suffering.

"During the consulate of Felix Matthews the system of consular trials, to which we have referred, developed a scandal that was a disgrace to our government. As stated above, a case in which one of the parties is under consular protection, or is a citizen of another country, must be tried before the consul of that country. The money lenders could get no advantage over their Moorish debtors in a hearing before the Cadi. Finding Consul Matthews corruptible, they bought of him certificates that they were consular proteges, equivalent for their purpose to being citizens of the United States, thus entitling them to have their cases before him, and being in their power, he did not dare decide against him if he would. The money lenders would agree verbally to lend at a small interest, and at maturity would demand a hundred per cent. The debtor being not only unwilling but unable to pay, would be brought before our consul and sentenced to prison. In cases where a memorandum of the debt was given, the money lender would fail to deliver it upon payment, on the pretense that it was lost, and would afterward sue upon it, deny that it had been paid,

and Matthews would give judgment for the plaintiff. The Moor unable to pay a second time would, of course, be imprisoned. Soon every prison in Morocco was filling with Matthews' victims, and through the intervention of the English representatives the attention of our government was called to the matter, and a commission of inquiry was sent to Morocco. For reasons, political or otherwise, the matter was hushed, but Consul Matthews was recalled and a successor appointed. Matthews, who had grown rich from the sale of certificates of citizenship and from trial fees and bribes, was forced to leave much of his property behind him and fly in the night across the country to Couda, where he found a vessel and thus escaped the mob that was awaiting him at the port of Tangier, from which he was expected to sail. Under his successor, Mr. William Read Lewis of Philadelphia, the debtors imprisoned under Consul Matthews were released.

"The report of Mr. Consul Lewis made to our government in April, 1888, show that upon his arrival there in March, 1887, he found over eight hundred persons enjoying United States consular protection. A village of 300 inhabitants, Moors and Jews refused to pay the Sultan's tax upon the ground that it was an American colony. The basis for it was that many of the villages had been employed in wild bear hunts gotten up for American visitors, and for which services Consul Matthews had given them certificates of consular protection. Although the abuse of the system under the former Consul led Mr. Consul Lewis at first to disapprove the system, his residence in Morocco soon convinced him that in a country where the evidence of a Christian will not be received, and where there is neither law, justice or mercy for a Christian, a system of consular protection is a necessity.

"In turning to legal methods in China one might expect something better. It has become the custom to credit China with originating and teaching the most noble precepts and with the most valuable discoveries and inventions. We are told that the golden rule, in the negative form, was taught by Confucius five centuries before Christ. Confucius himself said that the substance of what he taught was the three relations, of government and subject, parent and child, and husband wife, and the five virtues, charity, justice, observance of established usages, rectitude and sincerity. As the studies of the writings of Confucius and the commentaries upon his works constitute the greater part of the education of the governing class, an education which is tested by the most elaborate system of civil service examinations to be found anywhere in the world, one might expect that so noble a creed as to public and domestic relations and virtues, so thoroughly drilled into the entire ruling class, would produce model re-

sults. On the contrary, the laws themselves, their administration by the courts, the treatment of prisoners, and the punishment and execution of the condemned are all marked by injustice, absence of charity, and gross cruelty. The wholesale slaughter of female children is not considered a crime, while the accidental killing of a parent, step-parent, or parent-in-law, is punished with atrocious cruelty. Not long before I was in Canton, a case arose that caused much discussion among the foreign residents. There grows in that section a wild berry that has the peculiar quality of being wholesome for pigs, but poisonous to human beings. A young girl-wife had gathered some of these and was cooking them for the pigs, as is the custom. Her husband's father, an old man with feeble sight, mistook them for something else, tasted them and died. The girl was tried, found guilty of parricide, and condemned to death by 'ling chih.' This form of execution was carried out in the usual way. The girl was bound to a cross and tortured for days, the face flayed, the fingers and toes cut off little by little, muscles slowly torn out, the breasts cut off a slice at a time, and all with such diabolical skill as not to touch a vital spot, so that the victim lingered in agony for days. This form of execution, which is not an uncommon one, is carried out without exciting a touch of sympathy in the crowd about, but often to their enjoyment. Cutting off portions of the flesh is used as a reformatory measure for mild offenses. The punishment for opium-smoking by a soldier is slitting the lips for the first offense and decapitation for the second. In visiting the execution grounds of Canton, I fortunately saw only the crosses on which the condemned are tortured, which was quite enough. In the empire an average of 10,000 a year are executed. The same proportion to the population would give us in this State 166 executions a year, or more than three a week.

"The laws of China are codified and changes are made from time to time by imperial edicts. Her penal code commenced 2,000 years ago, and is published at a price within the reach of the poorest. A recent writer says: 'In China there are no lawyers, fees and costs. Litigation is regarded as a great evil, and is made very simple. A magistrate hears the case very much as a father would a dispute between two children, and in the main justice is administered speedily, thoroughly and cheaply. To prevent litigation many debts have been made debts of honor, not binding in law. Among these are all loans to friends or relatives to start a man in business or extricate him from trouble; all loans to a gambler, spendthrift, drunkard or runaway wife; all loans upon parole and various other debts. Drinking debts are not collectible. Professional services cannot be collected by suit unless there is a

written obligation. The unsecured creditor to collect an old account simply stands in front of the debtor's door and weeps. He rarely has to do this longer than an hour. To get rid of the annoyance and avoid disgrace the debtor hustles around and gets up the money. A Chinese who becomes financially embarrassed will sell himself for a plantation coolie, go into exile for twenty years or even commit suicide. It is part of his religion to pay off all he owes in the last week of the year, in order that he may begin the next one free from care and obligation.' I fear that the writer of the above is not personally familiar with the evidence-producers in use in Chinese trials, or he would not have applied the simile of father and children.

"While in Canton I visited the Hall of Judgment in which criminal trials are held. It is a large plain room with little furniture, a table for the magistrate and a few chairs. The clerk examines the witnesses, and the accused rarely has any one to speak for him. Even the trial of a case is marked by cruelty. If the accused or a witness refuses to testify he is forced to kneel with bare knees upon a rough iron chain folded back and forth so as to form a mat. The torture soon becomes so severe as to produce testimony of some kind as surely as ever the rack did in the days of the Inquisition. Unwilling witnesses are also suspended by their thumbs or toes, or they are stripped, laid upon the floor and beaten with the flat side of freshly split bamboo rods, the sharp wiry edges cutting open the flesh in ragged gashes. Although none of these tortures were applied while I was present, several of the instruments were at hand ready for use.

"I also visited the prisons and saw hundreds of prisoners of all classes. The six classes are: First, those awaiting trial; second, minor offenders; third, women; fourth, the worst criminals; fifth, prisoners wearing the cangue, and sixth, prisoners of wealth who can pay for comforts.

"The 'cangue' is a wooden collar about a yard square. The prisoner being unable to reach his mouth cannot feed himself, and all are dependent upon one another. When the food is put into the prison the strong get the most of it and feed one another, while the weak and the unpopular are left to starve. The cangue prevents the wearer from lying down, and their only rest and sleep must be taken in a sitting position. There were many prisoners in this class, and a more wretched lot I never saw together. In all parts of the prison were instruments of torture. Among them was a net of silk cords in which the feet are inclosed, fitted with a key by which the cords are twisted and tightened from day to day until they cut to the bone. I copy from a statement by the editor of the *China Mail* the following punishments in use, viz.: 'Compress-

ing the ankles and squeezing the fingers until crushed between boards, twisting the ears, kneeling on chains, striking the lips until jellied, putting the hands in stocks behind the back, or tying the hands to a bar under the knees and chaining the neck to a stone. Cases are officially recorded of nailing prisoner's hands between boards, using beds of iron, scalding with boiling water, inserting red hot spikes, cutting the tendon of Achilles and burying the body up to the neck in lime while the prisoner is forced to swallow large draughts of water. Finally, a lighter (?) punishment is to make the criminal kneel on a mixture of pounded glass, sand and salt until the knees are excoriated. Flogging to death with the bamboo is also not uncommon. There are many other minor punishments, but we have omitted one we know to be practiced at Shanghai on some rebels captured by the Imperialists during the Taiping rebellion, driving fine spikes of bamboo down between the nails and the fingers or toes. If devilish ingenuity can go further than this, we shall be surprised.'

"We must credit the Chinese with many ingenious inventions and useful discoveries—the mariner's compass, gunpowder and printing, and with the arts of making silk, paper and porcelain; but they have not improved their laws; their courts have become more and more corrupt, and their ingenuity seems principally devoted to devising new forms of torture for witness and convict. Confucianism and Buddhism teach both justice and mercy, but there is little of either in the legal system which has grown up under them in China.

"But there is a good side to the Chinese. When, prior to 1840, the English flooded China with opium from India, the Chinese recognized its injurious effects and passed laws making it a crime punishable by death. It was their misfortune that in the 'opium war' which followed they were compelled by the English not only to pay an indemnity of \$21,000,000 and cede the island of Hong Kong, but also to repeal the laws against the use of opium. It is to be said in their favor that they have the reputation in the East of paying their bills and notes with more promptness than any other class of people. They have a sense of commercial honor, and although naturally thieves, they are credited with prudence in creating obligations, with punctuality in keeping them, and with respect for a trust."

Forfeited payments made by a member of a loan association on shares which lapse in consequence of his default are held, in *Pioneer Savings & L. Co. v. Cannon* (Tenn.) 33 L. R. A. 112, to be inapplicable to the mortgage debt and cannot be credited thereon.

## BIG FEES.

THE extravagant fees obtained by lawyers, as appears from time to time in the press of the country, is about as much overestimated as the estimate placed upon a man's wealth. A writer in the *Pittsburg Leader* says:

"How much do Pittsburg lawyers charge for their services on the average?" is a question which I asked several well-informed attorneys the other day, and by means of which I acquired quite a fund of information without getting any very definite answer. "Average?" said one gentleman. "Why, you couldn't average the charges of one man, let alone the whole profession. Fees range from \$5 to \$100,000, according to the ability of the attorney and the disposition of the client, or rather, according to what he can make the client think his ability is and how much he will stand being charged for it."

The statement that a fee amounting to \$100,000 was paid for legal advice in this city seems rather incredible, and I was not able to confirm it fully enough to justify giving the names of the parties said to be concerned, but a story to the effect that it was once done has been in circulation among lawyers for quite a considerable time, and is believed by some of them at least to be true. It is said that a gentleman who has acquired wealth enough in manufacturing enterprises to rank as a magnate became interested, along with capitalists of other cities, in a large railway property. After they had acquired the property a question as to the validity of the charter they held arose, and several of the most eminent lawyers in the country informed them that their case was worthless, and they would lose a suit which had been instituted against them. Then the Pittsburg magnate consulted with his Pittsburg lawyer, and the latter thought out a theory upon which it appeared to him that the charter could be made to hold.

This theory was submitted to the eminent counsel who had previously pronounced the charter worthless, and by them was admitted to contain a decided element of plausibility. So much were they impressed, in fact, that they got ready to fight the case along the lines which the Pittsburger had indicated. As the time for the argument of the case before a court in a distant city approached, it came to the ears of the Pittsburg capitalist that his Pittsburg lawyer was getting ready to take a trip to Europe. He visited him and entered a decided objection, "You are my attorney," he said, "and it is your view of the law upon which this case is to be submitted. You must stay here and prepare the case and make the argument."

"It will cost you a good deal if I forego my Summer trip," said the lawyer, as the concluding argu-

ment of a dispute in which the magnate had the best of it.

"Stay here and win this case and I will pay you \$100,000," said the magnate, and the lawyer stayed. It is related, too, that he not only won the case and got the \$100,000, but that he still made his trip to Europe, though a little late in the season.

After this the best story which is told of a big fee is that the Standard Oil Company once received a bill for \$25,000 from D. T. Watson, and responded with a check for \$35,000. This case was one in which an attempt was made to tax them on their income in Pennsylvania, the ground of the attempt being that they were a foreign corporation, and Mr. Watson won the suit after a long and hard legal battle. There are thought to be half a dozen lawyers of legal firms in the city with whom it is a comparatively frequent occurrence to render a bill of from \$5,000 to \$10,000, and have it promptly paid, and Mr. Watson is generally admitted to head the list, and to be the leader of the Pittsburg bar. J. Scott Ferguson and the firm of Knox & Reed, Dalzell, Scott & Gordon, and a few others, are believed to be in possession of a legal practice worth from \$40,000 to \$50,000 per year, and from these figures the incomes of the local attorneys range down to sums too low to contemplate. There are in the neighborhood of 600 practicing attorneys, and it is thought by very well-informed lawyers that not to exceed 150 of them do nearly all the business, and that the incomes of the rest average considerably less than \$1,000 a year. The guess was also made that not less than \$1,500,000 a year is paid in this city as attorneys' fees, and when its vast interests and the frequency with which they are in the courts are concerned it would seem that this, if correct, is a very moderate sum.

"People who have suits involving big money," said one lawyer with whom I talked, "do not, as a rule, care what the cost of an attorney's services is going to be, and so it is not generally the case that any stipulation is made, unless the case of a plaintiff seeking a lawyer to take a case upon a contingent fee. It has thus happened sometimes that lawyers have acquired reputations very largely by the nerve displayed in making high charges. Let a man have a high opinion of his own abilities, and make his client aware of the fact by charging big fees, and the thing will result to his advantage, provided he is a good enough judge of human nature to know just when to exact all that his client will stand. A man who has a case of a peculiar character, and has inquired and learned what lawyer is likely to conduct it for him to the best advantage, and who has found his lawyer to meet his expectations, is not going to quit that lawyer for another because he is

made to understand that the lawyer knows what the service he has rendered is worth.

"For this statement to hold good, of course the business has to be of a character where big money is involved. There are many kinds of service where no matter who performs them, the charge must be moderate. For instance, the least fee which it is considered professional to accept is \$5, for such work, for instance, as drawing a deed. There are, of course, lawyers who do not want such work as this at all, yet if they consented to do it I do not think there is one in the city who would feel justified in charging more than \$25 for it. To get a big fee almost always implies that the case shall be a big one; that is, involving big money. The exceptions are where some very wealthy man is charged with a criminal offense, and wants the very best lawyers, and several of them, to defend him. Criminal business, as a rule, is not very profitable, and there have been very few really great lawyers who cared to have much of it. The prosecution of accused persons in particular does not pay well. A client may come in while his blood is hot and declare that he will pay thousands of dollars to have an adversary convicted, but before the time times to go on with the case his blood will cool, and he will think differently about the matter. Very few persons, as a rule, want to spend money to get revenge.

"It sometimes happens, though, that a large corporation will be willing to hire first-class lawyers, at a good stiff price, to secure the conviction of some defaulting employe, and to give its men everywhere an object lesson on the results of dishonesty. Such a concern as the Adams Express Company, for instance, if one of its men is caught robbing it, does not want to miss the opportunity of making an example of him, so that wherever there are Adams Express employes they shall hear of the matter, lay it to heart and be good.

"Contrary to the general notion about the matter, the fact that it is difficult to obtain admission to this bar is not a great protection to the business of those lawyers who already have an established practice, nor would the admission of everybody that applied greatly affect them. I think we might admit any lawyer who came here from a bar of this or any other State, and still we should not have competition, except among those who would get very little business, and the established large practices would not be injured. In particular it would not hurt the older lawyers for the attorneys with well-earned reputations to come from other places. There are, in fact, some of them here now, and they are not making any great headway toward getting a large share of the rewards of the business.

"It appears to be a rule, to which there have been very few exceptions, that, after a lawyer has passed

middle life, it is not worth while for him to change his location, and expect to get a practice. He may be a better attorney than any at the bar to which he comes, but will not get the business away from those who have it, and may consider himself fortunate if he even makes a comfortable living. I have never seen the fact explained, but I presume it is largely because of the extent to which getting a law practice is a matter of making acquaintances. There must also be something in the very air of a locality, so to speak, that is, in the peculiarities of its people, and the little eccentricities which they have in doing business, which the established lawyer will have gradually absorbed, and which the stranger, coming as an attorney already a master of his profession and not disposed to learn it all over again, cannot appreciate. It is strange that such trifles should constitute the difference between a big income and a poor living, but it seems to be a fact."

#### THE DEATH PENALTY.

IN his annual report to congress, Attorney-General Harmon recommends a uniform system of punishment for crime, and that the different degrees of murder be established. He says:

"I think a new crimes act should be passed as speedily as possible, which should contain provisions simple, easily understood, and general in their scope; that a uniform system of punishment should thus be provided, and that as to cases arising in the future, present laws relating to these crimes should be repealed. This work could be easily and quickly performed by a commission.

"The increasing repugnance on the part of juries to inflict the death penalty, in connection with the fact that the law makes no degrees in murder, constantly leads to the entire acquittal of persons charged with capital crimes in cases where the facts proven not only warrant conviction for murder, but oblige the court to charge that they do not permit a conviction for mere manslaughter. This danger to society can be at least mitigated by the establishment by statute of different degrees of murder with corresponding appropriate grades of punishment. Juries will not then be confronted with the alternative of a verdict which carries the death penalty or a verdict of acquittal in cases where they think the accused guilty of murder, but not deserving of the extreme punishment."

Is it not an indication of a more generous manhood, a higher civilization that is being shown through the medium of the juries in refusing to inflict the death penalty? It is not a maudlin sentimentality, as some sneeringly assert, or an invitation to the vicious to continue their slaughter, by refusing or by any act countenancing the taking of human life. There is an under-current of thought,

feeling and action on this subject which is being given expression by some of the ablest minds in the country, and backed by the mighty power of the press. In referring to the attorney-general's paper, the Washington (D. C.) *Times* says:

"He notes 'the increasing repugnance on the part of juries to inflict the death penalty,' and ascribes the frequent acquittal of persons charged with murder to that fact. The attorney-general might have safely gone a step further in the interest of the effective administration of justice, public morals and humanity by advocating a statute which does away with the death penalty altogether. It is a relic of barbarism — a reminder of that condition of society when one man's hand was raised against another, and when a check to a constant warring of the different elements could only be set by punishments which satisfied the brutal instinct in man. Gradually the death penalty has been more refined in its application, until to-day, among civilized nations, there are left only the ax, the guillotine, the garrote, the rope and the electric chair.

"It must be admitted by the student of history and sociology that in proportion to the decreasing infliction of the horrible methods of capital punishment and public executions, the number of murders committed has also become less. This is but natural, for men are not made kinder or gentler by the brutalizing exhibitions that were in vogue in bygone times in connection with the execution of criminals. Another evidence of this fact was the growing inclination of legislators to reduce to a minimum the crimes upon which the death penalty might be placed. It should not be difficult, therefore, to take the other step, which will bring us to the abolition of capital punishment.

"It is just as well to be quite candid in arguing these moral questions. Capital punishment is nothing but murder sanctioned and legalized by society. The commandment, 'Thou shall not kill,' should be as binding upon the lawmakers as upon the law-breakers. Nor should the dictum of 'an eye for an eye and a tooth for a tooth,' or that other one, 'he that wieldeth the sword, by the sword shall he perish,' be construed as an injunction upon man to kill his brother by any process, legal or otherwise. Moreover, it is extremely doubtful if capital punishment has ever acted as a deterrent. Humanity, with all its passions and impulses, is the same after all, no matter what are the barriers raised against them.

"Capital punishment makes no allowance for human error. Courts and juries have been shown to be wrong in the condemnation of men accused of murder. Innocent ones have suffered for the guilty. Men have been executed for crimes committed by others. This could not happen if the prison cell were substituted for the scaffold. Capital punishment should go."

## GENERAL ARBITRATION TREATY.

[Text of the Document Sent to the Senate By the President.]

PRESIDENT CLEVELAND has sent to the senate the treaty of general arbitration between the United States and Great Britain. It is of such importance that the *LAW JOURNAL* gives the text in full, as it was laid before the Senate, in executive session :

The United States of America and her majesty the queen of the United Kingdom of Great Britain and Ireland, being desirous of consolidating the relations of amity which so happily exist between them, and of consecrating by treaty the principle of international arbitration, have appointed for that purpose as their respective plenipotentiaries :

The president of the United States of America, the Honorable Richard Olney, secretary of state, of the United States, and her majesty the queen of the United Kingdom of Great Britain and Ireland, the Right Honorable Sir Julian Pauncefoot, a member of her majesty's most honorable privy council, knight grand cross of the Most Honorable Order of the Bath and of the most distinguished Order of St. Michael and St. George, and her majesty's ambassador extraordinary and plenipotentiary to the United States, who, after having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following articles :

Article I. The high contracting parties agree to submit to arbitration in accordance with the provisions and subject to the limitation of this treaty all questions in difference between them which they may fail to adjust by diplomatic negotiation.

Article II. All pecuniary claims or groups of pecuniary claims which do not in the aggregate exceed £100,000 in amount, and which do not involve the determination of territorial claims, shall be dealt with and decided by an arbitral tribunal, constituted as provided in the next following article. In this article and in article IV the words "groups of pecuniary claims," mean pecuniary claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact.

Article III. Each of the high contracting parties shall nominate one arbitrator, who shall be a jurist of repute, and the two arbitrators so named shall within two months of the date of their nomination select an umpire. In case they shall fail to do so within the limit of time above mentioned, the umpire shall be appointed by agreement between the members for the time being of the Supreme Court of the United States and the members for the time being of the judicial committee of the privy council in Great Britain, each nominating body acting by a majority. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the high contracting parties for either of them, the umpire shall be selected in the manner provided for in article X. The person so selected shall be the president of the tribunal and the award of the majority of the members thereof shall be final.

Article IV. All pecuniary claims or groups of pecuniary claims which shall exceed £100,000 in amount and all other matters in difference in



respect of which either of the high contracting parties shall have rights against the other under treaty or otherwise—provided that such matters in difference do not involve the determination of territorial claims—shall be dealt with and decided by an arbitral tribunal, constituted as provided in the next following article.

Article V. Any subject of arbitration described in Article IV shall be submitted to the tribunal provided for by Article III, the award of which tribunal, if unanimous, shall be final. If not unanimous, either of the contracting parties may within six months from date of the award demand a review thereof. In such case the matter in controversy shall be submitted to an arbitral tribunal consisting of five jurists of repute, no one of whom shall have been a member of the tribunal whose award is to be reviewed and who shall be selected as follows, viz.: Two by each of the high contracting parties and, one, to act as umpire, by the four thus nominated, and to be chosen within three months after the date of their nomination. In case they fail to choose an umpire within the limit of time above mentioned, the umpire shall be appointed by agreement between the nominating bodies designated in Article III, acting in the manner therein provided. In case they fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the high contracting parties, or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the president of the tribunal, and the award of the majority of the members thereof shall be final.

Article VI. A controversy which shall involve the determination of territorial claims shall be submitted to a tribunal composed of six members, three of whom—subject to the provisions of Article VIII—shall be judges of the Supreme Court of the United States, or justices of the Circuit Courts, to be named by the president of the United States, and the other three of whom—subject to the provisions of Article VIII—shall be judges of the British Supreme Court of Judicature, or members of the judicial committee of the Privy Council, to be nominated by her Britannic majesty, whose award by a majority of not less than five to one shall be final. In case of an award made by less than the prescribed majority, the award shall also be final, unless either power shall within three months after the award has been reported protest that the same is erroneous, in which case the award shall be of no validity.

In the event of an award made by less than the prescribed majority and protested as above provided, or if the members of the arbitral tribunal shall be equally divided, there shall be no recourse to hostile measures of any description until the mediation of one or more friendly powers has been invited by one or both of the high contracting parties.

Article VII. Objections to the jurisdiction of an arbitral tribunal constituted under this treaty shall not be taken except as provided in this article. If, before the close of the hearing upon a claim submitted to an arbitral tribunal, constituted under Article III or Article V, either of the high contracting parties shall move such tribunal to decide and thereupon it shall decide that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general im-

portance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative, the jurisdiction of such arbitral tribunal over such claim shall cease and the same shall be dealt with by arbitration under Article VI.

Article VIII. In cases where the question involved is one which concerns a particular state or territory of the United States, it shall be open to the president of the United States to appoint a judicial officer of such state or territory to be one of the arbitrators, under Article III or Article V or Article VI. In like manner, in cases where the question involved is one which concerns a British colony or possession, it shall be open to her Britannic majesty to appoint a judicial officer of such colony or possession to be one of the arbitrators under Article III, Article V or Article VI.

Article IX. Territorial claims include all other claims involving questions of servitude, rights of navigation and of access, fisheries and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the high contracting parties.

Article X. If in any case the nominating bodies designated in Article III, and V, shall fail to agree upon an umpire in accordance with the provisions of said article, the umpire shall be appointed by his majesty the king of Sweden and Norway. Either of the high contracting parties, however, may at any time give notice to the other that, by reason of material changes in conditions as existing at the date of this treaty it is of the opinion that a substitute for his majesty should be chosen, either for all cases to arise under the treaty or for a particular specified case already arisen, and thereupon the high contracting parties shall at once proceed to agree upon such substitute to act either in all cases to arise under the treaty or in the particular case specified, as may be indicated in said notice; provided, however, that such notice shall have no effect upon an arbitration already begun by the constitution of an arbitral tribunal under Article III. The high contracting parties shall at once proceed to nominate a substitute for his majesty in the event that his majesty shall at any time notify them of his desire to be relieved from the functions graciously accepted by him under this treaty, either for all cases to arise thereunder or for any particular specified case already arisen.

Article XI. In case of the death, absence, or incapacity to serve of any arbitrator or umpire, or in the event of any arbitrator or umpire omitting or declining or ceasing to act as such, another arbitrator or umpire shall be forthwith appointed in his place and stead in the manner provided for with regard to the original appointment.

Article XII. Each government shall pay its own agent and provide for the proper remuneration of the counsel employed by it, and of the arbitrators appointed by it, and for the expense of preparing and submitting its case to the arbitral tribunal. All other expenses connected with any arbitration shall be defrayed by the two governments in equal moieties. Provided, however, that if in any case the essential matter of difference submitted to arbitration is the right of one of the high contracting parties to receive disavowals of, or apologies for, acts or defaults of the other not resulting in substantial pecuniary injury, the arbitral tribunal finally disposing of the said matter shall direct whether any of the expenses of the successful party shall be borne

by the unsuccessful party, and, if so, to what extent.

Article XIII. The time and place of meeting of an arbitral tribunal and all arrangements for the hearing and all questions of procedure shall be decided by the tribunal itself. Each arbitral tribunal shall keep a correct record of its proceedings and may appoint and employ all necessary officers and agents. The decision of the tribunal shall, if possible, be made within three months from the close of the arguments on both sides. It shall be made in writing and dated, and shall be signed by the arbitrators who may assent to it. The decision shall be in duplicate, and one copy thereof shall be delivered to each of the high contracting parties through their respective agents.

Article XIV. This treaty shall remain in force for five years from the date at which it shall come into operation, and further until the expiration of twelve months after either of the high contracting parties shall have given notice to the other, of its wish to terminate the same.

Article XV. The present treaty shall be duly ratified by the president of the United States, by and with the advice and consent of the senate thereof, and by her Britannic majesty, and the mutual exchange of ratification shall take place in Washington or in London within six months of the date thereof, or earlier if possible.

In faith whereof we, the respective plenipotentiaries, have signed this treaty, and have hereupon affixed our seals.

Done in duplicate, at Washington, the 11th day of January, 1897.

JULIAN PAUNCEFOTE.  
RICHARD OLNEY.

#### GRAND JURIES.

When people contend that grand juries have outlived their usefulness and hinder rather than further reform, they forget what a comfortable and satisfying thing a grand jury is. For example, something goes wrong municipally or some corporation or other abuses its power at the expense of the community, and public-spirited citizens feel that something ought to be done. Now, that conceded, what ought to be done must be done either by themselves or somebody else. They are too timid or too lazy to do it themselves and yet, to so acknowledge to themselves would be irritating and perhaps humiliating. But when they can say that the grand jury ought to see to it they at once relieve their respective consciences, and can lay the blame on the grand jury when it is not done. Again, it is such a handy body to have around. When a man wants to stab a fellow-man in the dark, he slips in under the secret wing of the grand jury and sends the knife home, and comes out and joins the crowd, and is the loudest in proclaiming the outrage that has been done an upright citizen by the return of an indictment against him by that star chamber body.—*The American Lawyer*.

#### WAGES UNDER PUBLIC AND PRIVATE CONTRACT.

Ethelbert Stewart, in the *Bulletin of the Department of Labor*, Washington, Condensed for *Public Opinion*.

THE statistics which follow are the results of an original investigation in the cities of Baltimore, Boston, New York and Philadelphia, as to the wages paid, first, to those engaged on public work, employed directly by the city or State, to those engaged on public work employed by contractors, and, third, to those engaged on private work employed by contractors or firms. The rates given in these three divisions are not only for the same occupations, but these occupations represent similar work so far as it was possible to obtain such data. In Baltimore, blacksmiths employed on public work directly by the city or State, working 54 hours per week, were paid from 22½ to 30½ cents per hour. Those employed on public work by contractors, worked 60 hours per week, but were paid lower wages—from 17½ to 26 cents per hour, the majority being paid 22½ cents per hour. Those employed on private work, by contractors or firms, working 60 hours per week, were paid, also, from 17½ to 26 cents per hour, the majority being paid 22½ cents. In this manner each of the occupations for which data are given may be analyzed and comparisons made. Carpenters on public work employed directly by the city or State, were paid a maximum wage of 83½ cents per hour, the lowest wage paid being 27½ cents per hour, while the average was 82½ cents per hour. Carpenters on public work employed by contractors, were paid as much as 31½ cents per hour, and as little as 22½ cents, the average wage per hour being 25½ cents. For those working at the same occupation employed on private work by contractors or firms, a maximum of 28 cents and a minimum of 18 cents per hour were paid, the average being 26½ cents.

It is strongly asserted in some quarters that the tendency of letting public contracts to the lowest bidder is to lower the wages of labor; that the lowest bidder is, generally speaking, the man who pays lowest wages or expects to use poorest material; that the idea that the lowest bidder is the one willing to accept least profits for himself is erroneous. The legislature of the State of New York seems to have been convinced of the tendency of the contract system to lower the rates of wages, and in 1894 passed a law that all contractors on public works, State and municipal, must pay the prevailing rate of wages in the locality in which the work is being done. An inquiry as to whether or not the inspectors on public works were expected to enforce this clause was answered by the statement that its enforcement was left to the trades unions and working people in whose interest the law was enacted.

A glance at the tables will show that the highest rates of wages paid to unskilled labor are paid to those employed directly by the municipality or State. This is, generally speaking, true also of the skilled trades. Some of the exceptions will be noted further on. With the exception of Boston, all cities included in this investigation fix the rate of wages paid to unskilled labor by ordinance or, as in the case of New York city, by State law. The city of Baltimore, by an ordinance passed May 1, 1883, provides that the pay of all laborers shall be ten dollars per week. The law also fixes the hours of labor, which must not exceed nine in any one day, and provides that all city employes must be citizens and registered voters. Philadelphia fixes the rate of pay for laborers at \$1.75 per day of nine hours, except for those employed in the public parks. In its annual appropriation ordinance it has a most elaborate scale, fixing the rate of wages for nearly every trade and occupation employed by any of the city departments. These rates are the maximum union rates in cases of organized trades, and corresponding rates for other occupations. The same may be said of the laws of New York fixing rates of wages to be paid by New York city.

As a general statement it may be affirmed that the public, when employed directly by the day, pays the highest prevailing rate of wages for the shortest prevailing day's labor. This is especially true of the United States government, where in the navy-yards of Boston and Brooklyn the highest outside rates for a 10-hour day are made the prevailing rates for an 8-hour day. Certain apparent exceptions to this rule have been omitted from the tables, as without an explanatory note in each case some misunderstanding might arise, and because they become, upon examination, not really exceptions. For instance, the city gas works of Philadelphia employs bricklayers at a rate considerably below the prevailing one. These men, however, work steadily or are paid in the absence of work—that is, they lose no time. The superintendent states that these men were given their choice of the maximum union rate of \$4.05 and take work when they could get it, or \$3 per day and steady employment. It will be readily seen that yearly earnings would be greater at the lesser daily rate. Probably the highest wages paid (in the occupations employed) are those paid by the trustees of the New York and Brooklyn bridge, being considerably higher than wages in like occupations by private concerns. Yet the trustees of this bridge have been enabled to reduce fares continuously, to abolish tolls for pedestrians, and magnificently improve the plant.

The city of Boston sprinkles its own streets by day labor, having practically abandoned the contract system for this work. In the annual report of

the street department the superintendent gives the total saving in the day work over contract work in 1894 at \$4,294.52. It is to be regretted that a minute and satisfactory statement of the cost of sewer construction, excavation, etc., could not be obtained in Boston, where an enormous amount is being done under both systems. The work performed by day labor is, however, generally experimental, and even where the conditions were practically similar no accounts that could be used for comparison were obtainable. One very significant statement was, however, made by the secretary of the metropolitan sewer commission to the effect that one piece of sewer had been constructed entirely by day labor, because it undermined some private property, and notwithstanding their inspection the commissioners were afraid to risk the contract system because of the heavy damage suits that might result from faulty work.

#### LAWYERS AS LEGISLATORS.

AN extraordinary complaint comes from New Hampshire—that the legislature which has just assembled has not lawyers enough to fill the place on committees that require the services of members of the bar. There are but three lawyers among the twenty-four members of the senate and only nine among the 357 representatives, whereas it has been customary to place ten or eleven lawyers upon the judiciary committee of the house, and they have also been thought necessary upon the committee on revision of the statutes and as chairmen of the elections committee. Except in the cases of two or three Populist legislatures, where the prejudice of that party against the legal profession found expression, we do not recall an instance where a complaint of the dearth of lawyers in such a body has been heard. The usual complaint of the farmer is that there are too many lawyers. It seems that the present situation in New Hampshire is only the culmination of a tendency which has been observed for some years. One reason is that the sessions come at a time when courts are held in some counties, and work must be prepared for courts that sit later in other counties, so that lawyers with plenty of business are not inclined to give the time to legislative service that is required. Constituencies are also less disposed now than formerly to re-elect a member, and the average lawyer is less tempted to go to the legislature when he can generally expect to serve only a single term.—*The Nation*.

The Springfield *Republican* is rough on the lawyers of the Massachusetts legislature. Having discovered a few more of them than usual in that body this year, it proceeds to say: "There will be more wrangling, more pettifogging, more junketing,

more fussing over legal forms, more padding of statute forms, more evolution in phraseology, more involution in expression, more sunken pits in the enactments for courts and people to fall into and get lost, and a bigger blue book." The *Republican* finds in the farmers the natural antidote to this kind of work, and regrets that there are so few of them to undertake it.—*Boston Herald*.

#### REGULATING COLLEGE DEGREES.

NEW YORK State has set an example to every State in the Union by the summary regulation of questionable college degrees. Under legislation passed a year ago the regents of the State University last November provided that in future no university or college in the State should be permitted to confer the degrees Ph. D. or B. A. as an honorary degree. These decrees in New York State in future will stand only for both study and residence as far as the institutions of the State are concerned. The reprehensible practice, only too prevalent in this State, of conferring Ph. D. on men who have taken none of the rigorous courses usually required by this degree and always associated with it in the minds of those familiar with education, is prohibited altogether.

Going a step farther, the regents prohibit granting of honorary degrees at all except institutions whose study, standards and position give a fair guarantee that these honors will be well used and wisely applied. The interesting case in this State where a "college" had a corps of teachers composed of a man and his wife and the announcement was made in the "college" catalogue that the degree of LL. D. had been conferred on the "president" of the "college" by the unanimous vote of the "faculty," could not now occur in New York State, though it may here any time.

In addition, and still more important, the New York regents have restricted the use of the words "college" or "university" to institutions approved and sanctioned by the regents. Every "business college" in New York will, within a suitable time, have to change its name and title to "school." "Bank" and "insurance company" are terms which in most States, though not in this, are prohibited to individuals or corporations whose solvency and character do not reach a certain standard. There is exactly the same reason for regulating and restricting the use of the word "college" in education. It is a public injury to have it used by institutions which are not really furnishing a college education.

New York professional schools have already found their attendance increased by the stringent regulations imposed on them. In education the public

will always pay for the best if the public once learns where the best is to be had. If this State wants to keep at home the hundreds who now study in colleges and professional schools elsewhere it must give this State University Council the power to regulate the promiscuous granting of degrees, honorary and otherwise, which now make the higher education of this State of less repute than that of New York and Massachusetts. Over 180 institutions can grant degrees in this State. Many of them use their powers with a due sense of responsibility; but all of them would be the better for regulation and restriction. In a certain number of instances the legislature could not repeal vested charter rights; but even these the lawmaking power can regulate in the public good and place under suitable registry, inspection and report. This would do something, and with more recent charters more stringent regulation would be feasible. Until this is done the higher education in this State will be disgraced by many anomalies and by many questionable degrees, both in course and honorary.—*Philadelphia Press*.

#### CONFLICT OF AUTHORITIES RESPECTING COMMERCIAL PAPER.

Now that the legislatures of the different States have convened, it is important that the American Bar Association and the bar associations of the different States and credit associations should bend all of their energies in the direction of establishing a uniformity in the law in some one of the many subjects so seriously affecting commercial life. Among the many of such unsettled questions none is of more importance, none that has caused such hesitancy, doubt and uncertainty to exist among bankers, credit men and the commercial world generally, than the liability of banks taking deposits for collection. Nothing has tended so much to clog the wheels of the great banking system as the existence of one rule of law in one State fixing the liability of a bank forwarding collections, and another rule in another State holding the opposite, and the Supreme Court of the United States holding, with a few of the States, a certain rule, which is declared by others of unsound and unsatisfactory reasoning. What wonder then that banks hesitate before accepting paper or incurring responsibility when the courts of our States differ so widely upon a question that ought long ago, in justice and equity to the commercial world, to have been settled on a uniform rule. A banker accepting deposits for collection is about as certain in the liability he is incurring as he would be of winning a bet on which side a rooster on a fence would jump, or what the verdict of a jury in a criminal case would be.—*The American Lawyer*.

## LEGAL NOTES OF PERTINENCE.

The Nicaragua Canal bill appears to have small chances of getting through either branch of congress at this session.

The next meeting of the National Prison Association of the United States will be held at Austin, Tex., some time in October. Hon. John D. Milliken of Kansas, ex-Gov. Hogg of Texas, and ex-Justice Lyon of the Supreme Court of Wisconsin were recently elected Committee on Criminal Law Reform.

The time for holding the meeting of the American Bar Association is Aug. 25, 26 and 27, and the place Cleveland.

An unusual suit, which will be watched with interest all over the United States, has been filed at Henderson, Ky. The point involved is raised for the first time. The State seeks, under the alien land law, to reclaim property valued at \$30,000, because the owner afterward became a subject of Great Britain, the contention being that he thereby forfeited his right to own property in the United States.

David J. Dean, first assistant to the council of the corporation of the city of New York, died Sunday night in San Antonio, Tex., while on the way to Arizona, where, on the advice of his physician, he proposed spending the winter. He had been suffering for more than five years with consumption and diabetes, and had twice sought relief at the Carlsbad baths.

In sentencing Paul Tonetska to four months' imprisonment in the county jail, Judge Ikeler, at Danville, Pa., delivered a remarkable judicial utterance in order to impose the strictest penalty upon the prisoner. The judge instructed the sheriff to make Tonetska's imprisonment "as hard as possible, and to allow him to receive only enough food to sustain life" as long as he remained in jail.

The new year was only seven days old when eight murders had been committed in South Carolina and two men had been lynched. If the same average should be kept up for the whole year, South Carolina would have during 1897 over 400 murders and 100 lynchings. There is no probability that the number will be so large, but it will certainly be large enough to keep that State well to the front in the murder and lynching record. During 1895 and 1896, South Carolina's average was over 200 murders a year, and only five or six of the murderers were hung.

According to the new metropolitan valuation list the gross value of London has now reached the enormous total of £48,461,738 3s., the net value being £36,115,407 10s. The previous one was, gross, £41,239,847 12s., net being £34,230,334 15s.

This list shows a decided advance in respect of government property, which at last seems to be going to bear its fair share of the rates. An example of this is shown in the parish of Islington, where the figures in April, 1895, were £4,189, and are now shown as £10,391. In St. George's, Hanover square, there is an increase under this one head of £4,292. In the parish of St. Margaret and St. John, Westminster, the figures show a still greater disparity, as in 1895 government property was valued at £52,828, whilst at this time it is shown at £89,159.

An interesting decision has just been given by the French Court of Cassation on the question whether a husband has the right to attach the condition to the inheritance to his fortune that his widow must remain unmarried. Madame Fauquet, of Lisieux, opposed the validity of this condition on the ground that it was contrary to public order and morality, lost her case at Lisieux, won her appeal at Caen, but has just lost it again by the final decision of the Paris Court of Cassation. It was the cousins of Madame Fauquet who supported the validity of the will.

A bill has been introduced in the house conferring upon the Court of Appeals of the District of Columbia jurisdiction over suits brought by the United States to enforce or obtain relief upon liens on railways and their property, and giving to the court power to order the sale of the property to protect the interest of parties who may be concerned.

The theft by a cashier of securities held by a bank as a special deposit was held, in *Gray v. Merriam* (Ill.), 32 L. R. A. 769, to make the bank liable, if it had permitted him to have access to them after he was known to be speculating on the board of trade, and had accepted his statement that he was using his own money, without knowledge that he had anything except his salary.

Setting fire to one's own dwelling house is held, in *State v. Sarvis* (S. C.), 32 L. R. A. 647, not to be arson, either at common law or under a statute making it arson to set fire to "any house," even when the property is insured. When setting fire to one's own building will constitute arson is the subject of a note to the case.

A drawee bank which pays a draft relying on a forged endorsement thereon of the name of a fictitious person to whom the payee indorsed it innocently as the result of a fraud practiced upon him is held, in *Chism, C. & Co. v. First National bank* (Tenn.), 32 L. R. A. 778, to be liable to the payee.

A lessor's mortgage of his interest in crops raised by a tenant on leased land and still in possession of

the tenant and undivided is held, in *Riddle v. Dow* (Ia.), 32 L. R. A. 811, to give the mortgagee a right paramount to that of the mortgagor's creditors under garnishment proceedings subsequent to the mortgage.

The Court of Criminal Appeals of Texas has lately held, in *Cline v. State*, 36 S. W. Rep. 1099, that the provision of section 10 of the bill of rights (substantially identical with the provisions of other State constitutions), that in all criminal prosecutions the accused shall be confronted with the witnesses against him, refers to the prosecution by "public trial" before the "impartial jury" also guaranteed him by the same section; and in view of that provision, and the declaration of section 29, that "everything in this bill of rights shall forever remain inviolate and all laws contrary thereto \* \* \* shall be void," neither court nor legislature can legally authorize the reading in evidence against the accused on his trial of testimony given by the witnesses on another hearing, whether at the trial in court or before an examining magistrate, even upon a showing that such witnesses are dead.

The house committee on judiciary has been discussing Senator Hill's bill "to prevent government by injunction" and will be ready to report to the house in a few days. The intent of the bill, as it passed the senate, was to put a limit on the power of federal judges to punish for long range contempt. It met with very little opposition in the senate, but a disposition has been developed in the house committee to tack on amendments which will prevent the passing of the measure this session. The amendment which the committee seems determined to add, and which is looked upon as tantamount to defeat, is one relieving from direct and peremptory jurisdiction of the court persons cited for contempt in failing to obey subpoenas. The indications point to the death of the Hill bill by being loaded down with dangerous and offensive amendments.

In England last year the total convictions for drunkenness were 140,064, or 7,300 fewer than during the preceding year. The convictions of license-holders for permitting drunkenness or selling to intoxicated persons were 691, in 1895, as against 744 in the year previous. In Wales there was a corresponding decrease, or 11,253 convictions for drunkenness in 1895, constituting about 1,000 fewer than in 1894. There were also 63 convictions of license-holders in 1895, against 78 in the year before, a diminution of 15.—*British Medical Journal*, London.

There are, of course, numerous cases in which the courts have presumed that a woman is past child-bearing on the ground of old age. There are also a

few in which medical evidence has been admitted, such as *Re Summer's Trusts* (22 W. R. 639). But until last Saturday it is believed that the court was never asked to make the corresponding presumption in the case of a man. In *P. v. N., North, J.*, was asked to pay a fund out of court on the assumption that a man of seventy-two would have no more issue, and medical evidence was tendered in support of the application. North, J., refused to make any such presumption or to look at the evidence in support.—*Solicitors' Journal* (London).

At a meeting of the Royal Statistical Society the Rev. W. D. Morrison read a paper on "The Interpretation of Criminal Statistics." In the course of a discussion which followed the paper, Mr. Macdonnell said that it was difficult to compile statistics, more difficult to arrange them, and still more difficult to interpret them. Mr. Morrison had laid most stress on indictable offences, but those formed only a portion of the vast region of crime. The only way was to look at the whole domain of crime; and then certain difficulties appeared to the conclusions at which Mr. Morrison had arrived. For instance, the total convictions for 1894 were 553,442. Of these, 159,600 were for drunkenness, 68,426 for offences under the Education Act, 19,900 for obstruction of highways, etc., 64,980 for breaches of police regulations and 10,950 for begging. Together those represented more than 60 per cent of the total, and the larger proportion could only in a technical sense be regarded as crimes. Many of the returns of crime, therefore, referred to offences which implied no moral depravity. Another qualification that should be insisted upon was that every year the number of misdemeanors was increasing. The increase in the number of statutory offences which had taken place within the present reign meant that the possibility of committing offences had been enormously increased. Then, again, as regards the most serious crimes, indicative of real wickedness, there has been a very remarkable decrease. But two deplorable facts had been established. First, that there was an enormous increase in crimes of all kinds committed by persons between eighteen and twenty-one; and, secondly, that there was a marked increase in the number of habitual offenders.—*Solicitors' Journal* (London).

The Sherry dinner episode in New York is playing to a packed court-room. An enterprising theatrical manager offers to furnish a theatre for the trial and pay the participants \$2,000 per diem to give their testimony on the stage. He calculates that tickets of admission would fetch from \$5 to \$10 each, and that they would be scarce at that.

### Notes of Recent American Decisions.

**ACCIDENT INSURANCE POLICY — VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.**—A policy of accident insurance providing that the insurance does not cover death or injury resulting wholly or in part, directly or indirectly, from exposure to unnecessary danger, must be construed as including all cases arising from such exposure or unnecessary danger where such exposure is attributable to the failure on the part of the insured to exercise ordinary care.

**SAME—SAME—EVIDENCE.**—Where a policy of accident insurance does not cover death or injury resulting from exposure to unnecessary danger, the act of the insured in jumping from a rapidly moving freight car, without any reasonable cause therefor, on a dark night, is an act of gross negligence precluding recovery under the policy for the injuries received.

**SAME—SAME—SAME—QUESTION FOR COURT.**—In an action to recover on a policy of accident insurance, which provided that the insurance should not cover death or injury resulting from exposure to unnecessary danger, the answer alleged that the death of the insured was caused by an action within such exception. A witness testified that in company with the insured he climbed upon a rapidly moving freight car at a certain junction, to ride to a station near by; that they agreed that if the train did not stop at the station they would jump off; that as the train approached the station its speed increased, and that the witness jumped from the car; that he did not see the insured jump, but on walking toward the station he found the insured lying by the side of the track with his skull fractured. *Held*, that, in view of the undisputed evidence, it was error for the court to submit to the jury the question whether the insured jumped or fell from the car. Judgment for plaintiff below. Here reversed in favor of company. (*Shevlin v. American Mutual Acc. Ass'n* [Wis. S. C.]; 68 Northwestern Reporter [Nov. 21, 1896], 866.)

**DELIVERY OF DEED — WAIVER OF VENDOR'S LIEN — ESTOPPEL AS AGAINST INNOCENT MORTGAGEE.**—In *Shultz v. Colvin*, decided by the Supreme Court of Ohio in December, 1896 (45 N. E. R. 527), the following is the official syllabus.

"1. A vendor who takes a mortgage on the premises, including other lands of the vendee, thereby waives his lien for the purchase money.

"2. Where an owner of land, under a verbal agreement for the sale of it, places the purchaser in possession and executes a deed and places it in the hands of a third person, with direction to deliver it on the purchase money being paid or secured by mortgage, and the grantee induces the holder of the deed to deliver it to him that he may exhibit it as

evidence of title, and the grantee does so, to one ignorant of the facts, and who, in good faith, makes him a loan secured by mortgage on the property, the grantor in such case is estopped from setting up his claim to the land or a lien on it for purchase money against such innocent mortgagee. (*Ogden v. Ogden*, 4 Ohio St. 182, distinguished).

"8. The rule that one who would avail himself of an estoppel must plead it is fairly complied with where, upon the whole case made by the pleadings, it appears that the party intends to rely on it, if certain facts averred by the other party and denied by him for want of knowledge are made to appear; and in any case the rule only applies where the party has had an opportunity to plead it."

**DEED—DELIVERY.**—In *Stout v. Rayl*, decided by the Supreme Court of Indiana in December, 1896 (N. E. R. 515), it appeared that one S. delivered to his wife deeds executed by him and her, with directions to keep them until his death, and then deliver them to W. The deeds were placed in an envelope and indorsed "Deeds to be delivered by W. after my death," and on each deed were the words "After my death, this deed to be delivered by W." After S.'s death, W. delivered the deeds to the grantees named therein. It was held that there had been a legal delivery of the deeds, and that the transaction was not invalid as an attempt by the grantor to make a testamentary disposition of the land without the legal formalities of a will.

### New Books and New Editions.

#### BENDER'S LAWYERS' DIARY AND DIRECTORY FOR 1897.

We are pleased to again receive an early copy of this book, which has proved of so much service and value during the past year. The general scheme of the book is particularly useful to lawyers, as it contains so much that is of every day use. The work not only contains the assignments and terms of the courts of this State and the United States courts, but also under each day in the year gives the terms of the courts which are to be in session. The book also contains the judiciary article of the Constitution of the State of New York, the Supreme Court rules and a very excellent index of the rules, together with the special rules of practice used in the first and second departments. Much other interesting and valuable memoranda, too numerous to set forth in this brief review, will also be found between the covers of this book.

The Lawyers' Directory especially excites our praise, because the street addresses of lawyers in New York city and in Brooklyn are given. Altogether the work is most practical, and is more useful than any of the preceding editions.

Published by Matthew Bender, 511-513 Broadway, Albany, N. Y.

# The Albany Law Journal.

ALBANY, JANUARY 30, 1897.

## Current Topics.

AFTER long agony and many convulsions, the *State Reporter* has at last gone to its long rest. Why it should ever have been started has never been known, and why a more hasty and quick consumption has not taken it off years ago is equally unaccountable. It has left its subscribers with quite a lapse of decisions that would make between two and three large volumes (larger than any volume that has been published in the series); so that now the subscribers will have to come back and buy (which they should have done in the first place), the Combined Official series. It would be well for the profession to "fight shy of" all these "seaside editions" of reports that have no official existence, for they are sure to be caught, just as they have been, in this last gasp of the *State Reporter*.

The Appellate Division of the Supreme Court, Fourth Department, at its last session in December, handed down an opinion of much interest to newspaper publishers, reversing the trial court and ordering a new trial in the case of Tyndale Palmer v. E. P. Bailey & Co. This was an action for libel brought against the publishers of the *Utica Observer*, and tried last March. The defence was a plea that the charges were true, or justification; and the verdict was in favor of Mr. Palmer for \$25. From this verdict he appealed.

Aside from the general interest shown in the decision, the matter demands some notice at our hands because of editorial comment by our predecessors in management of THE ALBANY LAW JOURNAL immediately after the trial of the case, certain expressions of which may have tended to reflect upon Mr. Palmer or may have appeared to suggest that the charges made by the *Observer* were, in fact, true. In order that any such impression, if it was conveyed, may be entirely removed, we publish the following extract from the Court's opinion:

"Upon the trial the defendant endeavored

VOL. 55 — No. 5.

to make good its defence of justification, and also to prove facts by way of mitigation. \* \*

"Upon reviewing the record furnished us, we are so impressed with the necessity of directing a new trial, in consequence of error committed by the trial court in the admission of incompetent evidence which bore upon the defence of justification, that we pass at once to the consideration of the exception which presents the error we have in mind.

"In considering this subject it is to be noted that while facts are alleged in the defendant's answer with the obvious design of establishing the truth of the entire article published, the justification attempted upon the trial was not as comprehensive in its scope as were the facts alleged. \* \* \* Some evidence was, however, offered by the defendant which it was claimed by the defendant did legitimately tend to prove the truth of the main charge, to wit: That the plaintiff, in company with one DeFreitas, stole from the American Welsbach Incandescent Light Company the sum of \$440,000. This evidence consisted solely of the testimony of a witness by the name of Herbert E. White, who was permitted, over the plaintiff's objection, to swear that he was sent to Rio Janeiro by his brother who was the superintendent of the Incandescent Light Company, and that while there he examined the books of the "Banco Septentrional," which was the successor of the South American Welsbach Incandescent Electric Light Company, and that he learned from such examination that this company had paid for the Welsbach light patent somewhere in the neighborhood of half a million dollars. The same witness was in like manner permitted to repeat statements there made to him by one Chaves, an officer of the company, relating to the money paid and the disposition made thereof, but he likewise testified that there was nothing, either in the books, or in the declarations of Mr. Chaves, which connected the plaintiff in any manner with the transaction. When this evidence was first offered it was duly objected to by plaintiff's counsel, whereupon the court asked the defendant's counsel whether it was offered upon the theory of justification or mitigation? The latter replied that he offered it for the purpose of establishing a justification, so far as he could, and also as bearing upon the defendant's good faith in the conduct of the action.



"We have made careful examination to discover, if possible, any evidence which can fairly be regarded as sustaining the plea of justification, but we find none, save that furnished by the witness White, and this, we think, is hardly sufficient for that purpose. That it was clearly incompetent we entertain no doubt, for, at most, it was merely heresay, and did not in any way tend to connect the plaintiff with the matters testified to. It might possibly have been admissible as bearing upon the good faith of the defendant in interposing the defence of justification (*Youmans v. Paine*, 86 Hun, 479; *Marks v. The Press Publishing Co.*, 134 N. Y., 561), had it been limited to that object; but it will be seen by reference to the charge, that the learned court instructed the jury that there was evidence in the case for them to consider upon the question of justification, and as this was the only evidence which had even a remote relation to that subject, it follows that improper use was made of the same."

Thereupon, the judgment and order of the court below were reversed, and a new trial was granted — all the justices of the Appellate Division concurring in this decision.

The choice by the legislature of Chester Sanders Lord to the vacancy in the Board of Regents in the New York State University is a fitting compliment to one of the ablest and most gracious men who ever occupied the chair of managing editor. For more than sixteen years he has held that relation to the New York *Sun*. And it is no abridgment of the praise due Dr. Dana for the brilliant record of his great newspaper to say that his chief assistant has done much of the labor and deserves much of the laurel. The son of a Presbyterian clergyman, who was a fighting chaplain in the civil war. Mr. Lord unites, like his father, the probity and pugnacity of puritan and patriot. That he has social gifts and artistic sympathies of a rare type let the esteem of the Lotus club, of which he is secretary, be a sufficient testimony. A marvel of industry and of discretion, he has the complete confidence of his chief and of his own subordinates in the *Sun* editorial sanctum; while his wide reading and generous nature make him welcome socially wherever culture, geniality and high character have a home. This, of course, is the personal side of

the nomination. His literary tastes and his keen interest in educational work will make him an ornament as well as a help to the Board of Regents. No man in the State is better fitted for such responsibilities.

Governor Black's reference, in his first annual message, to the subject of biennial session of the legislature, and the undisguised favor with which he regards the proposition, calls attention to the fact that an attempt will be made in the New Jersey legislature to pass a constitutional amendment with that end in view. If the efforts in New York and New Jersey are successful, and the people ratify the proposition at the polls, there will then be only four States in the Union having annual legislative sessions. Thirty-nine of the forty-five States now have biennial sessions, and we have heard no complaint from any of them that the business of the State is not properly attended to. Of all the States which, since the movement for fewer legislative sessions began, have made the change, only one — Georgia — has gone back to annual sessions, which may properly be regarded as pretty good proof of the superior advantages of the plan.

Mrs. Clara Foltz, a well-known member of the New York bar, and a frequent contributor to the newspapers and periodicals, is just now deeply interested in enlisting support for a measure which it is proposed to introduce in the legislature. It is entitled: "An act to create the office of Public Defender, provide for his election, define his duties, and fix his compensation in the several counties, and cities and counties of New York." With Mrs. Foltz, who is an alert, studious and progressive lawyer, as well as a humanitarian, this subject is a hobby. It has been constantly in her mind for several years, and like Banquo's ghost, it will not down. She has thought it out, considered the question in all its aspects, and declares that the more she has pondered the more convinced has she become that some radical reform in the matter of furnishing proper defence for impecunious persons accused of crime is a duty of the State. Her ideas have been formulated in the following bill:

*The People of the State of New York, represented in Senate and Assembly, do enact as follows :*

SECTION 1. There shall be elected by the qualified electors of each county or city and county, at the general election to be held in the year 1897, and at the general election every third year thereafter, a public defender, who shall hold office for three years from and including the first day of January next succeeding his election.

§ 2. Any person duly admitted to practice as an attorney and counsellor-at-law in this State, and who has been a resident of the county or city and county for one year, shall be eligible to the office of public defender, and no person not possessing the said qualifications shall be eligible.

§ 3. The public defender, when authorized by the Board of Supervisors, Board of Aldermen, or other legislative body of any county or city and county in which he is public defender, may appoint one or more assistants. Every assistant public defender shall be an attorney and counsellor-at-law in this State, shall be a resident of the county or city and county in which the service is to be performed, and shall take and file the constitutional oath of office before entering upon his duties. When similarly authorized, the public defender may appoint clerks or other employes. Every appointment made by the public defender shall be in writing and filed with the county clerk, and may by him be revoked by a writing similarly filed.

§ 4. It shall be the duty of the public defender to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them ; also, to attend the courts and boards of charities and appear for and in behalf of all persons charged with being insane or lunatic.

§ 5. The public defender of any county or city and county in which a capital or other important criminal action is to be tried, may, with the approval of a judge or justice of the court in which the action is to be tried, which approval shall be filed with the county clerk, employ counsel to assist him on such trial ; and the costs and expenses thereof, duly certified by the judge presiding at the trial, shall be a charge upon the county or city and county in which the indictment was found or information filed.

§ 6. The Board of Supervisors, Board of Aldermen, or other legislative body of the county or city and county, shall provide suitable rooms for the use of the public defender, and shall fix his salary or compensation and that of his assistants and employes, and the same shall be a charge upon the county or city and county.

§ 7. Nothing in this act shall be construed to prevent any person from employing special counsel to defend him, or to limit his right therein, and such special counsel may appear and defend him alone, or may join therein with the public defender, at the option and discretion of the defendant.

Mrs. Foltz argues very plausibly, and with all the earnestness and enthusiasm born of sincere conviction, in favor of her pet measure. In her view, the State is far more interested, or should be, in saving an innocent man from unmerited punishment than in the conviction of a guilty one ; the innocent ought to be the special care of the law, in whose eyes, she points out, every man is innocent until proven guilty ; and one would expect to find, in the criminal court, a machinery for defence quite equal to that of the prosecution. But the facts, she says, are quite otherwise. The public prosecutor is not only, as a rule, selected for his skill in securing convictions, alert in mind, learned in the law, and experienced in practice, but has behind him an army of police officers and detectives, ever ready to do his bidding, while before him sits a judge with large discretion, and often affected by newspapers and police officials to the injury of the prisoner. On this phase of the subject, Mrs. Foltz says:

"Not only is machinery for the prosecution provided, but it is most effectively operated. The prosecuting attorney is usually imbued with the idea that he must convict at all hazards, and this idea takes deep root, because, in many instances, the State pays him a money bonus for each conviction. He misrepresents the facts he expects to prove, attempts to get improper testimony before the jury, garbles and misstates what is allowed, slanders the prisoner, browbeats the witnesses, all from the mistaken notion that it is the duty of the State to convict whoever is arrested. A police, impelled by vanity to justify its arrests, and inoculated with the error that it is the State's desire and duty to convict in any event, aids in the prosecution by colored testimony and overawing presence." \* \* \* \* \*

"Frequently, hired counsel are joined in the prosecution, counsel in no sense representing the majesty of the State, but rather the malice of a prosecuting witness, whose pride and vanity urge him to pay for a conviction to which he may point as a justification of his charge, and

over which he may gloat in the unholy pleasure of his revenge. When this mesalliance of the State's justice and the revenge of little minds is made, then no pack of blood-hounds ever pursued a fleeing fugitive with more relentless vigor than do these officers and allies prosecute their victims. Trials which should be calm and solemn investigations, unmarked by prejudice and untainted by rancor, degenerate into a legal battle in which the highest personal rights are subordinated and trampled under foot in the reckless desire to win. For the conviction of the accused every weapon is provided and used, even those poisoned by wrong and injustice. But what machinery is provided for the defence of the innocent? None. Absolutely none. For its lesser duty of convicting the guilty it maintains a policy army and gives access to the public funds; for the higher one of the defence of the innocent there is neither counsel, nor officer, nor money. It was not always so. One hundred and fifty years ago, when the death penalty for one hundred offences disgraced the Penal Code, when the circuit judge in his rigorous enforcement of a cruel law, was the herald of a hundred hangings, even then the accused was not without a defender, at least in name, for the law made it the duty of the State's attorney to produce all the facts both for and against him, and of the judge to see that his rights were preserved to the uttermost; so that the judge announced himself as the counsel for the prisoner. But times have changed. The State's attorney, once equally interested in the State and the accused, has so become a prosecutor that his very name is changed in common legal parlance to that of public prosecutor. The judge declines in every instance to interfere in behalf of the prisoner unless specially requested and urged to do so. The old defensive machinery is gone. There has been none supplied to take its place, and the accused is thrown back on his original natural rights — the great right of self-defence. In his hour of need and peril — an hour when before him stands all the menacing machinery of the criminal law, when he is deserted by friends and assailed by foes; when, if ever, the State should lend him its protection, — the law relegates him to his savage state, and tells him, as if conferring a mighty boon, that he may have the pitiful privilege of

defending himself if he can. In criminal trials as at present conducted, particularly under the vicious notions that prevail among the public officers without regard to the State's duty toward the accused, counsel for the defence is an absolute essential to the just examination of a case. A trial without it would be little less than a farce and would be regarded as an invitation to the jury to convict. So true is this, so clearly did justice demand counsel for the defence, that the right to it is secured by Federal and State constitutional guaranty. It being necessary to justice in the trial of a cause, we would naturally look for it, as one of the essentials provided by and in a court of justice; but we do not find it.

"The unfortunate prisoner is not denied counsel, however; he is merely told that he may supply this essential to justice if he will but pay for it. If he is able to hire counsel he must do so or go without, and thereby go without justice. While he has the means to procure counsel the law compels him to procure his own. No matter what financial hardship or disaster may follow, he must pay for his defence. It may ruin his business, impoverish his family, and make his wife and children objects of charity, merely to escape the malice of an enemy in the form of a prosecuting witness. Every criminal lawyer knows of scores of instances and illustrations of this fact. If he is not able to hire counsel, if he pleads his poverty and announces himself a pauper, then, generally, it becomes the duty of the court to appoint counsel for him. Do not imagine, however, that this counsel is free. It is not. The accused is under actual legal obligation to pay for it, and if he ever gets any property the lawyer can enforce the payment for his services. The most that can be said for this system of furnishing counsel, is that it is a system of compulsory credit, by which the legal profession is compelled to give credit to the pauper. Without detracting from the able men who sometimes do offer their services in behalf of a poor prisoner, the rule is that court appointees are wholly unequal to the public officer with whom they are to cope. Those whose ability commands a law business are seldom chosen. The appointees come from the failures of the profession who hang about courts hoping for a stray dollar or two from

the unfortunate, or from the kindergartens of the profession, just let loose from college and anxious to learn the practice. They have no money to spend in an investigation of a case, and come to trial wholly unequipped, either in ability, skill or preparation, to cope with the man hired by the State, who marshals the evidence for the prosecution. The defence, at most, is a sort of a perfunctory one. It is wholly inadequate to the requirements of the case. It is but a shadow of the substance sought for. The prisoner has asked for bread and has received a stone. He is usually relieved from paying bread prices for stone, however, for he is generally convicted and the statute of limitations has run against the lawyer's claim by the time he gets out of prison.

"Let me say again that a large percentage of those arrested for crime are proven not guilty, and all are presumed to be so during the trial and are entitled to be treated as innocent men. The only justification for any other treatment is the doctrine of necessity. We may detain, using as much force as is necessary, but only where it is necessary to secure the presence of the accused. Out of the presumption of innocence grows the right to bail, and necessity is the only justification of even a bail bond. So that at the trial every person accused of crime is rightfully regarded as innocent and entitled to treatment as such. This system of compelling the innocent (for they are innocent) to hire counsel works untold evil. It places in the hands of the malicious and designing a weapon by which they can work ruin upon the victims of their spite. Every lawyer knows that, hundreds of arrests are made for no other purpose than to worry, harass, annoy, disgrace socially and bring financial disaster upon the accused. Under this system trials cease to be judicial inquiries with a view to justice, and become acrimonious contests of men striving for verdicts."

The remedy for many of the evils of the present criminal court practice, Mrs. Foltz thinks, lies in the election or appointment of a public defender. The chief and highest function of the government being to secure the lives and liberties of its people, it is the duty of the government, under its implied contract, when the rights of a person are assailed, to provide him defence.

The subject being one of great importance, involving the personal rights and liberties of citizens, and Mrs. Foltz's idea being new and original, the LAW JOURNAL has thought fit to give the substance of her argument, and the text of the proposed law, in order to obtain the views and opinions of lawyers and laymen as to the advisability of inaugurating this innovation in criminal court practice in this State.

Six years of litigation by the city of Albany over the so-called driven-well contracts for supplying the municipality with water have resulted in a complete victory for the city. The defendants in the action were the Andrews Brothers, against whose estate judgment has just been entered for \$145,698, damages and interest, or altogether \$203,515.79, together with \$1,294.97 costs, on the report of Referee Brackett, before whom the case was tried. Since the beginning of the litigation in June, 1890, both Andrews Brothers have died, and the action was continued by Mary A. Andrews, a daughter of one of the brothers. The defendants contracted to furnish 10,000,000 gallons of water each day of twenty-four hours, for a period of one year, and if, upon test, the supply fell short of the guaranteed amount, the corporation was authorized to reject the works, or to accept them at such a reduction in price as the average daily supply fell short of the quantity so guaranteed. In case of rejection the driven-well contractors were to refund all sums received under the contract, and remove all material and property furnished by them in the performance of the contract. The quality of the water obtained was entirely acceptable, but the quantity was never one-half what was called for by the contract. There was paid the contractors altogether the sum of \$145,698, which, with interest, is to be recovered from the estate of Andrews Brothers, or from their bondsmen. Corporation Counsel John A. Delehanty performed a large amount of the work required to obtain the verdict.

A very interesting case, particularly to dairy-men, and, in fact, all consumers of dairy products, has just been argued before the Court of Appeals of New York. It is that of *The People v. John E. Salisbury*. The trouble originated in the cheese factory of Henry Davis, in North Litchfield, Herkimer county, in July, 1894

One of the patrons of the factory was John E. Salisbury, the defendant. It was the practice of Mr. Salisbury to carry the milk from the dairy to the factory but once every day, in the morning, using two ordinary milk cans for that purpose and putting the night's milk, as it was drawn from the cows, in one can, in which it was permitted to stand until the next morning, when it was taken to the factory, and the morning's milk in the other. After the night's milking, July 11, 1894, Mr. Salisbury, as usual, poured the milk fresh from the cows into a can which then stood in a wagon in the open air a short distance from the barn. The following morning, with another can containing the morning's milk, it was taken to the factory. Mr. Salisbury emptied the morning's milk into the weigh can first and then poured the night's milk from the other can in with it. Cream had risen on the night's milk to such an extent that when poured into the can with the morning's milk it still floated upon the surface and did not mix with the body of the liquid. George H. Davis, noticing the same, dipped out about three pints of the milk from which an analysis was made by Dr. Theodore Deecke, of Utica. From this analysis it was claimed that the milk was below the standard required by the State laws of 1893 in this connection. Action was brought against Salisbury. The case was tried in the Herkimer County Circuit and resulted in a verdict for the defendant, and the Appellate Division affirmed the verdict.

The North Carolina Supreme Court has lately decided that an action for damages will lie in favor of a husband against a druggist who, in violation of the husband's express orders, has sold laudanum to the wife, in consequence of which she has become a victim of the opium habit.

In affirming the conviction of Arthur Youngs of murder in the first degree the New York Court of Appeals has shown a tendency to disregard mere technicalities relied on to impeach a conviction. It was assigned as error that the Trial Term of the Supreme Court in and for Montgomery county, at which the prisoner was convicted, was appointed by the Appellate Division justices on December 3, 1895, instead of on or before December 1, as the Code directs.

The court holds that the observance of the exact date was not essential to the validity of the designation of the terms of Court. Overruling other exceptions, the Court held that it was not error to allow an expert on the issue of insanity to give his opinion as to the condition of the prisoner at the time he made an examination without first disclosing the facts upon which the opinion was based, and that mere impropriety in the form of questions asked by the prosecutor which did not prejudice the defendant, is not reversible error. The opinion contains this expression: "The power of this court to grant a new trial upon erroneous rulings at the trial is ample, even if no exception has been taken; but in such a case it should appear that some principle or rule of law had been violated to the prejudice of the accused." Youngs shot his wife on December 14, 1895, and was tried last February; so that in this case the course of criminal justice seems to have been as prompt as is consistent with decency.

An opinion handed down by Judge Haralson, of the Alabama Supreme Court, at Montgomery, recently, is important, especially to railroads threatening passage through a thickly settled neighborhood. The opinion holds that a pathway along the railroad track in a thickly settled neighborhood, and frequently used by persons, comes within the rule heretofore laid down in reference to railroads entering in or crossing streets of towns and villages, and that where the population of such neighborhood is expected to be around and passing on such pathway, it is the duty of railroad employes to be on the lookout at such places to guard against inflicting death or injury. Judge Haralson held that under such circumstances the law imputes to those operating the train knowledge of the perilous conditions of persons passing at such a place, and not to provide against it is recklessness such as amounts to wantonness. It is the duty of trainmen, when running through a city, town or village, to keep a lookout for person who would likely be passing over the track, and there is no reason why this doctrine does not apply as well to densely populated neighborhoods in the country as well as to cities, town and villages. It is the likelihood of peril known to defendant's employes that makes the duty, and not the place itself.

## SURVIVAL OF CAUSES OF ACTION.

THE question whether the representatives of a decedent could sue or be sued on a cause of action which was maintainable by or against the decedent in his lifetime, was at common law decided by rigorously adhering to the distinction between actions *ex contractu* and *ex delicto*, and holding that while the former generally survived, the latter invariably did not. It will therefore be necessary to treat of them separately. It was early laid down as a general rule that personal actions founded on contract survived in favor of a person's representatives.<sup>1</sup> In *Collers v. Lawrence*, Willes, 421, which was decided between 1787 and 1758, Wille's, C. J., said that the law had been so settled for at least a hundred and fifty years. It was also held that the scope of this rule was so great as to permit recovery on debts of record, on contracts under seal and on simple contracts and promises.<sup>2</sup>

In *Carr v. Roberts* (*supra*) it was held that an action on a bond to indemnify survived even though the expression "representatives" was not in the contract, but the words "assigns and heirs" appeared.<sup>3</sup> An action for the breach during decedent's life, of a personal covenant survives to his representatives; *e. g.*, a suit by an executor of a life tenant against his lessee for the breach of a covenant to repair.<sup>4</sup> It being held in New York that a covenant against incumbrances is broken immediately by any subsisting incumbrance, personal representative can sue.<sup>5</sup> And in all cases if the ultimate damages were sustained in the decedent's life, his representative might have sued.<sup>6</sup> But if it is a covenant which runs with the land, as a covenant of warranty in a conveyance, it survives to the heirs.<sup>7</sup>

The rule of survival in actions on contract applies as well against the representatives of a deceased contractor or debtor. And although this principle seems obvious, it was at that time necessary for the court to consider it, because a distinction was enter-

tained in actions on tort between the right of a representative to sue, and his liability to be sued.<sup>1</sup>

This liability existed independently of the nature of the contract or debt sued upon.<sup>2</sup> Every bond, covenant or contract includes representatives, though not named.<sup>3</sup> The contract liability does not require an express reference to the contingency of death, for a contract, if not personal, implies that death shall not cut off the survivor's remedies.<sup>4</sup> An executor is liable on a bond or note payable after another's death.<sup>5</sup> So if one contracts to build a house for another at a certain time, and dies before that time, his executors are bound.<sup>6</sup> By the old common law such a contract bound the administrators, but not the heirs, however large the real property.<sup>7</sup> But by 3 & 4 Wm. IV, Ch. 104, the real estate of a decedent is chargeable with all liabilities arising out of obligations entered into by the latter. On all covenants broken during the decedent's life, though personal to him, his representatives are, of course, liable.<sup>8</sup>

There has been legislation on this subject in almost every State. In New York it has been enacted that actions on account and all other actions upon contract may be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators.<sup>9</sup> Under this statute it has been decided that a cause of action against a stockholder of a limited liability business corporation to recover a debt on the ground that a certificate of payment in of capital stock has not been filed is in the nature of a contract, and survives defendant's death.<sup>10</sup> So an action to recover possession of a mortgage or money received thereon survives for and against representatives.<sup>11</sup> Also an action to recover the amount of taxes paid by a lessor, which the lessee covenanted to pay.<sup>12</sup> Likewise a revival of an

<sup>1</sup> Touchst. 482; *Atkins v. Kinnear*, 20 Wend. 241; *Davis v. Pope*, 12 Gray, 193.

<sup>2</sup> Bac. Abr. Exors. 1; *Harrison v. Vreeland*, 38 N. J. L. 366.

<sup>3</sup> *Bradbury v. Morgan*, 1 H. & C. 249-255; *Hyde v. Skinner*, 2 P. Wms. 197.

<sup>4</sup> *Williams v. Burrell*, 1 O. B. 402.

<sup>5</sup> Bac. Abr. Exors. (P) 1.

<sup>6</sup> *Gordon v. Calvert*, 2 Sim. 253; *Quick v. Ludbarrow*, 3 Bulstr. 80.

<sup>7</sup> Co. Lit. 209a.

<sup>8</sup> *Coffin v. Tallman*, 8 N. Y. 465.

<sup>9</sup> 2 R. S. 133.

<sup>10</sup> *Cochran v. Weicher*, 6 N. Y. Sup. 804; *Chase v. Lord*, 77 N. Y. 1.

<sup>11</sup> *Haight v. Hoyt*, 19 N. Y. 464; *Byxbie v. Wood*, 24 N. Y. 607.

<sup>12</sup> *Holsman v. St. John*, 90 N. Y. 461; *McGregor v. McGregor*, 35 N. Y. 220; *Livermore v. Bainbridge*, 49 N. Y. 128.

<sup>1</sup> 1 Saunders, 216a, note 1; *Sleeper v. Union Ins Co.* 65 Me. 394.

<sup>2</sup> *Allen v. Anderson*, 5 Hare, 183; *Went. Off. Ex.* 159 (14th ed.); *Lee v. Chase*, 58 Me. 453; *Carr v. Roberts*, 5 B. & Ad. 78.

<sup>3</sup> 11 Vin. Abr. 133; *William's Exors.* 787; *Hob.* 9.

<sup>4</sup> *Raymond v. Fitch*, 2 Cr. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718.

<sup>5</sup> 4 Kent, Com. 472; *Hamilton v. Wilson*, 4 Johns. 72.

<sup>6</sup> *King v. Jones*, 5 Taunt. 418; *Kingdon v. Nottle*, 1 M. & S. 355.

<sup>7</sup> Touchst. 175; *Lougher v. Williams*, 2 Lev. 92.

action brought against a sheriff on his liability as bail for failure to require justification of sureties on bail bond given on the issuance of an order of arrest will be granted against his representatives, since his liability is upon contract.<sup>1</sup>

An important exception to the survivability of actions *ex-contractu* arose where the injury from the breach consisted wholly in injury to the person and not to the estate. For example, cases of injury to the health or liberty of the decedent, as from the unlawful practice of a doctor, or imprisonment from the negligence of an attorney.<sup>2</sup> In *Knight v. Quarles* (*supra*), it was said that although the action was brought in the form of a contract, the damage consisted of the mental or physical suffering of the decedent.

But the most important illustration of this exception is an action on a breach of promise to marry. This is almost universally held not to survive, and in New York is held not to come within the meaning of 2 R. S. 133.<sup>3</sup> Nevertheless, should special damage be shown (which is such as might either be proved to aggravate the damages sued for, or might be a separate cause of action), the right of action survives.<sup>4</sup> In *Siboni v. Kirkman*, 1 M. & W. 418, Baron Parke said that the special damage which would cause the action to survive must be damage to the estate and not to the person.<sup>5</sup> Even if the promise to marry is broken before the death of the promisor, there will be no survival, as it is said to be more in the nature of an action for deceit than an ordinary breach of contract.<sup>6</sup>

On the principle of the breach of promise decisions it has been held that an action for fraud in inducing the plaintiff to marry the defendant on his false representations that his first wife was dead, does not survive, even if action were brought *ex-contractu*.<sup>7</sup>

The other exception to the rule that causes of action on contract survive, arises in agreements for the personal services of decedent, as that he write a book, or paint a picture; or if it is to pay

another for his personal services as servant and defendant dies before breach.<sup>1</sup>

In *Wentworth v. Cock* (*supra*), plaintiffs agreed to furnish slate in certain quantities, and an action for refusal to receive the same was maintainable against defendant's representatives. In *Robinson v. Davison*, L. R. 6 Ex. 269, it was held that a contract to play a piano, being one requiring personal skill, was conditioned on the contractor being well enough to perform.

And, in general, where purely personal relations are the foundations of a contract, as principal and agent, master and servant, etc., the death of either party ends both the relation and the obligations.<sup>2</sup> And when the contract is plainly to determine with decedent's life, or dependent on some condition that must necessarily fail by his death, his representatives can take no succeeding advantage under the contract.<sup>3</sup> In *Silver v. Gray*, 83 N. H. 566, a contract to support a parent was held to be personal.

Notwithstanding the rule that a representative is not liable on a personal contract of his decedent, he must respond for a breach during the latter's life, though he may set up the excuses the deceased might have employed, as sickness or other disability.<sup>4</sup> Upon dissolution of a firm by the death of one partner, the relation of master and servant between the firm and an employe is also dissolved.<sup>5</sup>

If the contract of several defendants is joint and one die, at common law the action lay against his co-contractor, and did not survive against the representatives of the decedent.<sup>6</sup> But when the contract liability was joint and several, the representatives of deceased could be sued separately, but not jointly with the survivors.<sup>7</sup> As opposed to the common-law rule it has long been the rule in equity that a joint contractor's liability could be

<sup>1</sup> *Harrison v. Conlan*, 10 Allen, 26; *McGill v. McGill*, 2 Met. (Ky.) 259; *Dickinson v. Callahan*, 10 Pa. St. 227; *Wentworth v. Cock*, 10 A. & E. 45.

<sup>2</sup> *Farrow v. Wilson*, L. R. 4 C. P. 745; *Cro. Eliz.* 533; *Smith v. Wilmington Coal Co.* 83 Ill. 498; *Bland v. Umstead* 23 Pa. St. 316.

<sup>3</sup> *Williams, Ex.* 789.

<sup>4</sup> *Schon. Dom. Rel. sec.* 474; *Hyde v. Dean of Windsor*, *Cro. Eliz.* 538.

<sup>5</sup> *Tasker v. Shepherd*, 6 H. & N. 575.

<sup>6</sup> *Osborne v. Crosbern*, 1 Sid. 238, 4 Mod. 315; *Godson v. Good*, 6 Taunt. 587; *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey*, 84 N. Y. 363; *Leaman v. Slater*, 18 Fed. Rep. 485; *Yorks v. Peck*, 14 Barb. 644.

<sup>7</sup> *Tower v. Moore*, 2 Vern. 99; *New Haven Co. v. Hayden*, 119 Mass. 361; *May v. Woodward*, 1 Freem. 248.

<sup>1</sup> *Hamilton v. Gorman*, 69 St. Rep. 299.

<sup>2</sup> 2 M. & S. 415; *Long v. Morrison*, 14 Ind. 594; *Williams, Ex.* 801; *Knight v. Quarles*, 2 B. & B. 102.

<sup>3</sup> *Wade v. Kalbfleisch*, 58 N. Y. 268; *Hayden v. Vreeland*, 37 N. J. L. 872; *Hovey v. Page*, 55 Me. 142; *Smith v. Sherman*, 4 Cush. 408.

<sup>4</sup> *Chitty, Pleading*, 16 Am. Ex. 22, 59.

<sup>5</sup> *Finlay v. Chirney*, 20 Q. B. D. 494; *Schouler, Husb. & W. sections* 40-41.

<sup>6</sup> *Stebbins v. Palmer*, 1 Pick 78; *Chase v. Fitz*, 132 Mass. 359.

<sup>7</sup> *Price v. Price*, 74 N. Y. 244; *Withee v. Brooks*, 65 Me. 144.

<sup>8</sup> *Finlay v. Chirney*, 20 Q. B. D. 494.

enforced against his representatives immediately, and they be compelled to pay the whole debt.<sup>1</sup>

In relation to joint liability statutory changes have been made in several States.<sup>2</sup> Formerly in New York, to sustain the action against the representatives, it was necessary to prove insolvency of the co-contractors or judgment against them returned unsatisfied.<sup>3</sup> But now, by the Code of Civil Procedure, section 758, it is provided that in case of the death of a party jointly liable on a contract, his estate is not discharged, and the court may make an order to bring in his representatives. In *Patterson v. Copeland*, 52 How. 460, it was held that in an action for specific performance of a contract, the death of one defendant did not abate action, but plaintiff could recover against survivors.

As to the death of one of several joint party plaintiffs, the rule of the common law was that all actions *ex contractu* could be maintained only by the survivors.<sup>4</sup> This rule has not been changed by the Code.<sup>5</sup> And see *Webster v. Union Trust Co.* 80 Hun, 420, holding that the surviving plaintiffs in an action of specific performance could give good title to real estate. But if the plaintiffs' rights under the contract were several, the representatives of a deceased party unquestionably could have sued.<sup>6</sup>

#### SURVIVAL IN ACTIONS EX DELICTO.

The rule of the common law, formerly unequalled, was that causes of action *ex delicto* died with the death of the person by whom or to whom the wrong was done.<sup>7</sup> This was true of a man's absolute rights in general, as his claim to safety from violence, and his relative rights, as husband, father, master or trustee. An action did not survive where there was fraud, malfeasance or misfeasance, or for such torts as trespass, trover, false imprisonment, assault and battery, slander, deceit, obstructing lights, etc.<sup>8</sup> Nor actions for torts affecting the feelings or reputation, as seduction, deceit or

malicious prosecution.<sup>1</sup> Actions for personal injuries to the decedent did not survive his death.<sup>2</sup> Nor did representatives have any right of action for damages caused by the negligent killing of another.<sup>3</sup>

One of the earliest cases on the subject of personal injuries was *Higgins v. Butcher*, 1 Brown 205, occurring in about the year 1600. It was an action by a husband for the assault of his wife, by which she died. And in *Baker v. Bolton*, 1 Camp. N. P. 493, Lord Ellenborough charged the jury to consider only the damages the plaintiff had sustained from his wife's injuries from the time of the accident to the time of her death. In *Quinn v. Moore*, 15 N. Y. 432, Comstock, J., said: "The deceased was a minor; his mother was by law entitled to his services. Of these she was deprived by the wrongful act of the defendant. The common law gave no action for this injury." *Green v. H. R. R.* 28 Barb. 9, and *Lucas v. N. Y. C. R. R.* 21 Barb. 245, held that to give plaintiff action for killing his wife, there must have been a period intervening between injury and death during which he suffered the loss of her services and incurred expense.

This rule was changed in England by 9 and 10 Vict. Chap. 98, and in New York by Laws of 1847, which latter act, as amended by Laws of 1870, Chap. 78, and as now appears in the Code C. P. Sec. 1902, gave a right of action to the representatives of a deceased person for the benefit of husband, widow, or next of kin, to recover damages for pecuniary injuries suffered by them when the death was caused by the wrongful act, neglect or default of defendant, which was such as would have entitled party injured to maintain action.

These statutes rendered obsolete the cases under the common law and statute of 1847, which held that husband could not recover when the killing of his wife was instantaneous. This statute did not create a cause of action enforceable against the injuring party's representatives.<sup>4</sup> *Hegerich v. Keddie* (*supra*), was brought against the representatives of a liquor dealer for causing the death of the plaintiff's intestate under the Civil Damage Act. *Victory v. Krauss*, an action against a landlord for personal

<sup>1</sup> *Simpson v. Vaughn*, 2 Atk. 31; *Ex parte Kendall*, 17 Ves. 514; *Hunt v. Rousmanier*, 8 Wheat. 174.

<sup>2</sup> *Bliscon*, Code Pleading, sec. 93.

<sup>3</sup> *Voorhes v. Childs*, 17 N. Y. 354; *Pope v. Cole*, 55 N. Y. 124; *Masten v. Blackwell*, 8 Hun, 313.

<sup>4</sup> *Rolls v. Yoyes*, Yelv. 177; *Anderson v. Martin-dale*, 1 East. 497.

<sup>5</sup> *Bucknam v. Brett*, 22 How. 233.

<sup>6</sup> *Shaw v. Sherwood*, Cro. E. 729.

<sup>7</sup> 1 Saund. 216, note; 1 Williams, Ex. 668 and 790.

<sup>8</sup> *Perry v. Wilson*, 7 Mass. 305; *Nicholson v. Elton*, 13 S. & R. 415.

<sup>1</sup> *Tory v. Hitchcock*, 3 O. 274; *Walters v. Nettleton*, 5 Cush. 544; *Deeming v. Taylor*, 1 Day, 285; *More v. Bennett*, 65 Barb. 338; *Miller v. Umber-hower*, 10 S. & K. 31.

<sup>2</sup> *Smith v. Sherman*, 4 Cush. 408; *Harper v. Clark*, 57 Cal. 245.

<sup>3</sup> *Safford v. Drew*, 3 Duer, 637; *Carey v. Berkshire R. R.* 1 Cush. 475; *Wyatt v. Williams*, 43 N. H. 102; *Williams, Ex.* 197.

<sup>4</sup> *Hegerich v. Keddie*, 99 N. Y. 258; *Victory v. Krauss*, 41 Hun, 533.



injuries caused by knowingly leasing unhealthy tenements.

An action by a master for the seduction of his servant did not survive, nor an action for crim. con.<sup>1</sup> Nor did an action for deceit in the sale or exchange of property survive.<sup>2</sup> A suit brought for a default, or the embezzlement of public or private trust funds, was personal.<sup>3</sup> Misrepresentation in the prospectus of a company was held to be personal, being an action for deceit.<sup>4</sup> The representatives of a postmaster were held not liable for the abstraction of letters by the latter's clerk.<sup>5</sup> Nor those of a sheriff for his deputy's default, because founded on tort, though an action of assumpsit was authorized by Stat. Westm. 2.<sup>6</sup> Nor was there any survival in an action against a person for a fraudulent representation by which credit was given to an irresponsible person.<sup>7</sup> Actions on penal statutes did not survive.<sup>8</sup> The same was true of an action for fraudulently inducing one to marry another.<sup>9</sup>

An exception to the rule of the non-survivability of actions *ex delicto* was entertained even under the old common law before the Stat. 4 Edw. 3, for in *Chamberlain v. Williamson* (2 M. & S. 108), Lord Ellenborough said: "Executors and administrators are representatives of the personal property of their decedent, but not of his wrongs, except where they operate to the temporal injury of the personal estate. At common law, replevin or detinue lies by an executor if the goods exist in specie in defendant's hands.<sup>10</sup> In *Weber's Exors. v. Underhill*, 19 Wend. 449, Cowen, J., said: "Replevin will lie by the representatives of the party injured." But it must be remembered that, at common law, replevin died with the death of the defendant.<sup>11</sup>

The harshness of this branch of the law was somewhat relieved by the rule of procedure that if the plaintiff could sue in contract instead of tort,

the action survived. If a man took a horse and brought it back, trespass did not lie against his executor, but an action for the use and hire of the horse was maintainable.<sup>1</sup> Or if plaintiff could sue in detinue or on an implied contract for money had and received, or for use and occupation, it survived.<sup>2</sup> It was on this principle that the representative of an attorney was rendered liable for the latter's negligence in transacting plaintiff's business.<sup>3</sup> And where there is a cause of action for loss of chattels through negligence, damages being laid as a breach of contract.<sup>4</sup>

The Stat. 4, Edw. 3, chap. 7 changed the law in so far as it gave actions *de bonis asportatis* to representatives, but as to all other wrongs to person or property the rule *actio personalis moritur cum persona* applied.<sup>5</sup> The force of this statute was equitably extended until they might sue for any injury to the personal estate of the decedent during his life, as trespass of trover.<sup>6</sup> Or against a sheriff for the escape of a debtor during creditor's life.<sup>7</sup> Or against a sheriff for his default, to the loss of the right sued upon.<sup>8</sup>

This statute did not give a right of action against the executor of a person who had tortiously taken goods.<sup>9</sup> Nor did it change the law so far as the survival of actions for injury to the freehold were excluded, as trespass q-c-f, or for cutting trees or other waste.<sup>10</sup> For this reason, by Stat. 3 and 4, Wm. 4, chap. 2, sec. 2, representatives might bring actions for injuries to real estate committed six months before his death.

In the United States many changes have been made by legislation in the rules of survivability of actions. The English statutes as to actions for damage to real or personal property have been generally enacted here,<sup>11</sup> and some States even go to the extreme of allowing actions for libel and

<sup>1</sup> *People ex rel. Tioga C. P.* 19 Wend. 73; *Clark v. McClellan*, 9 Pa. St. 128.

<sup>2</sup> *Cutting v. Tower*, 14 Gray, 183; *Henshaw v. Miller*, 17 How. U. S. 212; *Grim v. Carr*, 51 Pa. St. 533.

<sup>3</sup> *Franklin v. Low*, 1 John. 396.

<sup>4</sup> *Peck v. Gurney*, L. R. 6 H. L. 377.

<sup>5</sup> 1 Caines, 124.

<sup>6</sup> *People v. Gibbs*, 9 Wend. 29.

<sup>7</sup> *Zabriskie v. Smith*, 13 N. Y. 322.

<sup>8</sup> *Went. Off. Ex.* 255, 14th ed.

<sup>9</sup> *Price v. Price*, 75 N. Y. 244.

<sup>10</sup> *Hambley v. Trott*, Cowp. 371; *Le Mason v. Dixon*, Sir Wm. Jones, 173; *Williams, Ex.* 787; *Elrod v. Alexander*, 4 Heisk. 342.

<sup>11</sup> *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. 626; *Hopkins v. Adams*, 5 Abb. Pr. 351; *Mosley v. Mosley*, 11 Abb. Pr. 105.

<sup>1</sup> *Hambley v. Trott*, 1 Cowp. 371.

<sup>2</sup> *Collen v. Wright*, 7 El. & Bl. 647.

<sup>3</sup> *Knight v. Quarles*, 4 Moore, 532; *Wilson v. Tucker*, 3 Stark, N. P. C. 154.

<sup>4</sup> *Alton v. Midland R.*, 19 C. B. N. S. 242.

<sup>5</sup> 1 Saund. 217; *Cro. Eliz.* 84; *William's Ex.* 790.

<sup>6</sup> *Russel's Case*, 5 Co. 27; *Manwell v. Briggs*, 17 Ver. 176; *Rutland v. Rutland*, *Cro. Eliz.* 377.

<sup>7</sup> *Pratt's Case*, *Plowd.* 34.

<sup>8</sup> *Ld. Ray'd*, 973; 4 Mod. 403; *Williams, Ex.* 791.

<sup>9</sup> *Carter v. Fassett*, *Palmer's R.* 329; *Mellen v. Baldwin*, 4 Mass. 480.

<sup>10</sup> *Williams v. Belden*, 1 B. & P. 329; *Williams, Ex.* 793.

<sup>11</sup> *Mass. Pub. Stat. C.* 165, Sec. 1.

slander,<sup>1</sup> assault and battery,<sup>2</sup> malicious arrest and imprisonment,<sup>3</sup> and seduction,<sup>4</sup> to survive.

In New York by 2 R. S. 114, sec. 4, actions are maintainable by or against the representatives of a decedent for conversion of property and also by representatives for trespass committed upon the real estate of the decedent during his life. This statute enlarged 4 Ed. 3, so as to include actions for trespass *de bonis* against representatives, as well as by them.

The Code of Civil Procedure, Sec. 1736, provides that replevin shall not abate by the death of either party.<sup>5</sup>

In 2 R. S. 448, Sec. 1, it is provided that "For all wrongs done to property rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his administrators or executors against such wrong-doer, and after his death against his executors or administrators in the same manner and with like effect in all respects as actions founded upon contract.

Sec. 2. But the preceding section shall not extend to actions for slander, libel, or to actions for assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the testator or intestate of any executor or administrator.

Under this statute *People v. Gibbs* (*supra*) was reversed in *Benjamin's Ex. v. Smith*, 17 Wend. 208, which held that an action accruing to a party for a false return by a sheriff did not abate by plaintiff's death. So, *Fried v. N. Y. C.* 25 How Pr. 200, deciding that a right of action for carelessly setting fire to hay and fences was assignable, held that *Zabriskie v. Smith* (*supra*) was wrongly decided, because overlooking the above statute.

We have seen that a breach of promise of marriage did not survive considered as an action on contract; it has also been held not to be included within the meaning of the above statute relating to wrongs, as the breach caused only personal injuries.<sup>6</sup>

Under this statute, in *Height v. Hayt*, 19 N. Y. 464, an action was held to survive against the representatives of a vendor of land for fraudulent statements as to an incumbrance, although he refused to warrant. *Grover, J.*, said that the exceptions in Sec. 2 of the above statute showed the intent that all other actions in tort should survive.

In *Cregin v. B. & C. R. R.* 76 N. Y. 192, an

action by a husband to recover for the loss of the services of his wife through defendant's negligence did not abate on plaintiff's death, as the exception in the statute of actions on the case for injuries to the person of the plaintiff did not cover a wrong to plaintiff's rights and interests, though it was affected by an injury to the person, if it was not the person of the plaintiff.<sup>1</sup>

An action brought by an assignee for the benefit of creditors against a sheriff for the tortious taking of assets does not abate.<sup>2</sup> Also an action under the Civil Damage Act, although it would not survive so far as the personal injury to the decedent is concerned, would do so if an injury to the property also accrued.<sup>3</sup> An action for fraud by which defendants induced plaintiff to transfer valuable property to them survives death of defendants.<sup>4</sup> A liability under the peculative act of 1875, chapter 49, is one which, even if not in contract, affects property rights, and does not abate on the death of plaintiff or defendant.<sup>5</sup>

A case illustrating the principle of survivability under this act is *Scot v. Brown*, 24 Hun, 620 (75 N. Y. 192). This was a suit brought against a plumber for improperly making repairs by which plaintiff's health and that of his family was injured. *Held*, to abate by defendant's death in so far as damage to plaintiff's person was concerned, but recovery could be had for expenses caused by the sickness of his family, such as medical treatment, etc.

A right to recover damages caused by the fraudulent representations of defendant, whereby plaintiff was induced to buy stock, does not abate.<sup>6</sup> The action of a parent for the seduction of his daughter dies with death of defendant.<sup>7</sup> But a suit brought by a municipal corporation against a land-owner who omitted a statutory duty to repair a sidewalk, by which recovery was had against the city for personal injuries, survives.<sup>8</sup>

While it was formerly held that when the charter of a corporation expired before or pending actions against it for its negligence, it could not be revived against its directors,<sup>9</sup> these cases have been reversed, although the rule is well settled that under

<sup>1</sup> *Foels v. Town of Tonawanda*, 48 St. Rep. 150.

<sup>2</sup> *Emerson v. Bleakley*, 5 Abb. Pr. N. S. 351.

<sup>3</sup> *Moremus v. Crawford*, 51 Hun, 89.

<sup>4</sup> *Lyon v. Park*, 111 N. Y. 350.

<sup>5</sup> *Bank of Cal. v. Collins*, 5 Hun, 209; *Reynolds v. Mason*, 6 Week. Dig. 531.

<sup>6</sup> *Bond v. Smith*, 4 Hun, 48.

<sup>7</sup> *Holliday v. Parker*, 23 Hun, 71.

<sup>8</sup> *City of Rochester v. Campbell*, 55 Hun, 138.

<sup>9</sup> *Matter of N. Y. Oxygen Co.* 67 St. Rep. 549; *Grafton v. Union Ferry Co.* 46 St. Rep. 549.

<sup>1</sup> *Nutting v. Goodridge*, 46 Me. 82.

<sup>2</sup> *Mass. Pub. Stat. C.* 165, Sec. 1.

<sup>3</sup> *Whitcomb v. Cook*, 38 Vt. 477.

<sup>4</sup> *Shafer v. Grimes*, 23 Io. 550.

<sup>5</sup> *Robert v. Marsen*, 23 Hun, 486.

<sup>6</sup> *Wade v. Kalbfleish*, 58 N. Y. 282; 13 Serg. & R. 188.

section 1902 of the Code, permitting actions by representatives for death from negligence, an action dies with the death of the defendant, if a natural person.<sup>1</sup>

The old common law decision that penalties die with the person of the defendant has not been changed in New York. *Brackett v. Griswold* (103 N. Y. 405) was an action on the statute permitting suit by a creditor of a corporation against a director for making a false annual report. It was held to die with the death of the creditor, as the action was penal in its nature. This was followed in an action on the same state of facts, where the defendant died before action.<sup>2</sup>

Some actions abate from their very nature, being without question personal in their character. For instance, an action for divorce dies with the plaintiff, and her attorney cannot thereafter enforce an order previously made.<sup>3</sup> So an action for dower abates on widow's death before entry of the interlocutory decree, and cannot be revived by her representatives, although she consented to accept a gross sum in lieu of dower.<sup>4</sup> So an action to restrain defendant from entering upon plaintiff's land and cutting timber abates on defendant's death, being personal.<sup>5</sup>

On the death or expiration of the term of a public officer, an action maintainable by him as such survives to his successor, and not to his representatives.<sup>6</sup>

Before the Code it was held that special proceedings abated entirely with the death of the petitioner, and could not be revived by his representatives.<sup>7</sup> So held in proceedings to vacate assessments.<sup>8</sup> But by Secs. 755 and 757 of the Code, specials proceedings do not abate if the right to the relief sought survives or continues. But it is held that as this right to continue special proceedings depends on statutory authority, it cannot be extended to proceedings in surrogate courts, as on the death of a guardian pending an accounting.<sup>9</sup>

<sup>1</sup> *Marstabler v. Mills*, 143 N. Y. 398; *People v. Troy Steel Co.* 82 Hun, 303.

<sup>2</sup> *Reynolds v. Mason*, 6 Week. Dig. 531; *Carr v. Fischer*, 119 N. Y. 117; *Bank of Cal. v. Collins*, 5 Hun, 209.

<sup>3</sup> *Hopkins v. Hopkins*, 21 Week. Dig. 174.

<sup>4</sup> *McKeen v. Fish*, 38 Hun, 28.

<sup>5</sup> *Johnson v. Ellwood*, 82 N. Y. 362.

<sup>6</sup> *Pratt v. Seeley*, 20 Week. Dig. 280; *Matter of Marvin*, 39 St. Rep. 873; Code of Civil Pro. Sec. 766.

<sup>7</sup> *Matter of Roberts*, 53 Hun, 338.

<sup>8</sup> *Matter of Palmer*, 43 Hun, 572; *Matter of Ferris*, 27 State Re. 900.

<sup>9</sup> *Matter of Camp*, 81 Hun, 387.

As to the liability of two persons committing a tort together, it is considered joint and several, and so if one die before suit, his estate may be sued as well as the survivor, in separate actions.<sup>1</sup> The modern rule is that if an action be brought against all the tort-feasors, and one dies, the action should be prosecuted against survivor only.<sup>2</sup> The Code of Civil Procedure, Sec. 758, provides for the bringing in of the representatives of a deceased defendant liable on contract, but the rule as to torts has not been changed, *i. e.*, if one of the plaintiffs or one of the defendants dies, if the entire cause of action survives to or against the others, the action must so proceed without abatement. In *Pierson v. Morgan*, 23 St. Rep. 382, it was held that actions in tort, except slander, libel, assault and battery, false imprisonment or for personal injuries, can be revived against the representatives of one of several defendants who are sued jointly, or against survivor alone, or against both separately.<sup>3</sup>

ALBANY.

HAROLD D. ALEXANDER.

## HYPNOTISM AND CRIMINALS

"Hypnotism is of no value whatever to the police in securing confessions from men who do not want to make them," said Dr. H. A. Parkyn, medical superintendent of the Chicago School of Psychology. "It doesn't compare with good, sharp cross-questioning for getting at the truth, and, what is more, no hypnotist can get from a subject a confession or statement which the subject would not make as readily in his normal condition.

"It is easy to see how sharp criminals could take advantage of such an offer as one of being hypnotized that officers might learn the real truth. There are persons who are called 'hypnotic horses,' the accomplices of fakers, who can simulate sleep in such a way that no one can detect the fraud. They become inured to the pain of all the ordinary tests, such as having needles run through their hands and being compelled to inhale ammonia and the like. As a matter of fact, no one can tell whether or not a subject is hypnotized. It would be too easy, therefore, for smart criminals to simulate hypnotic sleep and tell stories that would tend to clear them of crime rather than convict them. But even if the sleep be genuine, there is no hope of learning from the subject anything he does not want to tell when he is awake. If he will lie in one case he will

<sup>1</sup> Addison on Torts, par. 13, 21.

<sup>2</sup> *Mechanics' Ins. Co. v. Spang*, 5 Pa. St. 113.

<sup>3</sup> *Gardner v. Walker*, 22 How. Pr. 405; *Heimlicher v. Gray*, 44 How. Pr. 260; *Bond v. Smith*, 4 Hun, 48; *Union Bank v. Mott*, 27 N. Y. 633.

lie in the other. As I said before, hypnotism accentuates the natural. It is of no use in trapping criminals.—*Chicago Times-Herald.*

#### HUNTING AN ESCAPED CONVICT.

THE sympathy of all England, it would seem, has turned these last few days in an unexpected direction. It has been lavished on a convict, a man sentenced to a long term of imprisonment, a sentence which he was duly appreciating on the morning of Christmas eve last. Perhaps the thought of the happier days, when Christmas meant home and cheer and loving companionship, suddenly came to him and to two of his companions. They were working out in the open, in the midst of a dense fog, and guarded by warders with Winchester rifles. Dartmoor stands in the midst of marshland, and is not far from Plymouth. It was built at the end of the eighteenth century for the safe custody of prisoners of war, and hundreds of Frenchmen imprisoned there died and were buried in the marshes. It is not the first time that the convicts have attempted to escape from Dartmoor during the fog. Those who are familiar with Dickens's "Great Expectations" will remember the adventures of the little chap who gradually grew up as the hero of the story—otherwise Pip, and the escaped convict who threatend to eat "his lights and liver."

Well on Christmas eve three men of the convict gang working at some horrible toil or other in the marshes surrounding the prison, made a bolt for liberty. One man was promptly shot dead, a second was recaptured within a few hours, but the third, a man named Goodwin, managed to disappear completely in the fog.

For a whole evening and night the fugitive wretch wandered over bog and fen, with the rain pouring in torrents and the fog so thick that he was continually slipping up to his waist into the treacherous mud, until the fog lifted and he found, to his horror, that he was still within half a mile of the prison. He had been wandering round the building in a circle. Again he trudged forward, almost dead with cold and famished with hunger, and although sighted by warders stationed on the tower tops of the prison, he still managed to escape recapture, and succeeded in breaking into a couple of houses and finding sufficient food to stay his hunger. He also obtained an overcoat, a pair of top boots, which were much too small for him, and a child's straw hat. These garments somewhat disguised the convict clothing in which he was attired, but he knew that in daylight the trousers that he wore would at once betray his identity. His only hope was to steal a pair somewhere, anyhow, and with that object he broke into three or four houses

during the second night he was at liberty, but without obtaining the coveted pair of breeches. He did not attempt to take anything else, as he related himself after his recapture.

"I did take a swig or two out of some of the decanters of port wine and other Christmas drinks about, and I got two 'alves of plum pudden and a lot of breast of turkey stowed away in the pockets of that parson's overcoat which I stole in the first house I entered. But it must be a queer country as lies around that prison; why, there don't seem a single man to live there as 'as got more than one pair of pants to his legs, and it seems as 'ow they must all sleep with them under their pillows. Why, I was in one bloke's bedroom while he was in bed, and 's help me I think he must have been sleeping with his trousers on!"

Goodwin was finally captured by a Devenport policeman, and surrendered from sheer weariness. He had managed to elude at least two dozen warders, who imagined they were in hot chase after him. As the convict was being taken away in an open van, surrounded by warders, he was cheered all along the streets of Devenport, and the papers are unanimous in their sympathetic references to the wonderful endurance and courage of the man. Of course the poor devil will be severely punished, but he at least spent his Christmas at liberty.—*London Cor. N. Y. Mail and Express.*

#### PROTECTING WILLS.

WHAT appears to be a practical and simple scheme for the prevention of attacks on wills is that proposed by Judge John H. White, of Hartford, Conn., and defeated by the legislature of 1895. It provides, says the *Times* of that city, that every person on making a will may deposit it with a legal officer, who shall give public notice that a will has been so offered, and that all who wish to attack the capacity of the testator shall have a certain time in which to offer evidence and bring the matter to a decision. If no objection to the testator's capacity is made within the time specified, the will cannot be attacked on that ground after his death. The contents of the will are not disclosed, even to its custodian. No one has any ground to attack it because he is left out, or gets less than he thinks he should have. Evidently people will think twice about attacking the testamentary capacity of a man who is there to defend himself, especially when they are uncertain how he has devised his property, and may be biting off their own noses. As "Mr. Swiveller" remarked about the rooms at Bevis Markis: "The contingent advantages are extraordinary." Under this law there would be no premium on will breaking.

## Notes of Recent American Decisions.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**—An insolvent, after an assignment for the benefit of creditors, agreed with a creditor bank, if the latter would furnish the funds to pay off the claims of all other creditors who would agree to compromise, the assigned property should be transferred to such bank for the payment of its claim and the amount so advanced, in full. Over 90 per cent of the claims were thus compromised, and the bank, after paying the amount advanced and its own claim in full, reconveyed the property to the insolvent: *Held*, that such reconveyance was a fraud on the rights of a creditor not accepting the compromise, rendering the bank liable for the amount of its claim to the extent of the property so transferred. (*American Exchange National Bank v. Walker* [Ill.], 45 N. E. Rep. 271.)

**ATTACHMENT—PROPERTY SUBJECT.**—Property in the hands of the sheriff, under a mandate in claim and delivery, which requires him to take the property and deliver it to plaintiff, is not subject to attachment. (*Williamson v. Nealy* [N. Car.], 25 S. E. Rep. 953.)

**COMPROMISE.**—The compromise of a doubtful claim is a sufficient consideration to support a promissory note fairly given in settlement of the controversy compromised. (*Johnson v. Redwine* [Ga.], 25 S. E. Rep. 924.)

**COMPROMISE — CONSIDERATION.**—Mutual concessions for the prevention of litigation are a valid consideration for a compromise settlement between the heirs and the legatees of a decedent. (*McDole v. Kingsley* [Ill.], 45 N. E. Rep. 281.)

**CONTRACT — RESCISSION — FALSE REPRESENTATIONS.**—Representations that a saloon is first-class in every respect, and well fitted up, and that the business will yield a profit of \$4,000 in two years, though false, will not entitle the purchaser to rescind the sale for fraud. (*O'Donnell & Duer Bavarian Brewing Co. v. Farrar* [Ill.], 45 N. E. Rep. 283.)

**CRIMINAL LAW—CONFESSIONS.**—Whether or not admissions made by a person accused of crime relate to independent facts, proof of which would be admissible as circumstances tending to establish the hypothesis of guilt, or of themselves amount to an indirect confession of guilt, is a question of fact for the jury; and the court, having in effect so instructed them, did not, in either view of the matter err in submitting for their consideration the weight of such admissions. (*Bryant v. State* [Ga.], 25 S. E. Rep. 927.)

**CRIMINAL LAW — LARCENY — STEALING OF NOTE.**—Under the provision of Code 1892, § 1176, that "if any person shall steal any note, the money due thereon shall be deemed the value of the article

stolen, without proof thereof," a defendant shown to have stolen notes cannot be permitted to show the insolvency of the makers and their refusal to pay the notes as a defence, or to reduce the value of the property stolen. (*McDowell v. State* [Miss.], 20 South. Rep. 864.)

**DOWER — LEASE.**—A widow cannot lease her dower interest before it has been assigned to her. (*Union Brewing Co. v. Meir* [Ill.], 45 N. E. Rep. 264.)

**MASTER AND SERVANT—ASSUMED RISK.**—An employe working in a place lighted by an electric lamp, which, as he knew, had been out of repair and the light intermittent for several months, during which he continued to work without objection or promise of remedy, assumed the risk of injury incident to the defective light, though he was told on the particular night when he was injured, by another employe in charge of the lights, that they were all right; it not appearing that such employe was authorized or assumed to speak for the employer, or that the light had been repaired. (*Colorado Fuel & Iron Co. v. Cummings* [Col.], 46 Pac. Rep. 875.)

**MUNICIPAL CORPORATION — UNREASONABLE ORDINANCE.**—In *City of Grand Rapids v. Newton* (69 N. W. Rep. 84), decided by the Supreme Court of Michigan, it was held that a city ordinance providing that no person shall allow or permit any indecent, loud or boisterous noise, or any fighting or other disturbance, in or about his house or tavern, inn, saloon, cellar, shop, office, or other residence or place of business, or permit drunkards or persons having the reputation or name of being prostitutes to congregate, visit or remain therein, is unreasonable, as not limited in its application to such assemblages or to such places of business as are properly within police control, and consequently void.

**WAREHOUSEMEN — WHO ARE.**—On trial of a mill company's manager for shipping wheat stored in the company's warehouse without written assent of the holder of the receipt therefor, it appeared that, according to its usual course of business, known to the person whose wheat was shipped, all wheat received became a part of the consumable stock of the mill, was manufactured into flour and other mill products, and sold; that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat; and that, in the former case, no storage was charged, but in the latter a charge of eight cents a bushel was made.

*Held*, that the company was not engaged in the warehouse business, and the wheat was not received on storage, within Laws 1885, p. 61, regulating warehousemen. (*State v. Stockman* [Oreg.], 46 Pac. Rep. 851.)

### Legal Notes of Pertinence.

At the regular meeting of the Bar Association of the District of Columbia, held Tuesday, January 12, 1897, the following officers were elected for the ensuing year: President, Henry E. Davis; first vice-president, Samuel Maddox; second vice-president, Job Barnard; secretary, William M. Lewin; treasurer, Charles H. Cragin; directors, Randall Hagner, John C. Heald, Sidney T. Thomas, Clarence A. Brandenburg and Jesse H. Wilson.

Hon. James S. Sherman has introduced a bill in the house to prevent the sale of railway tickets by "scalpers" and to punish forgers of such tickets. It provides that all railway ticket agents shall be furnished with a certificate setting forth their authority to make such sales, and that any person not possessed of this authority shall be punished by a fine or imprisonment for each violation of the law. The bill further provides that any unused part of a ticket must be redeemed by the company from whom it was purchased at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket of the same class between the points for which the ticket was actually used. The sale by any person of the unused portion of any ticket except to the company from which it was originally bought shall be punishable by a fine or imprisonment. The bill applies only to roads under the jurisdiction of the interstate law.

Judge Burlingame has a joke on the Michigan Supreme Court. In ordering a new trial for J. S. H. Holmes, convicted of murder in the first degree and whose defence was insanity, the Supreme Court took occasion sharply to criticise Judge Burlingame's charge to the jury, asserting that it too fully expressed the court's opinion of the merits of the case. The charge to the jury in the Holmes case happens to be a verbatim repetition of a charge to a jury made by Judge Burlingame five years ago in a trial where insanity was the defence, and in sustaining the verdict at that time the Supreme Court found fault with the charge because it did not go far enough.—*Correspondence Chicago Times-Herald.*

The late E. P. Whipple used to tell the story of Rufus Choate, that once while addressing a jury he several times repeated a certain part of his plea—repeating in the same words and accent. Certain that the great advocate had some reason for so strange a proceeding—a reason not obvious to others—Mr. Whipple took an opportunity to ask an explanation. Mr. Choate's answer in substance was: "There was a numskull on the jury who was paying no attention to what I was saying; I would have kept up the repetition until he listened if it had taken the entire day!"

It may be perfectly true, as Lord Brougham said, that the whole machinery of the State ends in simply bringing twelve good men into a box, but it is also true that it also at times brings twelve good men into a bad box, not to speak of the cases where part of the twelve men are bad.

The City Court has lately held, following the ruling of the Appellate Division in this city, as to a question not yet passed upon by the Court of Appeals, that sickness in the family of a tenant which compels him to hold over at the end of his term will not relieve the tenant from liability to pay double rent under the statute for the time he occupied after the expiration of his lease. In the City Court case a tenant, who leased for six months, was imprisoned in the house for nineteen days after his time was up by an order of the Board of Health, issued because the tenant's child was sick with scarlet fever. The court's decision is founded on the reasoning that the tenant rather than the landlord should bear the burden of the former's misfortune."—*N. Y. Evening Post.*

The jury in the case of W. R. Swan against the Chicago and Alton Railroad returned a verdict, in Judge Adam's court, Chicago, of \$14,000 damages against the railroad. Swan was a baggageman in the employ of the company and was hurt in an accident at the crossing of the Alton and Belt Line in the summer of 1894. A switch at the crossing was misplaced and the train derailed, and the baggage-car rolled into the ditch, throwing trunks and boxes on top of Swan. He was injured in such a manner that he will always be helpless, his lower limbs being paralyzed. Swan sued for \$25,000. The company entered a motion for a new trial.

The Philadelphia Free Library recently celebrated a year of most successful work. The aggregate circulation for 1896 of the library is 1,350,000 volumes, a larger overturn, it is said, than that of any other popular library in the world.

A child adopted in another State in substantial compliance with the statutes thereof is held, in *Gray v. Holmes* (Kan.), 32 L. R. A. 207, to have capacity to inherit lands of the adopting parent on equal terms with any other child.

An interesting ceremony was witnessed in the Supreme Court of the United States recently in the presentation of admission to practice before the court of two women by sisters in the profession. For the first time in its history the court enrolled a female attorney upon the motion of one of her own sex. The candidates were Catherine H. Pier, of Milwaukee, Wis., nominated by her sister, Kate H. Pier, of the same city, and Alice A. Minick, of Lincoln, who was vouched for by Belva A. Lockwood, of Washington, D. C.



## Humors of the Law.

EVIDENCE was being taken as to the value of certain water privileges, and photographs were put in of the *locus in quo*. The fall in question was only some few inches, but the photographers had improved on it. Counsel, wishing to magnify the descent of water and the consequent value of the right to use it, holds up the picture and remarks: "Why, my Lord, it is a perfect cataract." C. M.—, Q. C., in his dry way, replies: "On investigation, my Lord, the cataract will be seen to be in my learned friend's eye."—*London Law Times*.

Even a lawyer, who is generally supposed to know exactly what to do with his tongue, may make a slip occasionally. In a certain court, not long ago, one of the attorneys demanded permission to introduce the testimony of two witnesses who had not been duly cited.

"Do you suppose," said the court, "that they will materially assist us in getting at the facts?"

"I think so," answered the lawyer. "I have not had an opportunity to communicate with them."

An audible smile ran around the court room.

"Let them be called at once," said the judge, and the smile grew in volume.—*Youth's Companion*.

A farmer's son up in the country conceived a desire to shine as a member of the legal profession and undertook a clerkship in the office of the village pettifogger at nothing a week. At the end of the first day's study the young man returned home. "Well, Tobe, how d'yer like the law?" was the first paternal inquiry. "Tain't what its cracked up to be," replied Tobe. "Sorry I learnt it."

The Foreman.—"We find that the diseased died from natural causes."

Coroner.—"You mean the 'deceased,' not the 'diseased.'"

The Foreman.—"Both. If he hadn't been diseased he wouldn't be dead."—*Tid-Bits*.

## Communications.

NEW YORK, January 13, 1897.

To the Editor of the Albany Law Journal:

The Law Journal of March 21st, contained an editorial taking for its text the result of my action against the *Utica Observer*, the result being a verdict of \$25.

From that verdict I appealed, and the Appellate Division, Fourth Department, sitting at Rochester, in December reversed the verdict and ordered a new trial of the case. The grounds for that reversal were, that the defendant's evidence in sup-

port of its plea of justification was incompetent, was hearsay only, and, moreover, did not in any way connect the plaintiff with the matters testified about and charged in the libel.

I need hardly point out that the whole tendency of your editorial, in so far as it related to my action and in so far as that action furnished a text for your remarks, was derogatory and harmful to me, and tended to attach odium to me in the minds of your readers.

I feel that I have the right to expect that you will now give as wide publicity and as much prominence to the facts relative to the reversal of this verdict, and the grounds therefor, as you gave to the original statement, and that you will take pains in an honorable way to correct and withdraw any possible wrong impression your editorial may have conveyed.

Very truly,

TYNDALE PALMER.

[Elsewhere THE LAW JOURNAL publishes the facts of the case.—ED. LAW JOURNAL.]

## New Books and New Editions.

A TREATISE ON MECHANICS' LIENS, BY LOUIS BOISOT, JR., A. B., LL. B., OF THE CHICAGO BAR. ST. PAUL, MINN.: WEST PUBLISHING COMPANY.

This is a work of some pretensions which the author in his preface declares he has spared no pains to make both accurate and exhaustive, having personally consulted the authorities and left no part of the labor to others. It is a volume of 910 pages, and treats of all phases of the complicated and difficult subject, showing a vast amount of patient research. Busy lawyers will undoubtedly find the volume of much value as a text book.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND AND CANADA, VOL. I, NEW SERIES. LAWYERS' CO-OPERATIVE PUBLISHING COMPANY, ROCHESTER, N. Y.

Volume 1 of the General Digest, the first of a new series, is a digest of official reports, which were first published between Sept. 1, 1895, and July 1, 1896. Any case which has not an official citation is one that is not to be officially reported. All cases unofficially reported during the period covered by this digest, are included in a supplement of some 1,200 pages, which accompanies the volume, for temporary use, and these will appear in permanent form in a subsequent volume of the series when they are officially reported. The arrangement and classification are excellent, being the same as has been employed heretofore by Mr. C. C. Herrick and his co-laborers.



# The Albany Law Journal.

ALBANY, FEBRUARY 6, 1897.

## Current Topics.

THE ALBANY LAW JOURNAL will shortly begin the publication, in serial form, of a new work on "Lis Pendens," by Major Henry C. Whitney of Beachmont, Mass., the well-known author of that popular and intensely interesting volume, "Life on the Circuit with Lincoln." The announcement of a new work by Major Whitney will be received by the profession with real pleasure, and the JOURNAL is able to assure its readers that it will be, like his previous works, full, exhaustive, conscientious and up-to-date.

The flagrant, notorious abuse of the pardoning power by John P. Altgeld, while governor of Illinois, to which THE ALBANY LAW JOURNAL has already referred, is likely to cause the passage by the legislature of that State, at its present session, of a law creating a State pardoning board, to consider all applications for executive clemency. Gov. Tanner, in his first annual message, strongly recommended such legislation. "At this time," he says, "when the humanities have found expression in a far more lenient Criminal Code and a more enlightened procedure, when all presumptions are indulged in favor of innocence, when severe punishments have been abolished in all except the most heinous crimes, when the technically guilty generally escape, and when the highly guilty are only convicted after a long and heated trial, it seems illogical and most arbitrary that one man should be endowed with power, through mere caprice, if he chooses to indulge it, to overturn the results of a long and expensive adjudication."

Without doubt there are cases in every State in which it is entirely proper that the pardoning power should be exercised; but, as a general rule, the presumption is against the applicant for clemency, and favorable action is warranted only where there are exceptional and extraordinary considerations to support the plea for mercy. It will probably not be denied that the free use of the pardoning power by some of the

governors has tended to lessen public confidence in the established machinery of justice, and to encourage the sentiment in favor of summary dealing with certain classes of criminals, in order to make sure that they shall not escape well-merited punishment. Besides, a governor usually hears but one side of a case, and is unable, by reason of his many other pressing duties, to make thorough investigation of the merits of each particular application presented to him, so that no matter how honest his intentions or pure his motives, he is very liable to err. The substitution of a pardoning board, for the governor in such matters, ought to prove a decided improvement, so far as the dealing out of exact justice is concerned.

The Supreme Court of Kentucky has at last opened its doors for the admission of women to the bar, Mrs. S. P. Breckenridge having recently been admitted, after an examination by the Court of Appeals. One of the judges declared that Mrs. Breckenridge had stood the best examination ever had before the court, and that she was thoroughly versed in the law. Mrs. Breckenridge enjoys the distinction of being the first woman ever admitted by the Court of Appeals of Kentucky. She was educated in the Blue Grass State, and spent several years in Paris studying French and Roman law.

The Barrister's Bureau, which was established in Philadelphia two years ago by Jno. Houston Merrill, as a modern labor-saving device for the legal profession, seems to have "filled a long-felt want." The plan is an outgrowth of modern conditions. Every lawyer is painfully aware of the enormous increase in the number of reported cases and text-books, and of the inadequate facilities for learning the latest development of any principle of law, or the last instance of its application. In addition to this, comparatively few lawyers, even in large cities, have convenient access to complete law libraries, while those who practice in small towns must do without them entirely. It may, at any time, become exceedingly important that the lawyer shall learn the correct answer to a single question of law which he cannot investigate for himself; and it is for this purpose that the Barrister's Bureau was started. The plan of operation involved the organization of a force

of competent men to do the work, and it has required the two years already given to gain experience and test the experiment, which, we are informed, has been successful. It is now proposed to spread over a wider territory. The greatest obstacle to the success of the plan was doubtless the conservatism of the profession, which appears to have been, in large part, overcome.

The Supreme Court of Iowa recently handed down a decision which has created something of a sensation, especially among the fairer sex, in that it is held to be within the jurisdiction of a court to insist upon the exhibition of a woman's feet and legs on the witness stand. This somewhat startling result has not been reached, however, without prolonged litigation, extending over a period of more than five years. The case was that of a young lady who, in crossing the street, fell into an excavation of which she had no knowledge, and sustained severe injuries about the foot and ankle, so much so as to permanently disable her, according to her complaint. During the course of the trial the municipal authorities tried to show that the plaintiff was not permanently or seriously injured, and maintained that such fact could be clearly proven by an examination of the foot and ankle of the plaintiff. This demand on the part of the defendant that the foot and ankle be examined and measured in the presence of the jury, was denied by the trial judge in the lower court, and judgment was rendered for plaintiff. Defendant appealed, and one of his grounds for appealing was that the trial judge had erred in not allowing the foot and ankle to be measured in the presence of the jury in order that the character of the injury and its condition at that time might be ascertained. All the grounds upon which the defendant based his appeal were thrown out by the Supreme Court, with the exception of the one given above, and upon this one point that tribunal reverses the finding of the lower court, in language as follows:

"Her claim was that by reason of the fall several ligaments of the second and third toes were ruptured and her ankle severely sprained; that the injury caused severe and acute pain. Several medical men testified for the plaintiff that they had just measured her foot at

various places and her leg six inches above the ankle and found it considerably larger than the other foot. At the point above the ankle they say that the leg was smaller than the other leg at the same point. An equal number of doctors who had just measured the injured foot at the same place swore for the defendant that it was the same size as the other foot except in the measurement of the leg above the ankle, which was one-sixteenth of an inch larger than the other leg at the same point. It will not admit of a doubt that this array of medical men are not all telling the truth. Either the injured foot and leg were at the points where measured of the same size as was the other foot and leg, or it was larger or smaller at some or all of the said points of measurement.

"Now, clearly, when such skilled men differ so radically touching a matter of mere measurement, as to which any number of men lacking in skill but possessed of ordinary good sense, ought to substantially agree because relating to a fact capable of exact ascertainment, it was proper to resort to the practical plan of taking these measurements in the presence of the court and jury. There is nothing indelicate in the measurement of a foot or arm or ankle in a proper case. Plaintiff offered no objections to these measurements being made. No ground of objection thereto was stated by her counsel, but the court refused to permit it to be done. As we have said, the condition of the foot and ankle was material as bearing upon the question of the permanency of the injury, and the court erred in not ordering the measurements made as requested. Because of the refusal of the court to permit the measurements asked for the judgment is reversed."

Justice Robinson filed a dissenting opinion, in which he states that the decision of the lower court should have been sustained. He said in part:

"The request of the defendant was that Miss Hall remove her shoes and stockings in the presence of the jury, and we may presume before a large audience of bystanders in a crowded court-room for the single purpose of having her feet and legs measured in such a manner that the jury might see it done. In my opinion it was not only within the power but it was the duty of the district court, under the circumstances shown to exist, to refuse to allow the de-

sired experiment to be made. As it appears to me it would certainly have appeared indelicate if not positively indecent and would have been shocking and repulsive to any modest and sensitive woman. It was not shown to be necessary. The opinion of the majority, while disclaiming the adoption of a rule applicable to all such cases, does in effect hold that the district court had no discretion and that in all similar cases the defendant may, as a matter of right, require a woman whose injuries are in question to partially disrobe herself in the presence of the court, jury and members of the bar and possibly a court-room full of bystanders and raise her garments sufficiently high to permit each of the twelve jurors to see her legs six inches above the ankles, and that this may be done even though other evidence is at command of the defendant and at hand which may show that the exhibition is wholly unnecessary, I cannot assent to such a holding."

The Supreme Court of Utah has just rendered a unanimous opinion sustaining the constitutionality of the eight-hour law. In accordance with the Constitution of that State the legislature enacted a law forbidding the employment of men in underground workings of mines for more than eight hours per day, and making the enforced working of men for more than that time a misdemeanor punishable by fine. William Hooley was compelled by Albert F. Holden to work for more than eight hours in a mine, and Holden was prosecuted, found guilty, and fined \$50. He refused to pay the fine, and was committed to jail. He brought a suit of *habeas corpus* in the Supreme Court for his release, and on the writ the case was argued and decided. The opinion was by Chief Justice Zane, and concurred in by Justices Burtch and Miner. It reviewed the provisions of the State Constitution, and also of the Federal Constitution, which it was alleged were violated by the statute, and arrived at the conclusion that the act was in contravention of neither the fundamental law of the State nor the nation. The right of the State to pass such a law was emphatically affirmed. The writ was therefore denied, and the plaintiff remanded to jail until discharged according to law. The opinion settles conclusively a much discussed question in Utah.

The Supreme Court of the United States has reversed the decree of the Court of Appeals of the District of Columbia in the case of The Warner Valley Stock Company, appellant, v. Hoke Smith, Secretary of the Interior. The cause is remanded to the Court of Appeals with directions to reverse the decree of the Supreme Court of the district, and remand the cause to that court with directions to dismiss the bill, with costs, for want of proper parties; the costs to be paid by the appellant. The opinion of the Supreme Court is by Mr. Justice Gray, and the ground of the decision is that the suit was abated by the retirement of Secretary Smith from the secretaryship of the interior, and as to Commissioner Lamoreux, of the general land office, on the ground that he was merely a subordinate official.

A bill has passed both houses of congress giving to the Circuit Courts of Appeals final jurisdiction in all criminal cases other than capital. Under the act of March 3, 1891, creating the Circuit Courts of Appeals, it is provided, by the fifth section, that appeals and writs of error may be taken from the circuit and district courts direct to the Supreme Court of the United States, in certain cases, among them cases of conviction of capital or otherwise infamous crimes; and it is said that there are now on the docket of the Supreme Court more than forty cases in which the offence of which the plaintiff in error was convicted is below the degree of capital. The effect of the present measure will be to withdraw all such cases in future from the consideration of the Supreme Court, and to give final appellate jurisdiction to the Circuit Courts of Appeals.

An important test suit, brought by the attorney-general of Illinois against several Lloyds associations of New York, reached a decision in the Circuit Court, Chicago, a few days ago. The Lloyds concerned were the Traders, Tradesmen's, New York Central and the Lafayette. John A. Barnes & Co. represented the Lloyds at Chicago, and that firm was made the nominal defendant. Presiding Judge Clifford held that Lloyds not admitted to the State have no legal right to operate therein. He said: "The special provisions in section 22 of the act which declares that the

provisions of this sections shall apply to all foreign companies, partnerships, associations and individuals, whether incorporated or not, brings individuals under the provisions of the act, even as entitled, because such regulation of insurance business done by individuals is germane to the object stated in the title." Barnes was fined \$500, the full limit of the penalty for violation of both acts of 1869 and 1879. An appeal will be taken to the Illinois Supreme Court at the March term, and if it affirms the Circuit Court's opinion, it is said the case will be carried to the United States Supreme Court.

There is considerable criticism, some of it it must be confessed, not wholly undeserved, relative to the large lines of insurance written on the life of Charles Pfeifer, who died from a gunshot wound inflicted by himself while hunting. The total amount of insurance on the man's life was \$425,000. In June, 1895, the Equitable issued \$50,000, and in April of the same year \$50,000 additional. The Provident Life and Trust issued \$25,000 of its \$50,000 in 1895. The New York Life issued \$10,000 in 1892; two policies of \$5,000 each at an earlier date, and \$80,000 in August, 1896. The mutual issued seven policies of \$25,000 each, in September, 1896, and a note was given for the latter insurance and is not yet due. A note was also given for the \$80,000 which fell due the day after Pfeifer's death. The latter note was given to the agent of the New York Life, who had it discounted in his own bank and paid the cash to the company, whose officers had not been informed of that feature of the transaction. It is safe to say that had the agent informed his superior officers that he was obliged to accept a note for the premium, the policy for \$80,000 would not have been issued. The points raised are: Were the companies justified in writing such heavy lines on the life of a man who was obliged to pay the premiums in notes? And is a man who can really pay the cost of carrying such heavy insurance really in need of life insurance at all? It is not unlikely that the experience derived from this case and other similar losses will have the effect of inducing life insurance managers to seriously consider the question of reducing the limit that may be written on any one applicant.

The Appellate Division, First Department, has affirmed an order made at the Trial Term in a suit by Josephine De Rosaz against the Metropolitan Street Railway Company, for damages for personal injuries, granting a new trial, after a nonsuit. The plaintiff testified on the trial that she was with her daughter on Twenty-third street, waiting to board a car of defendant. The car stopped upon her daughter's signal, and the driver motioned hurriedly, saying, "Hurry up; this way." They hurried to get in by the front platform. When the plaintiff was on the platform the car started up suddenly, and she was thrown against the side of the car, striking her arm against one of the brass handles of the door, and was quite seriously hurt. Judge Rumsey, giving the unanimous opinion, holds that it is quite clear the case should have been submitted to the jury. "To attempt," he says, "to mount the front platform when the car was standing still was certainly not negligent as matter of law, nor do we think it could have been said to be negligence at all, in view of the fact that she was invited by the driver to enter the car in that way."

The Supreme Court of the United States, in the case of *Cake v. Mohun*, recently had occasion to pass on the question of what constitutes a proper compensation for the receiver of a hotel. Mohun had been appointed receiver of a hotel in Washington by an order of the Supreme Court of the District of Columbia, which instructed him to carry on the hotel business for the time being. He had never previously kept a hotel, and had to employ a manager at a salary of \$125 a month. The receivership did not interfere with his private business, and he usually spent only his evenings at the hotel. The court, nevertheless, allowed him upward of \$2,500 for his services as receiver, being 10 per cent on the receipts of the hotel while under his charge. On appeal to the Supreme Court, that tribunal sustained the allowance, though with some hesitation, intimating that, as a rule, 5 per cent on the receipts and disbursements was a fair compensation to receivers. "We are bound to say," writes Mr. Justice Brown, "that if it had been the original question, we should have fixed his compensation at a considerably less amount."

A case of alleged wife poisoning at Batavia, N. Y., in which prussic acid is said to have been the poison by which death was caused, has served to call attention to the fact that prosecutions for homicide by means of this substance have been comparatively rare in the United States. It is a common agent, however, in cases of suicide. The New York *Sun* calls attention to the fact that, in his treatise on toxicology, Dr. Rudolph A. Witthaus, of the University of the City of New York, mentions 402 cases of poisoning by cyanide compounds, of which only thirty-one were classed as intentional homicides. Where prussic acid is suspected to have been the means by which death was effected, an early analysis of the organs in which the poison may be found is of the utmost importance, as the acid is extremely volatile and unstable. The possibility that this poison may be produced in the body during the process of disorganization after death has been admitted by some high authorities, though the weight of opinion seems to be against it. There have been instances where its employment was suspected, but where death was finally proved to have been due to apoplexy. In the Batavia case death was ascribed to atrophy and degeneration of the muscular heart tissues.

The bill to reduce the cases in which the death penalty may be inflicted for crime has been signed by the president. This is the bill which Representative N. M. Curtis, of the St. Lawrence (N. Y.) district, succeeded, after many efforts, in getting through congress. The signing of the bill Jan. 15 is coincident with the anniversary of the assault upon Fort Fisher, which was led by General Curtis. General Curtis led the assault against Fort Fisher Jan. 15, 1865, in which he was successful after a desperate struggle. This achievement gave him the title of the hero of Fort Fisher. The humanitarian measure he regards as a prouder achievement than his military success. The passage of this bill, says the *Washington Star*, is due to the persistent efforts of General Curtis. He has been for many years collecting information and evidence from the criminal statistics of this and foreign countries, and has given a brief summary of the results of his labors in a pamphlet, which the judiciary committee has made use of in its favorable report of his measure. (Report No. 108, 54th

congress, first session.) It gives the result of correspondence with foreign countries, through the state department, and answers to inquiries propounded by him as to the offence for which the death penalty is inflicted in thirty-five countries, and especially as to the effects of a partial or total abolition of the death penalty. Of the thirteen countries reporting a total or partial abolition of this penalty, eleven reported the experiment as satisfactory, and that the adoption of this course was followed by a decrease in homicidal crimes. It is doubtful if so great a change in reducing the penalties prescribed by the Saxon laws has ever been made in a single legislative measure as has been done in this bill. While the offences of murder, rape and treason may be punished by death, should the jury fail to add to their verdict the clause "without capital punishment," it is very unlikely that the death penalty will be hereafter inflicted except in the most atrocious cases. There is but one single offense for which the law prescribes the death penalty on conviction, and that is the 57th article of war, for the forcing of a safeguard. All other offences for which the death penalty may be prescribed are in the discretion of military courts and the jury in civil courts in the three offences of murder, rape and treason.

The question "What constitutes desertion?" under the provisions of the Marriage Act of 1890, is interestingly discussed by the Australian *Law Times*, with two decisions of Mr. Justice Hood as the text. In one of these — *Drake v. Drake*, the circumstances of which are very unusual, if not unique — it appears that a wife brought her petition for dissolution of marriage on the ground that her husband had wilfully deserted her without just cause, for three years and upward. It appeared from the evidence that after their marriage in 1877 they lived together till 1890. In that year the respondent informed the petitioner that he loved another woman and could not any longer cohabit with her — and, as a fact, did not. In January, 1891, they gave up housekeeping and she went to live with her mother. They kept up a correspondence, she urging him to rejoin her, he refusing, saying in one letter: "I think it is absolutely immoral for two people to live together who are

not joined together by true love, and to my mind it is nothing more or less than prostitution, even if they are husband and wife in the eye of the law. But strange to say, when his wife, in 1893, began to maintain herself by keeping a boarding-house, he wrote to her suggesting that he should come to her house as a boarder. At first Mrs. Drake refused, but ultimately consented in the hope of inducing him to resume cohabitation. He accordingly became a lodger at a guinea a week—and remained a well-conducted lodger and nothing more. These relations of boarding-house keeper and lodger continued for three years, when the petitioner told him that unless he was willing to live with her as her husband she would leave, which, on his refusal, she did, and commenced proceedings for a divorce. The question then arose, "Was this desertion on his part?" His honor held it was, as the husband had wrongfully and intentionally brought to an end an existing state of cohabitation, he was thus held to have deserted his spouse, notwithstanding the fact that they occupied the same house. The *Times* commends the decision on the ground that the husband "by refusing to cohabit with his wife had put her in a state of temptation to immorality, the avoidance of which should be the first purpose of matrimony."

On the other hand, in *Ross v. Ross*, the same judge rejected a petition by the wife for a divorce on the ground of desertion, where the parties had resided in the colony, but where the husband went to New South Wales seeking for work, which he ultimately obtained. He left home (his honor thought) without the idea of desertion, but appeared to have changed his mind after a lapse of eight or ten months; after he had obtained a domicile in New South Wales. This seems to be a violation of the principle that no man is allowed to take advantage of his own wrong. It seems rather contradictory to grant a decree to a wife for desertion by a husband who comes to board and lodge with her, and to refuse one to another wife whose husband goes to what is, in the eye of the divorce law, a foreign country. A husband can simply cross the border of the colonies to look for work, and vanish from home forever, and the unfortunate wife, who may be able to find a local protector, is deprived of the opportunity. This decision is regarded by

the *Times* as against public policy and as making for immorality.

The paper adds: "According to section 74 (of the Marriage Act), a domiciled person includes a deserted wife who was domiciled in Victoria at the time of desertion, and such wife shall be deemed to have retained her Victorian domicile, notwithstanding that her husband may have, since the desertion, acquired any foreign domicile. These words exactly fit the facts of the case, and their meaning is clear and reasonable. In every other jurisdiction of the law a man is presumed to intend the natural consequences of his own acts; and no matter what the originally 'expressed' intention may have been, the respondent in the case in question, by an absence of several years, must be taken to have absolutely changed his originally expressed intentions. To hold otherwise is to inflict hardship and cruelty on a host of wives whose husbands may have gone to seek their fortunes in distant lands, and who may happen to have found them together with other comforts which may be a substitute for matrimony, though not sanctioned as such by the law. But this decision sanctions them, and we would like to see it the subject of an appeal."

The Supreme Court of Massachusetts recently handed down a decision sustaining the law which limits the issuance of liquor licenses to one for every one thousand inhabitants. The law was attacked on the ground that it, in effect, gives to the proprietors of licensed places unequal advantages and peculiar and exclusive privileges, being thus in conflict with the State Constitution, and with article 14 of the amendments of the United States Constitution. The court upheld the law as being a reasonable exercise of the police power of the State. "It is too late," the court said, "to question the validity of such statutes. This one does not differ in substance from any statute which forbids the carrying on of a trade or business or the exercise of a profession by other than licensed persons. Such statutes are upheld because the resulting exclusion of unlicensed persons is not designed to confer on those who are licensed an exclusive benefit, privilege or right, and where that result does follow it is merely the collateral and incidental effect of provisions enacted solely with a view to secure the welfare of the community."

## THE SUPPRESSION OF SHYSTERS.

THE recent request by the grand jury, that action be taken by the Bar Association for the disbarment of criminal lawyers guilty of irregular practices, has called forth considerable comment in the press. Among other things, criticisms have been made upon the alleged indifference of the Bar Association to professional abuses, and suggestions offered that if it did its duty the criminal shyster nuisance would be weeded out. No doubt the association, through its committee, to which the present complaints were recently referred, will act promptly with regard to any specific cases brought to its notice. But the evil in question is one which occasional disbarment proceedings can never hold in check.

As is well known, there are several thousand lawyers in this city. While, according to immemorial custom, a committee on character passes upon the moral eligibility of candidates for admission, the test so exercised in the nature of things can be only of a more or less negative and perfunctory kind. Our public policy would scarcely admit of requiring any qualifications in the nature of social standing. If a young man, no matter what his breeding and associations, has escaped discreditable notoriety and obtains the indorsement of one or two lawyers of respectable standing—surely no difficult thing to procure—he is admitted upon passing his examination, practically as a matter of course. Persons thus enter the profession in considerable numbers whose origin and personal affiliations naturally dispose them towards laxity of moral scruples. Then they are constantly settling down into the dregs of professional life lawyers who began respectably and even with good promise, but whose careers have been blighted by dissipation, by lack of energy or real ability, or by extraordinarily bad luck.

From such classes the ranks of criminal shysters are constantly recruited. Such men, as a rule, live from hand to mouth, and their natural method is to get access to persons arrested on criminal charges, extort all the money they can by holding out delusive hopes of a discharge or acquittal, and then either leave their victims entirely in the lurch or by interposing absurd defences aggravate the penalties which their clients are ultimately to receive. A practitioner of this kind, who has a confederate in someone connected with the care or custody of prisoners, obviously has a decided advantage in procuring business, though his temptation to mulct his victims to the uttermost is greater because his silent partner comes in for a "divvy."

The situation is a very difficult one to deal with because under our democratic system it is impracticable to exercise strict censorship over the *person-*

*nel* of the Bar. Disbarment should, of course, be resorted to whenever a sufficient case can be made out without extraordinary difficulty and expense. But the exercise of that remedy would not be sufficient to abate the nuisance. Disbarment involves the formulating and establishing of definite charges and a laborious legal proceeding. The professional sins of the criminal shyster are constant, but usually comparatively petty, and often difficult to clearly prove. Moreover, the number of such practitioners is very large. The deterrent effect of disbarment, say a half dozen of them at a term, would not be so very great, because they have little, if anything, of character and standing to lose, and no general clientage to imperil. The disposition of shysters in general would still be to take the chances of not being found out in continuing their dishonorable practices. From their standpoint the practical penalty of disbarment would be only that of being obliged to change one precarious method of earning a living for something that probably would not be much worse.

While, therefore, professional discipline of professional offenders should be faithfully prosecuted, criminal indictments should not be neglected in any cases in which they will lie. And, as intimated on a former occasion, the evil could be quite substantially mitigated by missionary effort among criminal clients. It would be a worthy charity if the Legal Aid Society, or some similar organization, should undertake the work of causing these unfortunate persons to be systematically interviewed by attorneys of respectability and intelligence, who should disinterestedly advise as to the best course to be pursued under given circumstances.—*N. Y. Law Journal.*

## ANCIENT JAPANESE LAWS.

PRIVATE conduct was regulated by some remarkable obligations entirely outside of written codes. A peasant girl, before marriage, enjoyed far more liberty than was permitted to city girls. She might be known to have a lover; and unless her parents objected very strongly, no blame would be given to her; it was regarded as an honest union—honest, at least, as to intention. But having once made a choice, the girl was held bound by that choice. If it were discovered that she met another admirer secretly, the people would strip her naked—allow her only a shuro leaf for apron, and drive her in mockery through every street and alley of the village. Afterward the girl was sentenced to banishment for five years. But at the end of that period she was considered to have expiated her fault, and she could return home with certainty of being spared further reproaches.



The obligation of mutual help in time of calamity or danger was the most imperative of all communal obligations. In time of fire, especially, everybody was required to give immediate aid to the best of his or her ability. Even children were not exempted from this duty. In towns and cities, of course, things were differently ordered; but in any little country village the universal duty was very plain and simple, and its neglect would have been considered unpardonable.

This obligation of mutual help extended to religious matters. Everybody was expected to invoke the help of the gods for the sick. For example, the entire village might be ordered to make a *sendo-mairi* on behalf of some one seriously ill. On such occasions the Kumi-cho (each Kumi-cho was responsible for the conduct of five or more families) would run from house to house, crying: "Such and such a one is very sick; kindly hasten all to make a *sendo-mairi*!" Thereupon, however, occupied for the moment, every soul in the settlement was expected to hurry to the temple—taking care not to trip or stumble on the way, as a single misstep during the performance of a *sendo-mairi* was believed to mean misfortune for the sick.—*Lafcadio Hearn in the December Atlantic*.

#### NEW YORK LEGISLATURE.

##### BILLS INTRODUCED WHICH ARE OF INTEREST TO THE LEGAL PROFESSION.

**A**MONG the bills introduced in the legislature of New York which are of particular interest to members of the legal profession are the following:

Mr. Rounds: Reducing the legal rate of interest to five per cent.

Mr. Armstrong: To allow illegitimate children to inherit from the mother if there is no lawful issue.

Mr. Bondy: To pay county judges and surrogates quarterly, except in Kings county.

Mr. Cain: Regulating telephone charges so that New York shall pay a rental of \$85 per annum, Brooklyn \$75 per annum, cities less than 500,000 and more than 100,000 \$48 per annum, cities less than 100,000 and more than 20,000, \$36 per annum, cities less than 20,000 and more than 8,000 \$30 per annum, and all cities and places less than 8,000 inhabitants, \$27 per annum. The pay station tolls are to be ten cents for the first five minutes' conversation, and five cents for every five minutes thereafter. The bill also provides that the comptroller, attorney-general, state engineer and surveyor shall constitute a board to examine and regulate the affairs of telephone corporations, and that they shall be recompensed for all moneys paid for clerical assistance.

Mr. Armstrong: To protect bicycle paths. It

proposes to amend the Penal Code (section 652) so as to provide that all sidepaths or wheelways constructed by or for the use of bicyclists shall be declared to be private paths, and any person who shall ride or drive any team, vehicle, cattle, sheep, horse, swine or other animal thereon shall be guilty of a misdemeanor. The use of sidepaths or wheelways by pedestrians shall be subject to the rights of bicyclists thereon.

Mr. Laughlin: Providing that property purchased with pension money may be subjected to seizure and sale for collection of taxes.

Mr. C. H. Miller: Increasing the number of electors in election districts in towns and cities, except New York and Brooklyn, from 400 to 600 and providing that no division of an election district shall be made until the number of electors shall exceed 800.

Mr. Humphrey: Amending the code of civil procedure, so that an action against a non-resident on a contract may be brought in the town where the plaintiff resides, and the summons may be served by a sheriff or constable in any county.

Mr. Nussbaum: Changing the State Board of Claims to a Court of Claims, and making it a court of record, to which the Civil Code is applicable. The method of appointment of judges and court officers is not changed, and their term of office is not curtailed.

Mr. Cantor: Repealing the section of the transportation corporations law which permits the consolidation of gas companies.

Mr. Adler: Constituting the mayor, recorder, comptroller, president of Charities Department and sheriff of the city of New York a commission to secure a site within the Eighth New York Assembly District, and erect thereon a building for a City Magistrates' Court and a District Court for the Fourth Judicial District, and also for the erection of a building for the use of a city prison and a county jail. The comptroller is authorized to issue bonds to the amount of \$600,000 to pay for the same.

Mr. Austin: Fixing 2,000 pounds avoirdupois as a legal ton of coal, in cities of the first class, any violation to be punishable by a fine of \$50.

By Mr. Philo: Dividing the second, eighth, ninth and twelfth wards of the city of Utica and creating additional wards, to be known as the 13th, 14th and 15th wards.

Mr. Lewis: Providing for the incorporation of associations for lending money on personal property in cities of over 25,000 inhabitants in sums not exceeding \$200 to one person.

Mr. Glen: Providing that a formula of all patent and proprietary medicines shall be filed with the State Board of Health and a certificate issued there-

from that the same is not dangerous to public health before such medicine can be lawfully offered for sale.

Mr. Ives: Amending chapter 813, Laws of 1886, relating to the requirements of veterinary surgeons, and allowing their registration in certain cases before Jan. 1, 1898.

Mr. Bondy Amending section 344 of the Penal Code, making it a misdemeanor to have in any one's possession gambling manifold sheets or gambling paraphernalia of any kind.

Mr. Hughes: Prohibiting printing, other than that used by public institutions, being done in any penal or other institution in the State.

Mr. Leonard: Repealing the retaliatory insurance law of 1896 against foreign insurance companies whose governments have refused to admit New York State companies to do business in their countries.

#### NEW YORK STATE BAR ASSOCIATION.

THE twentieth annual meeting of the New York State Bar Association was held at Albany January 19 and 20. A general meeting was held in the assembly chamber, State capitol, on the 19th, when two very able and interesting papers were read, viz.:

Anniversary oration, "Some Points in the Making of Our Constitutional System," by Hon. William L. Wilson, Postmaster-General, and an address, "A few Suggestions on Lord Chief Justice Russell's Address at Saratoga," by Hon. Walter S. Logan of New York.

The business meeting of the association was held on Wednesday, when all of the officers were re-elected, including Hon. Edward G. Whitaker, president; L. B. Proctor, Esq., secretary; F. E. Wadhams, Esq., assistant secretary; Albert Hessberg, Esq., treasurer, and Amasa J. Parker, Jr., corresponding secretary.

The annual reports of the secretary and treasurer show that the association is in a flourishing condition and that it is doing effective work throughout the State to purify the ranks of the profession, and to secure needed legal reforms. The fact was noted that the movement in behalf of national arbitration which was inaugurated by the State Bar Association at its meeting a year ago, has culminated in the recent arbitration treaty negotiated between the United States of America and Great Britain. On motion of Mr. Hawes, the committee on arbitration was continued, with power to add to its numbers and take such steps as might be necessary to carry on the work.

The address of the president was particularly timely, and called attention to the growing evil of

the multiplication of reports and the length of the opinions handed down, and suggested that the decisions be rendered by the court instead of separate opinions by the individual judges thereof, thus doing away to a considerable extent with dissenting opinions or a mere concurrence in the result. He also advocated legislation compelling registration of lawyers in a manner similar to the acts recently passed relative to the registration of doctors and dentists. A committee was appointed, of which Franklin M. Danaher, Esq., is chairman, to prepare a registration bill for submission to the legislature. Papers were also read as follows: "Plea for Preservation of Public Records," by David N. Carvalho; "View of the New York State Bar Association as seen from the Standpoint of its Twentieth Anniversary," by Martin W. Cooke; "Historic Methods of Law Reform," by Prof. C. A. Collin; "How the Battle of Lexington was looked upon in England," by Hon. John Winslow; "Examinations in Law for Admission to the Bar in the State of New York," by Franklin M. Danaher.

Wednesday evening a reception was held at the Fort Orange Club, which was attended by the judges of the Court of Appeals, the judges of the Supreme Court, and a large number of lawyers from all parts of the State.

#### THE LOUD POSTAL BILL.

THE Loud bill, which was before the house of representatives yesterday, is a good measure, having regard to its chief object, but a vicious one in some of its secondary requirements that are not at all essential to the purpose of the bill. That purpose is, or appears to be, to prevent an abuse of our postal laws by which publications that are not *bona fide* periodicals pass through the mails under the newspaper rate of one cent a pound instead of at the regular rate for books—one cent for two ounces.

There is much to be said for a cheaper rate on book postage, but this should be accomplished open and above board, and not by allowing books to masquerade as periodicals. The first section of the Loud bill is addressed to this false pretence and provides a remedy for it. It should stop there. Why proceed to put petty and embarrassing limitations on newspaper publications by exempting sample copies and return copies from the pound rate? There are other annoying restrictions upon newspaper publishers which are not based on any apparent necessity and are not germane to the main purpose of the bill.

The circulation of immense quantities of reprinted old literature through the mails at the pound rate is not an evil of that gravity that should excite congress to reprisals. Much, if not most, of the

literature thus circulated is not only cheap but good. Under the pretence of serial publications much excellent literature has been brought within the easy reach of the million who could not or would not buy the same books in more expensive form. Congress should look upon the popularizing of good literature with favor and not with reproach. It must be conceded, however, that if paper-bound books are to be given a cheap rate they should be given that boon outright on their merits, and not receive it on the shuffling pretence that they become magazines by the simple process of each book being numbered.

There is merit and plausibility in this Loud bill because it assails a manifest false pretence. Its merit would be greater if it was restricted to limiting the benefit of newspaper rates to genuine periodicals without unnecessarily hampering them in the enjoyment of the low rate. Its public effort would be more surely beneficial if it made some provision for a cheaper postage for the kind of publications which this bill excludes hereafter from the benefit of newspaper rates.—*Philadelphia Press*.

#### THE PROPOSED AMENDMENTS TO THE INTERSTATE COMMERCE LAW.

**A**FTER nearly ten years of trial the Interstate Commerce Act ought to have shown all its strong and weak points, and those charged with administering it ought to have pretty clear ideas as to its efficiency. Instituted in 1887, it has already had three important amendments, in 1889, 1891 and 1893, and every annual report of the commission has complained of defects and called for greater powers, without which the intimation has been the act was substantially a failure. From time to time federal courts have rendered decisions which seemed to knock the props of authority to enforce the law from beneath the commission, and again an opinion has been rendered which greatly strengthened its arms, notably that in the Brown case, where the power of the board to compel the testimony of witnesses was distinctly enunciated. Of the effect of three notable decisions of the Supreme Court the commission itself says: "In one case at least the law has been upheld and fortified in a most important particular, but the outcome of the others has either emphasized the defects of the statute or left its further interpretation so doubtful and uncertain as to increase the difficulties of efficient administration."

In this unsatisfactory condition of things the commission appeals to congress to pass a number of amendments, which it considers necessary, "simply to make the substance of the law mean what it was supposed to mean at the time of its passage." With a touch of apparent skepticism

the commissioners say: "If the policy of regulating railroads by public authority is to be permanently continued, laws should be provided to make that regulation efficient and useful," and after thus indicating their belief that the present policy of regulation is neither efficient nor useful, they proceed to specifically recommend nine amendments to the law, "in addition to those already mentioned in the report," as follows:

1. To confine the procedure in the courts for enforcement of orders of the commission to the record made before the commission, and to provide that the order of the commission shall be enforced unless the court shall find in the proceeding some material error which furnishes sufficient reason for refusing to enforce it.

2. To so amend section 15 (notice to carriers to cease from violation of act) as to make it expressly provide that the commission may, after due procedure and investigation, issue an order requiring the rates, facilities or practices complained of to be changed, modified or corrected as in the order specified.

3. To make railroad corporations liable to indictment for offences against the statute, as well as their officers, agents and employees.

4. To require the carriers to adopt a uniform freight classification.

5. To make the rate sheets, reports and contracts of carriers, on file with the commission, by express provision in the statute, competent testimony and *prima facie* evidence of what they purport to be in all proceedings before the commission or in the courts.

6. To permit the commission to appoint special agents with the authority to inquire into the business management of carriers.

7. To provide for the interchange of traffic between connecting roads and the continuous carriage of freights from point of shipment to place of destination, as contemplated by sections 3 and 7 of the act.

8. To require carriers to file reports with the commission for each year ending June 30, on or before September 15 next following, and to enforce obedience to this requirement by cumulative money penalty for non-compliance; to make the provisions authorizing the commission to prescribe a uniform system of railway accounts more specific, failure to conform to such a uniform system prescribed by the commission a misdemeanor; to require the carriers to file monthly reports with the commission covering earnings and expenses.

9. To require that joint tariffs shall specify the names of the carriers parties thereto, and that each of said carriers, other than the one filing the tariff, shall file with the commission such evidence of con-

currence or acceptance as may be required by the commission ; to authorize the commission to prescribe and from time to time change the form, contents and arrangement of the schedules and joint tariffs required to be published and filed.

It must occur to Senator Cullom and the other authors of the law of 1887 that their work is pretty severely reflected upon by its present administrators ; and yet it is not strange that defects developed when the experimental law was subjected to the test of practice. But are congress and the public prepared to go to the still greater length of dispensing authority which the commission desires ? May it not be troubled by the doubt, "if the policy of regulating railroads by public authority is to be permanently continued," at least under the machinery, and hesitate to pass the nine amendments in addition to a few others ? Certainly the matter ought to elicit full discussion, for it is certain, at least, that the interstate commerce act is not a perfect piece of legislation, and that certain changes are necessary to its satisfactory working.—*Railway Age*.

#### MINISTER WILLIS AS AN ATTORNEY.

The death of Minister Willis in Hawaii has set Kentuckians here to story-telling about him. One of them describes an incident illustrative of his method of trying a lawsuit before a jury. He was once attorney for a young woman in a case against a prominent and wealthy contractor of Louisville. The case attracted much attention, and the courtroom was crowded when the trial was on. The contractor took the stand, and being of an easy conscience, tried to swear the case out of court. Then Willis arose in behalf of the young woman. He did not seek to cross-examine the witness. He turned to the great crowd of spectators, and at random singled out a man in the front row.

"Stand up and get sworn where you stand," said Willis to the astonished spectator. "Do you know the defendant?"

"Yes," answered the spectator.

"Do you know his reputation for truth and veracity?"

"Yes."

"Is it good or bad?"

"Bad."

"Would you believe him under oath?"

"No."

Then Willis called on another spectator to stand up and be sworn, with similar results. Thus he called on spectator after spectator at random, until he had sworn fifteen or twenty of them. They all agreed that the contractor could not be believed under oath. It was proof positive to the jury in impeaching the contractor, for it was clear to every

one that the witnesses had not been summoned for the purpose of impeachment. Willis won the case and secured a verdict of \$20,000 against the defendant.—*Washington Dispatch to N. Y. Evening Post*.

#### PUNISHMENT NOT CRUELTY.

ONE of the first offices and best fruits of civilization is the restraining influence which it exerts upon the cruel instincts and brutal propensities of perverted human nature. It accomplishes this primarily by imposing upon governments the imperative duty of so performing their official functions as to present a proper example to the individual for the regulation of his private conduct. A government has no more right to be cruel or revengeful than has an individual. A cruel government will necessarily develop cruelty and barbarity in those under its authority. These reflections are suggested by the following incident reported on Saturday from Danville, Pa.:

"In sentencing Paul Tonetska to four months' imprisonment in the county jail, Judge Ikeler delivered a remarkable judicial utterance in order to impose the strictest penalty upon the prisoner. The judge instructed the sheriff to make Tonetska's imprisonment 'as hard as possible, and to allow him to receive only enough food to sustain life' as long as he remained in jail."

Such a sentence would not have been regarded as extraordinary, except, perhaps, for its mercy, a century or two ago. It might be considered as mild and temperate even in this day by some of the more rigorous European and Eastern governments. But it cannot be regarded in this country, in the closing decade of the nineteenth century, other than as excessive, oppressive and cruel. This judge may be safely within the letter of some old Pennsylvania statute, a surviving relic of the common law of England engrafted upon our early penal system. Still, he has unquestionably violated the spirit that now animates American jurisprudence. The famous sentence pronounced against Sir Walter Raleigh indicates the source of such penalties. It is described as follows:

"After the preliminary announcement that the prisoner should be removed to the jail, the lord chief justice pronounced sentence in these words: 'And you shall be taken to the place of execution in a cart, and shall be hanged by the neck and cut down alive, and your heart shall be taken from your body and burned before your eyes, and your body shall be divided into four quarters, to be disposed of at the king's pleasure. And may the Lord have mercy on your soul.'"

It is to the credit of England that this sentence was not carried out. The king mercifully decided

that in view of Raleigh's services to the crown, and his many years of imprisonment, that he should enjoy the inestimable privilege of simply being beheaded; and so they cut off his head. Our system of punishment under the law excludes entirely the barbarous idea of punishment for the sake of punishment. Our theory of punishment combines three ideas: First, the vindication of the majesty of the law; second, the deterring of others from crime, and third, the reformation of the criminal.

The day will probably come when the last named will be given the first place in the order of purposes and uses of judicial penalty and criminal punishment. Justice unless tempered with mercy almost inevitably degenerates into cruelty and brutality.—*N. Y. Mail and Express.*

#### LEGAL AUTHORS OF FAMILIAR QUOTATIONS.

**L**IEUT. COL. DALBIAC, the Conservative member in the present house of commons for Central Finsbury, has just presented to the public an excellent "Dictionary of Quotations," on which he has been at work for upwards of five years. Reference to chapter and verse for each quotation has been given, and a glance at the index of authors will prove in a way that is at once convincing and gratifying how largely the members of the bar and of the judicial bench have contributed to the authorship of the famous phrases which have become familiar in our mouths as household words.

Sir Edward Coke and Blackstone are highly technical legal writers, but Col. Dalbiac has successfully laid both the "Third Institutes" and the "Commentaries" under contribution. To Coke we owe the familiar expression, "A man's house is his castle," while Blackstone gives us the well-known axiom, "Man was formed for society."

Lord Bacon, who had "chosen all knowledge for his province," is, as might be anticipated, the author of many familiar quotations. Here are a few: "A crowd is not company, and faces are but a gallery of pictures, and talk but a tinkling cymbal where there is no love." "A man is but what he knoweth," "A man's disposition is never well known till he be crossed." "Children sweeten labors, but they make misfortunes more bitter, they increase the cares of life, but they mitigate the remembrance of death." "Discretion of speech is more than eloquence." "He that hath a wife and children hath given hostages to fortune, for they are impediments to great enterprises either of virtue or mischief." "Knowledge is power." "Lookers-on many times see more than the gamesters." "One foul sentence doth more hurt than many foul examples." "Praise is the reflection of virtue."

"Reading maketh a full man, conference a ready man, and writing an exact man." "Some books are to be tasted, others are to be swallowed, and some few are to be chewed and digested." "The knowledge of man is as the waters, some descending from above and some springing from beneath, the one informed by the light of nature, and the other inspired by divine revelation." "The mould of a man's future is in his own hands." "The remedy is worse than the disease." "There is nothing makes a man suspect more than to know little." "Wives are young men's mistresses, companions for middle age, and old men's nurses."

John Selden is the author of the immortal sayings "Old friends are best," and "Syllables govern the world," while Jeremy Bentham, the eminent juridical writer of the present century, has given to us "It is the greatest good to the greatest number which is the measure of right and wrong."

The saying "When rogues fall out and honest men get their own" fell from the lips of Sir M. Hale, when sitting on the judicial bench, and the saying "The greater the truth, the greater the libel," was first uttered by Lord Mansfield in his capacity of chief justice of England.

Lord Brougham, speaking in the house of commons in 1828, first gave utterance to the saying "The schoolmaster is abroad." The full paragraph of the speech runs thus: "The schoolmaster is abroad, and I trust more to him, armed with his primer, than I do to the soldier in full military array, for upholding and extending the liberties of the country."

Fielding, whose unique knowledge of human nature was largely derived from his experience as a police magistrate, has enriched our literature by the saying "Love and scandal are the best sweeteners of tea."

Nor has the origination of well-known sayings been confined, so far as legal circles are concerned, to those who have passed away. Mr. Augustine Birrell, Q. C., M. P., occupies a very conspicuous position in the pages of Col. Dalbiac's "Dictionary of Quotations." To Mr. Birrell we owe the sayings: "A great poet, like a great peak, must sometimes be allowed to have his head in the clouds;" "That great dust heap called 'history,'" and "The possession of great physical strength is no mean assistance to a straightforward life."

In this very cursory and fragmentary selection of the sayings of legal personages selected from Col. Dalbiac's Dictionary—a selection which might be largely extended—we have strictly confined the quotations to authors whose fame lies not exclusively in the domain of literature, but largely, also, in the domain of jurisprudence and the actual practice of the law. Col. Dalbiac's work, which is a monument of laborious industry and of eminent care and

judgment in the selection and marshalling of the questions, has been utilized by us for a purpose not contemplated by the author. The pages of this Dictionary of Quotations bear evidence which, although unconscious, is irrefragable, to the power and influence of the profession of the law, in giving birth to the term "syllables," which, in the words of old John Selden "govern the world."—*Law Times* (London).

### Notes of Recent American Decisions.

**ACCIDENT INSURANCE — VIOLATION OF GAME LAWS — UNNECESSARY DANGER.**—In *Cornwell v. Fraternal Acc. Ass'n of America*, in the Supreme Court of North Dakota, November, 1896 (69 N. W. R. 191), the following points were decided :

One who has started to hunt prairie chickens with a loaded gun at a season of the year when it is unlawful to kill prairie chickens has not, by such act, committed the offence of attempting to kill prairie chickens.

One who hunts for game with a loaded gun cannot be said to have voluntarily exposed himself to unnecessary danger by such act, within the meaning of the provision in an accident insurance policy which declares that, for injuries sustained by reason of a voluntary exposure to unnecessary danger, there can be no recovery.

Nor is an attempt to scale a bank with a loaded gun in hand a voluntary exposure to unnecessary danger, within the meaning of such a provision.

In almost direct conflict it is held, on the one hand, in *McCall v. Hampton* [Ky.] 33 L. R. A. 266, that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity any more than at law ; and on the other hand, in *Clendening v. Wyatt* [Kan.] 33 L. R. A. 278, that such an expectancy may become a subject of contract which will be upheld in equity if fairly made and for an adequate consideration. An exhaustive note to this case reviews the numerous decisions of the validity of such a sale of an expectancy, and most of them agree with the Kansas decision.

**ADMINISTRATION — APPOINTMENT OF ADMINISTRATOR.**—A grant of letters testamentary on proof that decedent owned property in the State, no matter when or how such chattels were brought into the State, was valid though decedent, at the time of his death, was a resident of Alabama, and left assets there. (*Shield v. Union Central Life Insurance Co.* [N. Car.], 25 S. E. Rep. 951.)

**ADVERSE POSSESSION — PARENTAL RELATION.**—As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse.

To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land. (*O'Boyle v. McHugh* [Minn.], 69 N. W. Rep. 37.)

**CARRIERS—INJURIES TO PASSENGER ON STREET CAR.**—The concurrent facts of the happening of an accident to a passenger on a street car and the exercise by the passenger of ordinary care, do not raise a presumption of negligence against the carrier, so as to shift the burden of proof on it to show that it was not guilty of negligence, where plaintiff's evidence shows that the accident was due to a wagon driven so close to an open car as to strike plaintiff's foot. (*Chicago City Ry. Co. v. Rood* [Ill.], 45 N. E. Rep. 238.)

**CONTRACT—PUBLIC POLICY.**—A contract between a board of trade and a person who represents himself as having control over certain industries which he is about to establish in another town, whereby such person agrees to withdraw from that deal, and use his influence to have those industries established in the town represented by said board, is not against public policy. (*Lord v. Board of Trade of Wichita* [Ill.], 45 N. E. Rep. 205.)

**CONVERSION — OWNERSHIP OF CROPS.**—The owner of real estate is presumed, *prima facie*, to own its products, including annual crops. Such presumption, however, is not conclusive and may be rebutted by evidence. (*Elstad v. Northwestern Elevator Co.* [N. Dak.], 69 N. W. Rep. 44.)

**CORPORATIONS — INSOLVENCY—FRAUDULENT CONVEYANCES.**—A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property on hand, which, if converted into money at market prices, would be sufficient to meet liabilities. (*Silver Valley Min. Co. v. North Carolina Smelting Co.* [N. Car.], 25 S. E. Rep. 954.)

**LANDLORD AND TENANT—ERECTION OF FIRE ESCAPES.**—Fire escapes on a leased building are held, in *Schmalzried v. White* [Tenn.], 32 L. R. A. 782, to be not required of the landlord, unless they are required by statute or ordinance.

**MARRIED WOMAN — PARTNERSHIP WITH HUSBAND.**—There is no law or public policy in this State which forbids a married woman from engaging in business with her husband as a copartner; and where a partnership between them is formed, and she is held out to the world as one of its members, she becomes liable to one who deals with the firm upon the faith of her membership therein. (*Burney v. Savannah Grocery Co.* [Ga.], 25 S. E. Rep. 915.)

**PAYMENT OF MONEY BY MISTAKE — RIGHT OF PARTY PAYING TO RECOVER.**—Where money is paid by a mistake of fact (in this case as to the realty

of the party with whom both plaintiff and defendant dealt), neither party being in fault, the party paying the money may recover it back as money paid without consideration, and therefore money had and received by the defendant to the use of the plaintiff. (*Straus v. Hensley*, decided by Court of Appeals of District of Columbia.)

**RAILROAD COMPANIES — EJECTION OF TRESPASSER — SERVANT'S AUTHORITY.**— In an action against a railroad company for injuries, it appeared that plaintiff got on a box car to steal a ride; and he testified that after the train started he was kicked off by one of the trainmen, and was injured. *Held*, that, though plaintiff was a trespasser, if he was given no reasonable opportunity without exposing himself to danger, but was forced to leave the train while it was in motion, by force exercised by defendant's employes within the scope of their employment, and in so leaving he received his injuries, defendant was liable. (*Chesapeake & O. R. Co. v. Anderson* [Va.], 25 S. E. Rep. 947.)

**RAILROAD COMPANIES — LIABILITY OF LESSOR.**— A railroad company which allows other companies to run trains over its track is jointly liable with such other companies for injuries caused by their negligence. (*Chicago & E. R. Co. v. Meech* [Ill.], 45 N. E. Rep. 290.)

**RIGHT OF INDORSER TO SUE ON NOTE.**— The indorser of a note, who again indorses it as collateral, but who obtains possession of it again from the second indorsee for the purpose of suit, may sue in his own name, notwithstanding the second indorsement. (*Henderson v. Davisson* [Supr. Court of Ill.], 41 N. E. Rep. 560.)

**SALE—DAMAGES FOR BREACH.**—The measure of damages for refusing to accept and pay for the subject of a contract of sale is the difference between the contract-price and the market-value at the time when it should have been accepted, less expenses which the seller was saved by such refusal. (*Newark City Ice Co. v. Fisher* [U. S. C. C. of App., Third Circuit], 76 Fed. Rep. 427.)

### Legal Notes of Pertinence.

In a recent case before the Supreme Court of Indiana, the terms of the accident insurance policy upon which suit was brought, required, under penalty of forfeiture, that notice of accidental injury or death be given within ten days, with "full particulars of the accident and injury." It appeared that the insured was drowned; that the wife, who was beneficiary, did not and could not know until the finding of a coroner's jury, eleven days after his death, that he died of accident; that

she gave the required notice within five days afterwards; that the company admitted that he was accidentally drowned; and that the general agent of the company had actual knowledge of the facts within ten days. Under these facts, it was held that the notice was sufficient. (*Peele v. Provident Fund Soc.* 44 N. E. Rep. 661.)

There appears to be an increasing tendency in Scotland to invoke the divorce laws in connection with matrimonial disputes. During last year there were 184 consistorial cases, including divorce, separation and alimony, and adherence, compared with 155 cases the year before. Of last year's cases, 124 were initiated by wives and sixty by husbands; and in eighty-four instances infidelity was the ground of action. In 1889 the total number of cases was only 129; in 1890, 110; in 1891, 143; in 1892, 149; in 1893, 150, and in 1894, 138.

The *Springfield Republican* remarks that the Boston lawyer who put in a bill of \$25,000 for four months of personal services as receiver of an insolvent Springfield concern was, at least, trying to live in harmony with his professional environment. We do not understand, however, that charging big fees is confined to Boston lawyers exclusively. It is a practice that is about as wide spread as the profession.

Abram S. Hewitt has evolved another of his choice epigrams. He defines bipartisanship, which it is proposed to perpetuate in the Greater New York charter, as a scheme by which one or the other party—and it doesn't matter a continental which party it is—will be in control, and the result will be that your property will be divided between the bosses of the two parties and their heelers.

Julian Ralph says that while Lady Scott has undoubtedly been guilty of disgusting conduct, and has a very shady reputation, public opinion in London has rather favored her. None of the parties may be worthy of much esteem, but Lord Russell did not exactly shine in the affair, and the average man demands that the person who hounds down a woman shall have his own hands very clean.

An intoxicated person who refuses to go into a car when there is standing room inside, but goes down upon the steps of the platform without the knowledge of the conductor or other person in charge of the train, after he has been several times requested to come inside, and loses his balance when the car lurches in rounding a curve, is held, in *Fisher v. West Virginia & P. R. Co.* ([W. Va.], 33 L. R. A. 69), to be guilty of such negligence on his part as will preclude any recovery against the carrier. His intoxication is held to be no excuse for his contributory negligence.



### Humors of the Law.

REFERRING to a railroad whose operating expenses always exceeded its earnings, an opinion of the United States Supreme Court contains the following: "Counsel say that 'it is familiarly known in Texas as a teaser, and if it ever passes beyond this interesting but unprofitable stage, even its friends will be surprised.' We are not advised, and we can hardly be expected to take judicial notice, of what is meant by the term 'teaser,' but it is clearly disclosed by the record that this was an unprofitable road."

There was an amusing scene at the Spalding Sessions-house last week, when Edward Thompson, a tramp, was sentenced to one month's hard labor. Prisoner: "No; this is not a full court. You cannot give me that." The magistrate conferred with the clerk, who admitted that the prisoner was perfectly right and that the magistrate could not give him more than fourteen days. The magistrate: "Very well, then—fourteen days. You are perfectly entitled to that."—*London Law Times*.

ALSO TO BE SUSPENDED.—It is told of Judge E. H. Gary of the Chicago bar, that before his election to the bench he was associate counsel in the trial of a murder case in the Circuit Court of an adjoining county. The late Colonel Joselyn, one of the ablest advocates in his day, concluded a most effective argument to the jury in these words:

"Gentlemen, do not come to a conclusion during the appeal which will be made in the closing argument. Suspend judgment until the argument is closed. Suspend judgment until the charge is given you by the court. Suspend judgment until you have retired to the jury-room. Suspend judgment until you have time to consider carefully what the awful result of your verdict will be if you fail to acquit."

The jury were bathed in tears, but the effect of the peroration was materially lessened by the words of Prosecutor Gary, who deliberately rose, and, as if continuing the argument said: "And, finally, gentlemen, because it is necessary, suspend the prisoner."

#### KENTUCKY JUSTICE.

The pithy complaint in a Kentucky slander case made out by a justice of the peace is sent us by a correspondent:

Mrs. Rose C. to Mrs. Will P. Dr.

To use of abusive language in my presence,	\$75.
Credit by abusive language,	\$45.
Balance,	\$30.

— *Case and Comment*.

In Germany there is no matter so small or so trivial that it has not its laws and ordinances. To the mind of the German police officer these, and all these, are as important as the decalog. A young Englishman was riding early one morning in a certain public park, and seeing a bench near by and no one in sight, he jumped his horse over it, when, to his amazement, a man appeared and told him he had broken such and such a law, and then fined him a mark. In Germany the policeman is first a constable, next the witness for the prosecution, then the jury, and last the judge who pronounces sentence—all in one breath. "You must pay a fine of one mark for jumping your horse over that bench," he said. The rider claimed that no harm had been done and that both the bench and the park were empty at the time. But the official said: "No, you have broken the law." So the law-breaker put his hand in his pocket and handed the officer a two mark piece. "But," said the policeman, "I cannot change this." "Oh! that makes no difference," replied our young horseman. "I'll just take another jump"—which he did, without waiting for further instruction in the law of the land.—*Cor. N. Y. Evening Post*.

"What is the complainant's reputation for truth and veracity," asked the lawyer.

"It is generally good, I think," answered the witness, "though in telling about the size of the snakes he has killed he seems to be inclined to go to almost any length."—*Indianapolis Journal*.

### New Books and New Editions.

COMMENTARIES ON THE LAWS OF ENGLAND, in four books, by Sir William Blackstone, Knight, one of the Justices of His Majesty's Court of Common Pleas; with notes selected from the editions of Archbold, Christian, Coleridge, Chitty, Stewart, Kerr and others; and in addition, notes and references to all text-books and decisions wherein the commentaries have been cited, and all statutes modifying the text. By William Draper Lewis, Ph. D., Dean of the Department of Law of the University of Pennsylvania, Book 1. Philadelphia: Rees, Welsh & Co., 1897.

As good wine needs no bush, so Blackstone's Commentaries on the Laws of England require no commendation. As a work on the elementary principles of the law, it has probably never been equaled; while, in addition to its comprehensiveness and accuracy, the purity and elegance of the style, which great scholars all unite in commending, lend charm to what would ordinarily be, in part at least, dry and uninteresting matter. It is a constant source of surprise to the student that so large a portion of the principles enumerated so far back as

1760 are still the law to-day; and as Chancellor Kent remarked, in referring to Blackstone, "what is obsolete is necessary to illustrate that which remains in use." The author of the present edition, in his preface, declares that his apology for adding still another to the list is his desire to accomplish, in the notes, certain things not heretofore attempted, and also his belief that the time has come when accumulated experience makes it possible to select what is best from the mass of notes left by his predecessors. This painstaking effort to preserve the learning which has accumulated around Blackstone's work, while it involved a very large amount of research and labor, will surely well repay the effort. In his own notes Dr. Draper gives the dates of the cases, as well as the citations. The edition will be found to be absolutely unabridged.

**THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES**, by Arthur Underhill, M. A., LL. D., of Lincoln's Inn and the Chancery Bar, Barrister-at-Law. Fourth edition, enlarged and revised. First American edition by F. A. Wislizenus and Adolph Wislizenus of the St. Louis bar. St. Louis: The F. H. Thomas Law Book Co. 1896.

This edition of Underhill on Trusts is considerably enlarged by the addition of all important decisions since April, 1888, the date of the third edition, by amplifying the important chapter on the Duties of Trustees, and by numerous references to the recently enacted Trustee Act (1893). The American editors in writing the notes to Mr. Underhill's work have endeavored to follow, as closely as possible, the path marked out by the author of the English text. Whenever it is not apparent from the face of the text that a proposition declared is based upon peculiarly English statute law, attention is called to the fact in the American notes, and where the English and American common law are not in harmony, the difference has been clearly elucidated. Wherever feasible the American cases reported in the various unofficial reporters, have also been cited from the official State reports. Mr. Underhill's really valuable treatise is thus admirably adapted to the use of American practitioners.

Messrs. Dodd Mead & Co. announce the publication of an American edition of **THE EXPOSITOR**, edited by W. Robertson Nicoll, M. A., LL. D., beginning with the commencement of the fifth series in England. Rev. Charles Cuthbert Hall, D. D., recently called to the presidency of Union Theological Seminary, New York, has undertaken the editorship of the American edition. Many eminent writers have promised their co-operation. The *Expositor* has for many years occupied the foremost place among theological magazines in England.

### The Magazines.

**HARPER'S MAGAZINE** for February is a monument of the policy of exalted journalism which has characterized it in the past, and which is more and more becoming the policy of American magazines everywhere. Articles of literary research, literary criticism, or advanced thought in art and letters, though by no means entirely absent, are subordinated to reports and discussions of the vital interests of modern life. Richard Harding Davis went all the way to Moscow to report the coronation of the Czar and the Czarina. Charles F. Lummis presents the first of a series of articles on the Mexico of to-day, in preparing which he spent three months beyond the Rio Grande; and Poultney Bigelow has brought back from Cape Town a series of articles on "White Man's Africa," the present number of which, illustrated by Frederic Remington and W. H. Drake, from photographs taken by the author, discusses the career of President Steyn of the Orange Free State.

**McCLURE'S** magazine for the current month is a splendid monument of the enterprise and liberality of the management of this popular periodical, which has won a high place and large circulation despite strong opposition. Space is not available for extended reference to the many excellent features; suffice it to say that McClure's is a veritable mine of literary gems.

**LITTELL'S LIVING AGE** seems like old wine—age adds to its strength. A number of timely topics are treated by eminent writers in the February number.

The February number of the **REVIEW OF REVIEWS** is one of the best issued in a long time. Leading features are: "A Sketch of and Tribute to the late Gen. Francis A. Walker," by Joseph Jansen Spencer; and an appreciative reference to his worth as a public man, by Prof. D. R. Dewey; a sketch of "Rudyard Kipling," by Charles D. Lanier, and two excellent articles on "Browning," by Dean Farrar and Rev. Herbert Stead, respectively.

One of the most beautiful specimens of modern typography that has ever come under our notice is the souvenir volume issued by the MacKellar, Smiths and Jordan branch of the American Type Founders' Company, of Philadelphia, in commemoration of the one hundredth anniversary of its organization. It is a large, beautifully bound volume, with letter-press work about as near to perfection as has yet been reached, and embellished with many half-tone engravings, which are in the very highest style of the art. As an example of the art preservative, it is easily entitled to a place in the front rank.

## The Albany Law Journal.

ALBANY, FEBRUARY 13, 1897.

### Current Topics.

WE notice that a bill has been introduced in the legislature, making an appropriation of \$25,000 for the purchase of sets of statutes, embracing all the Codes. This appears to be, on the face of it, a measure of decidedly questionable propriety, and for reasons which will at once occur to the mind of every practicing lawyer. This proposed arrangement of the Statutes, with all the Codes in alphabetical order, without consideration of the amendments which are certain to be made to the Codes—civil, penal, highway, insurance, railroad or other Codes,—would destroy the value of this edition, rendering it of little or no practical use to the profession. Another strong and convincing reason why this bill ought not to pass, is found in the fact that last year the legislature appropriated money for the purchase of the ninth edition of the Revised Statutes, edited by Mr. Charles A. Collin, who was for many years one of the revisers, and under whose direction all the revised Code Laws up to within the last few years, were passed. It would therefore seem to be wholly unnecessary for the State to again furnish to each officer in the State and in the various counties another edition which, as already stated, would be really of no use after the adjournment of the legislature. We do not think it possible that either the ways and means committee of the house, or the finance committee of the senate will recommend to the legislature the passage of an act appropriating money for any such purpose.

The defective condition of the law with respect to the defence of insanity in criminal cases, again clearly demonstrated by the recent acquittal of Marie Barberi, on her second trial in New York, of the charge of murdering a man, who, after betraying, refused to marry her, is sought to be remedied by the bill to amend section 454 of chapter 442 of the Laws of 1881 (the Code of Criminal Procedure), recently introduced in the legislature by Senator Brackett. This bill was drawn by Henry

Lauren Clinton of the New York bar. Under the present law, as is well known, one on trial for murder may be acquitted on the ground of insanity, and at once let loose on the community, as the Barberi woman has been, to repeat outbursts of murderous violence. The bill referred to provides that when

"The jury shall acquit the defendant on the ground of insanity such insanity shall be presumed to continue, and the court in which such acquittal shall be had shall make an order that the person so acquitted shall be confined in the State Lunatic Asylum for a period of not less than ten nor more than twenty years, and until he becomes sane."

This bill also provides that :

"The governor shall have power at any time, if in his opinion justice shall require it, to discharge any person confined in the State Lunatic Asylum under the provisions of this section in relation to acquittals on the ground of insanity in the cases specified in this section."

While there may be differences of opinion as to the exact provisions of the amendment, few will deny that the public safety imperatively demands that the law in this respect be changed. Mr. Clinton well says, in defence of the proposed amendment, that "if a person escape the consequences of a capital crime and obtain an acquittal on the ground of insanity, he ought to accept the consequences of the verdict. If he be so insane as to kill people, he is clearly too insane to be at large." How long or how short should be the minimum term of confinement in the State Lunatic Asylum is a matter properly resting in the legislature. Of course, no general law can be enacted which will fit harmoniously every case that may arise; but the proper test is whether it will operate justly in the great majority of cases. It would seem that, under the provisions of the law, as now proposed to be amended, no injustice would be done to those restrained of their liberty. An application for their discharge could at any time be made to the Governor; and there would be little or no danger of the Executive erring on the side of severity. In England, when the defense of insanity prevails, the defendant is convicted and his imprisonment continues during the pleasure of the Queen. Under this bill it would rest in the dis-

cretion of the Governor to say how long the confinement should continue, within a certain limit, namely, from ten to twenty years. It is claimed, in behalf of the bill, that it would encourage the defense of insanity where it actually exists, by throwing around the really insane the protection of the law, and that the effect would also be to discourage the interposition of this defense where it was a sham. It should also be borne in mind that by the present law any one confined under the authority of section 454 of the Code of Criminal Procedure, can institute proceedings by *habeas corpus* and ask for his release on the ground that he has "become sane." The petition for the *habeas corpus* can be verified by him or any of his friends or relatives. If it aver that he has "become sane," the judge to whom the application is made is obliged to allow the writ. Should he refuse he would be subjected to a severe penalty. When the person so confined is brought before him, the judge must decide upon the facts as they appear. If the officials having him in custody allege in their return that he has not "become sane," an issue of fact may be raised upon which evidence can be taken. The judge must decide upon the case thus presented to him. He cannot be influenced by any information obtained outside of such evidence; and he must render his decision with reasonable promptness. There has been much complaint of the abuse of medical expert testimony in capital cases. In the Barberi trial the cost of one of these witnesses is said to have been \$10,000, and in the Fleming trial Prof. Vaughn, of Ann Arbor University, received \$300 a day and expenses; he arranged his terms in advance, and would not come for less. The trial of Dr. Myer cost \$62,000 for expert testimony. Mr. Clinton well asks how a poor man is to be defended upon a murder trial when the defense is insanity, and adds that if the successful defense of insanity were sure to result in a sentence of confinement in the State Lunatic Asylum of from ten to twenty years, such defense would rarely be, if ever, interposed except in cases of actual insanity. The suggestion, made, we believe, by Recorder Goff of New York, that the court should select medical experts and permit none other to officiate as witnesses, Mr. Clinton believes would be clearly unconstitutional, the

court having no more right to select medical experts as witnesses for a defendant than it would have to deny him the right to choose his own lawyers to conduct his defense.

Judge Pryor has handed down a decision in favor of John D. Rockefeller, dismissing the suit brought against him by the Tabernacle Baptist church, New York, to compel the performance of an alleged contract, by the terms of which Mr. Rockefeller was to deposit \$50,000 of five per cent. bonds with a trustee, the interest to be applied for the benefit of the church. Reference to this action was made in a previous issue of the LAW JOURNAL. It appears that the bonds were deposited by Mr. Rockefeller as required, but after they had paid interest for eighteen months the railroad company that issued them defaulted in the payment of interest, and since then the church has received nothing. Rev. Dr. D. C. Potter, on behalf of the church, sued to compel Mr. Rockefeller to pay about \$9,000 interest, which had accrued on the bonds, and make good the alleged agreement. Judge Pryor holds that, in substance and effect, the transaction between Mr. Rockefeller and the church was a gratuity, and as such not the subject of a suit to compel performance.

Everybody is, or ought to be, interested in the subject of good roads, and the statement that the New York legislature is likely to give the matter the attention it deserves at the present session, will be heard with pleasure. Senator Higbie has introduced at Albany his good roads, bill which provides for a state highway Commission of three, one of whom shall be a civil engineer—to serve for three, four and five years, respectively, as the Governor shall designate. It is made the duty of this commission to compile statistics, make surveys and prepare maps, pass upon material for certain localities as well as methods of construction, decide where State aid is desirable, advise and co-operate with local officials and generally recommend and superintend this important work. One-half of the expense of construction is to be borne by the State, 35 per cent by the county, and 15 per cent by the property directly benefited. A State tax of one-tenth of a mill, to be known as a highway tax, is to be

levied annually, and exhaustive provision is made for every detail of the work. The commissioners are to receive each a salary of \$5,000, and \$10,000 a year for office expenses.

Morton Cromwell, the member of assembly from Queens county, has been requested by constituents who are members of the legal profession to introduce a bill making it a misdemeanor for any person to draw up a deed or mortgage unless he be an attorney and counselor-at-law. In giving reasons why such a law should be enacted, G. Smith Stanton of Thomaston—Great Neck, N. Y., says in addressing the member from Queens:

"Having been a searcher of titles from the time I was admitted to the bar in 1866, I know the custom of ignorant justices of the peace and conceited carpenters, blacksmiths and the like, drawing up conveyances has caused untold annoyance to abstractors of titles, sometimes leaving a cloud on the title almost impossible to remove, and in some instances leading to litigation, thereby injuring the public. The enactment of such a law has long been in my mind, and what brought the matter to my attention at this particular time was a deed brought before me, as a notary public, for acknowledgment which had been drawn up by a mechanic. There were so many erasures and interlineations there wasn't space to note them. You are aware I have not the honor of your acquaintance, nor do I know your occupation, but there are many lawyers in the legislature, and if you call their attention to this question, they will, I believe, to a man, agree with me. You need not fear that the business would suffer from a scarcity of lawyers, as the woods are full of them."

Mr. Stanton refers to a real grievance, as every lawyer whose practice has required him to search titles will testify. Whether the remedy proposed is not too radical, however, and whether it would be constitutional, are questions to be decided by the legislature.

The New York Supreme Court, Second Department, recently handed down a decision in *Colon v. Lisk*, which holds certain sections of the Fisheries, Game and Forest laws of this State unconstitutional. The opinion, which is by Judge Hatch, holds that the sections which

authorize the seizure of any boat or vessel, together with its tackle and furniture used in disturbing or carrying away oysters of another, lawfully planted or cultivated in any of the waters of the State, or removing boundary marks of any planted or cultivated oyster beds, are unconstitutional.

The law further provides for the trial of the question whether a vessel or property seized was used in violation of the law before a justice of the peace without a jury, and it is held that such provision is void as in such case the right to trial by jury is constitutionally guaranteed. The determination as to the right to trial by jury in close cases always to a large extent turns upon a historical question, and the court has very carefully examined the law in aid of the conclusion reached. The opinion cites the decision of the New York Court of Appeals and the Supreme Court of the United States in *Lawton v. Steele* (144 N. Y. 226; 152 U. S. 138). In that case, as Judge Hatch shows, the right of a legislature to provide for summary confiscation of articles of small value actually in use in violation of law, was recognized. In *Lawton v. Steele* Mr. Justice Brown, of the United States Supreme Court, used the following language:

"It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law.

"But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, ch'

and dice of a gambling room. The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation."

Under State laws, therefore, forfeiture of personal property as a police measure may be sustained as to articles of trifling value without judicial inquiry; but where the articles sought to be forfeited are of comparative importance, the owner is entitled to a jury trial of the merits.

Josiah W. Place, general assignee of the firm of Walter & Place, appealed from an order of the Supreme Court obtained by the York Haven Paper Company and others, in their suits as judgment creditors, to set aside the assignment, for a discovery and inspection of books and papers used by the assignor. The Appellate Division, by Justice Barrett, has given a decision holding that the order was properly granted. The assignors are brother and brother-in-law of the assignee, and the plaintiffs claim that the assignors, who did not appear in the action, fraudulently withheld certain assets from the operation of the assignment, and omitted to specify them in their schedules. "It would seem to be natural," Justice Barrett remarks, "that the assignors should throw open the firm's books freely to the inspection of creditors. If their assignment is honest, who can be harmed by the inspection? If it is dishonest, assuming the assignee is not a guilty party, why should he obstruct creditors in ob-

taining proof of fraud? It seems clear that where general allegations of the selling and secreting of the firm's assets are made, and these allegations are supported by evidence to the effect that there are entries in the firm's books which will show such concealing and secreting, the evidence being specific as to a particular sum withdrawn upon a given date, a case is made out for a general inspection."

The action of the New York police commissioners in dismissing Policeman John Fitzgibbons has been sustained, in the Appellate Division, by a divided court. Justice Ingraham gives an opinion, in which Justices Williams and Patterson concur, holding that the commissioners were justified, on the evidence, in finding the officer guilty. Justice O'Brien writes an emphatic dissenting opinion, which is concurred in by Presiding Justice Van Brunt. Justice O'Brien says it is clear that the preponderance of evidence is in favor of the officer, and the only evidence upon which the conviction rests comes, he says, "from a witness who is not only shown to have told an uncorroborated, improbable and inconsistent story, but who, by elaboration, has attempted to torture into an offence against police discipline, and into a felonious assault, an incident which, as shown by three witnesses, was perfectly natural and harmless, viz., that the relator, instead of carrying his revolver in the case in his hip pocket, had, by reason of a hole therein, placed it in his inside blouse pocket; and the roundsman, upon suspicion that it was a bottle of whiskey, not only insisted upon searching the relator upon the street, but, when this was refused, and the relator, to prove that it was not a bottle, exhibited his revolver, he makes that the basis of a charge that the relator opened the case and took out the revolver, and in a threatening manner pointed it toward him; an act which, if true, would have been a most serious offence. If the right to a trial which may result in a dismissal is to confer any substantial benefit upon the accused, it must be entered upon and conducted, and a determination reached, with some regard to the principles applicable to evidence and the rules of law. Otherwise it must degenerate, as it seems to have done in this case, into a delusion and a snare. If, as here, charges made and supported

upon a trial by unreliable and untrustworthy evidence, prompted manifestly by ill-will on the part of the accuser, are to be regarded as sufficient to justify a conviction and a dismissal, even though they are shown to be untrue by three other witnesses, then the right given to one accused to disprove the charge is a mere mockery."

Sir Travers Twiss, the eminent English jurist, who has just died, was one of the most accomplished men of his time, and distinguished himself as a historical student and writer, as well as in the practice of his profession. As a professor he won high distinction before he attained his full eminence at the bar and bench. He was born in 1809 and educated at Oxford, where he became successfully fellow, tutor and professor of political economy. In 1852 he was made professor of international law in King's college, London, resigning in 1855 to become professor of civil law at Oxford. In 1852 he was appointed vicar-general of the archbishop of Canterbury, and later judge of the Arches Court of Canterbury and chancellor of the diocese of London. He became advocate-general of the admiralty in 1862, and later queen's advocate-general, and in 1867 he was knighted. Among his published writings are: "The Oregon Question Examined, with Respect to Facts and the Law of Nations," "An Epitome of Niebuhr's Rome," "Views of the Progress of Political Economy in Europe Since the Sixteenth Century," "Lectures on the Science of International Law," "The Law of Nations," and other works representing different phases of his manifold activity. In 1884 he drew up the Constitution of the Free State of Congo. He has also served on many important commissions, including the one which settled the boundary line between New Brunswick and Canada.

A chancery suit which bids fair to rival the famous one of "Jarndyce v. Jarndyce" will shortly come before the court in England. It is a claim for the sum of £9,000,000, and concerns the right to the Drymna estates, in Wales. These have an annual rent roll of £300,000, and are capitalized at £6,000,000, being let out as collieries. The claimant is Nathaniel Richard Thomas, a collier. As may be expected, there

are numerous other claimants, one of whom, Elizabeth Vaughan, said to a representative of the Associated Press: "The original testator was John Banks, who died in 1716, and was thrice lord mayor of London. The estate comprises lands in Swansea, Cardiff and Ogmore Valley. It also includes a portion of the land on which the Cannon street station in London is erected. It has been in chancery since 1720, the guardians being the aldermen of London. The last direct heirs who derived any benefit from the income were John and Elizabeth Price, who died in 1841. Since then the estate has been locked up in chancery, and £3,000,000 of income has accumulated. The direct heir of the Prices is my husband, Nathaniel Vaughan."

The award of \$50,000 damages to an injured husband by a jury in the Supreme Court in New York city is the maximum verdict, the *Sun* thinks, in this part of the world at least, in a suit for alienating the affections of a wife. In such cases the jury are generally instructed that the damages are to be measured largely by the previous relations between the husband and the wife whose affection has been withdrawn from him by the wrongful interference of the defendant. The happier the marriage the greater the injury to the plaintiff. As Chief Justice Cooley has said, the jury in suits of this sort are "at liberty to award much or little, according as they find that much or little has been lost by the complaining party." In a \$50,000 verdict, however, it may safely be assumed that something is included by way of punishment.

Gottlieb Becker, of New York, gave certain property in trust "to apply to the proper maintenance, support and education of my minor children, and to pay off the mortgages which are now liens on my personal estate," the property to be divided between his five children equally, "as soon as the youngest of my said children shall have arrived at the age of twenty-one years." The will was executed in 1886, and the testator died in February, 1891. One of the five children, a daughter, was at the date of the will a minor, thirteen years old. John Becker and others, the testator's five children,



brought suit in the Supreme Court against Jacob Becker, as surviving executor, to have this trust declared void, on the ground that the absolute power of alienation was unlawfully suspended, in that the trust estate was not made dependent upon a life or lives in being, but upon a term of years, so many as would be comprised between the age of the testator's youngest child and the attainment of majority by that child. The Appellate Division, Justices Patterson and Barrett giving opinions, has reversed the judgment below, saying that the court will, in support of an otherwise valid trust, imply an alternative, and make the trust terminable at the attainment of majority of the minor upon whose life the suspension is limited, or the earlier death of that minor. The provision for the extinguishment of the mortgage is also held to be valid. Presiding Justice Van Brunt, however, dissents from the latter view, but as it appears that two years prior to the commencement of the action the mortgages had been paid, there was nothing, he thought, in this branch of the action to act upon, it having become merely a moot question upon which their decision could have no weight.

According to the *London Law Journal*, there was a striking increase in the number of legal publications in England during the year 1896, no fewer than 182 law books being published in that year, as against ninety in the year 1895. The total number of books was 6,573, so that law may claim to occupy a thirty-sixth part of the field of literature. In 1894 as many as 149 law books were published, as against fifty in 1893, but this great increase was due to the finance act and the local government act, both of which produced a large number of explanatory works. It is not so easy to explain the still larger number published last year. One hundred and thirty-two were new works, while fifty were new editions. The busiest month for the law publishers was October, fifty-two books being then issued. The highest number in any other month was nineteen.

A man in Augusta, Me., was recently sentenced to jail for thirty days, for taking a premature sleigh ride. The judge held that it was cruelty to the horse, and no pleasure or benefit to the man.

#### INTER-STATE RENDITION IN ITS CONSTITUTIONAL ASPECTS.

IT is not the purpose of this discussion to recite the long line of precedents which have been builded up in an effort to justify the nullification of one of the most important provisions of the federal Constitution, and to exaggerate the importance of state executives, but to question broadly whether, in fact, the governor of a state may exercise a discretion in the rendition of a person charged with crime in another state; whether there is a link in the chain which binds the states so weak that it may be broken at the will of the executive authority of any one of the sisterhood. No number of precedents can make wrong right, and even a decision of the Supreme Court of the United States, under changed conditions, may give way to correct reasoning, and to obvious considerations of public policy. The doctrine of executive discretion in the rendition of persons charged with crime in another state is destructive of the objects of the Constitution, as recited in its preamble, and it ought not to be tolerated unless its overthrow brings us into a more violent conflict with the fundamental law than a mere quibble as to the extent of the delegated power. A constitution must always be construed to have the power within itself for its own preservation, and an interpretation which places it within the power of an individual to defeat one of the declared objects of the Constitution, however much it may have been demanded by considerations of humanity, is certainly not in accord with the present, nor is it consistent with the letter or the spirit of the fundamental law as it was handed down to us from the founders of the republic.

Subdivision 2 of section 2 of article 4 of the federal Constitution declares that—

"A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

"Looking to the language of the clause," says Chief Justice Taney in delivering the opinion of the court in the case of *Commonwealth of Kentucky v. Dennison* (24 Howard, 99), "it is difficult to comprehend how any doubt could have arisen as to its meaning and construction," and the same thought has, no doubt, occurred to every fair-minded man who has read the language with a view to gathering the intent of the framers of the Constitution, yet the executive officers of the several states, under a variety of pretexts, have for nearly a hundred years refused to surrender such persons whenever it pleased them to do so, and the Supreme Court of the United States, in the case above mentioned,

held squarely that while the obligation was perfect, and it was the duty of the governor to deliver the prisoner to the demanding state, there was no power in the federal government to compel compliance with that obligation. This decision, practically annulling the provision of the Constitution under consideration, has so far destroyed the federal statute governing interstate rendition that the delivery of prisoners has become a mere matter of comity, and our state statutes intended to protect our vast commercial interests against frauds, have almost ceased to be operative because of the arbitrary refusal of state executives, and especially in the southern states, to deliver to the state of New York those who have transgressed its laws. So long as this condition of affairs exists every state is open to the possibility of becoming the asylum for all manner of criminals, or to have its gravest offenders escape the responsibilities of their crimes through the action of one who has assumed the duties of office and taken an oath to support the Constitution of the United States. In this disregard of a plain mandate of the Constitution we are to-day realizing a danger pointed out by George Washington in his farewell address, and which it is well for us, in shaping the policies of the future, to consider. He says, in this memorable document, "The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our own country, and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be, in any particular, wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can, at any time, yield.

"Willis Lago in the year 1859 was a free man of color. He was charged by indictment in a Circuit Court of the State of Kentucky, with the crime of abducting a slave woman. He fled from the jurisdiction of that State and was found in the State of Ohio. A demand in due form of law was made upon Mr. Dennison, the governor of Ohio, by the executive of the State of Kentucky, and upon Mr. Dennison refusing to comply with the demand, the State of Kentucky brought an action in the United States Supreme Court, asking for a mandamus compelling the governor of Ohio to act. Various jurisdic-

tional questions were raised, and the right of the court to issue a mandamus in the case was brought forward, but the court disposed of these, accepted jurisdiction and asserted that it had the right to cause a mandamus to issue if the judgment of the court required the process, but it dismissed the case because it held that the United States, notwithstanding the provision of the Constitution requiring the surrender of persons charged with crime in another State, had no power to compel the governor of a State to act under the provisions of the federal statute. This precedent, reducing in effect the obligations of the States to that of comity, has "greatly overbalanced, in permanent evil, any partial or transient benefit" which the decision may have been to Mr. Lago, and it has exposed us to dangers which, with the growth of the country, must ever be increasing, and likely at any time to involve sister States in controversies of far-reaching consequences, if not of actual conflict. It is proper, therefore, to examine the reasoning in this case, to take into consideration the time and the environment in which the decision was made, and, if the conclusion reached by the learned court is open to question, to demand that the issue shall be again taken to the court, to the end, if necessary, that the Constitution may be so amended as to make this plain provision, carrying with it a perfect obligation, absolutely essential to the realization of the objects for which it was founded, operative.

Fortunately for the purposes of this argument, the court has cleared the question of all collateral matters, bringing it down to the simple proposition of the power of congress to make this clause of the Constitution operative by imposing a duty upon the Governor of a State, for it is conceded that if congress had the power, the court would be justified in issuing a mandamus to compel compliance with the law. After disposing of these questions the court, speaking through Chief Justice Taney, decides the question at issue in the following language:

"The demand being thus made, the act of congress declares, that 'it shall be the duty of the executive authority of the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State." The words, "it shall be the duty," in ordinary legislation, implies the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect

or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal.

\* \* \* \* \*

"But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

"And it would seem that when the Constitution was framed, and when this law was passed, it confidently believed that a sense of justice and of mutual interest would ensure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

"But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."

Before entering upon the consideration of this remarkable construction of the Constitution, making

it depend for its efficiency upon the irresponsible will of an individual, it is necessary to a full appreciation of the question to understand something of the men who made up the court, and the environment in which they were acting. This decision was rendered at the December term of the Supreme Court in the year 1860. Abraham Lincoln had been chosen to the Presidency, and the slave-holding States were asserting the right of secession; of renouncing the obligations of the Constitution, and of establishing a confederation of States, and this doctrine found its supporters in the court which was called upon to pass upon this question, one of them, John Archibald Campbell, resigning his office in 1861, to take office in the cabinet of Jefferson Davis. Four of the eight justices who sat in judgment upon this case, including the chief justice, were residents of southern States; of States which asserted the doctrine of nullification, and attempted by force of arms to carry this doctrine into effect, while the remaining four from the States of New York, Pennsylvania, New Jersey and Maine, were either negative or pronounced anti-slavery men, whose sympathies in the case would prompt them to acquiesce in the judgment of the ultra states-rights advocates, chief among whom stood the presiding justice, whose celebrated decision in the Charles River Bridge case almost impelled Mr. Justice Story to resign from the bench, and which caused Chancellor James Kent to say that he had lost confidence in the constitutional guardianship of the Supreme Court. Had the court been organized for the express purpose of securing this decision it could hardly have found a combination of men and circumstances better calculated to produce the result, and it is for the present to say whether this decision, standing, as it does, in the way of that "more perfect union," which was sought by the founders of the republic, shall continue the accepted construction of the law of the land. We come now to the consideration of the question, "Is the Constitution dependent upon the will of an individual in the rendition of persons charged in another State with crime; is it beyond the power of the Constitution, and the laws made pursuant to its provisions, to compel obedience on the part of the executive officers of the States?"

The essential error in the reasoning of the learned court in respect to this provision of the Constitution is found in the assumption that it is a compact between the States instead of a compact between the people of the several States. If it were true that this clause was merely an agreement on the part of individual States to surrender persons charged with crime in another State, the conduct of the Governor would be a question purely within the purview of the asylum State, and the federal

government would have no power in the premises, but neither the language of the Constitution nor the conditions which surround its formation justify such a conclusion. The preamble to the Constitution, adopted after mature deliberation, declares, not that the States, but that "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Recognizing the inadequacy of the confederation, and acting upon the doctrine asserted in the Declaration of Independence that the people had the right to "alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness," the citizens of the several States, acting in their sovereign capacity, assembled in convention through their delegates, and among other things provided that —

"A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

"But an objection is made," says Mr. Pendleton in the Virginia convention (Elliott's Debates, vol. 3, page 56), "to the form of the expression 'We, the people,' as though improper. Permit me to ask the gentleman (Mr. Henry) who made this objection, who but the people can delegate powers? Who but the people have a right to form government? The expression is a common one, and a favorite one with me; the representatives of the people, by their authority, is a mode wholly inessential. If the objection be that the Union ought to be not of the people but of the State governments, then I think the choice of the former very happy and proper. What have the State governments to do with it? Were they to determine the people would not, in that case, be the judges on what terms it was adopted." The records of the conventions of delegates of the people who ratified the Constitution are full of evidences that the language of the preamble was fully understood, and that it had a distinct and definite meaning, and that meaning that it was the act of the people, independent of the then existing State organizations.

Chief Justice Waite, in the case of the *United States v. Cruikshank* (92 U. S. Reports, 548), in delivering the opinion of the court says: "Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of

the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the Confederate States. For this reason, the people of the United States in order to 'form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves' and their posterity, ordained and established the government of the United States, and defined its power by a Constitution which they adopted as its fundamental law and made its rule of action.

"The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. \* \* \* Within the scope of its powers, as enumerated and defined, it is supreme and above the States, but beyond it has no existence. It was erected for special purposes and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. \* \* \*

"The people of the United States residing within any State are subject to two governments; one State and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad."

In the same line is the reasoning of Chief Justice Taney in delivering the opinion of the court in the cases of *Ableman v. Booth* and *the United States v. Booth* (21 How. 524) where he says: "The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State is proved by the clause which requires that the members of the State legislatures, and all executive and judicial officers of the several States (as well as of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States for their consideration and decision."

Coming thus directly from the sovereign people, with the power to compel an oath of allegiance on the part of all legislative, judicial and executive officers of a State; with a complete and undoubted obligation on the part of the State to deliver a person charged with crime in another State on the demand of the executive authority of the State having jurisdiction of the crime, by what process of reasoning can we arrive at the conclusion that the Constitution conferred no power upon the general government to compel the executive of a State to perform a merely ministerial duty, when that duty becomes necessary to "support this Constitution?" Every man elected as governor of a State becomes the agent of the United States for the purpose of carrying out the obligations which that State owes to the national government; he is the ministerial officer of the people who created the federal Constitution for the purpose of establishing a "more perfect union," and the fact that the Constitution of the United States compels him to take an oath to "support this Constitution," necessarily implies the power to compel him to do so if he refuse to respect his obligations. He cannot be said to be supporting the Constitution when he deliberately refuses to perform a purely ministerial act necessary to make the Constitution effective, nor is this refusal any the less without the jurisdiction of the federal government because it is the act of the executive officer of the State, and not of the State itself. The refusal of the governor to act is, in fact, the refusal of the State; he is the only officer on whom this duty could devolve consistent with the dignity of States, and in harmony with the practice between the confederated States when the present Constitution was adopted, and which, in respect to the rendition of prisoners, follows nearly the same language, the modifications being only such as were necessary in forming a "more perfect union." It is true, of course, that the Constitution does not say that the demand shall be addressed to the executive officer of the asylum State. "But," says Chief Justice Taney, in *Kentucky v. Dennison* (24 Howard 103), "the part of the clause in relation to the mode of demanding and surrendering the fugitive (with the exception of an unimportant word or two), is a literal copy of the article of the confederation, and it is plain that the mode of the demand and of the official authority by and to whom it was addressed, under the confederation, must have been in the minds of the members of the convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the confederation—that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up."

If it was the intention of the framers of the Constitution to follow the practice of the confederated States in respect to this question, can there be any doubt of the fact that congress was, by necessary implication, endowed with the authority to enact the law, making it the duty of the executive of the asylum State to deliver persons charged with crime in another State upon a demand being made for such surrender, or that the people, acting in their high capacity as citizens of the United States, delegated to the federal judiciary the power to compel obedience to that law? Such a construction of the fundamental law, making it subject to the will of an individual to defeat the declared purposes of the instrument, is consistent only with that ultra state's-rights doctrine which denied the right of the federal government to preserve the Union, and which has been set aside by the arbitrament of war. "The government and the citizens of the State," says Chief Justice Chase, in the case of *Texas v. White* (7 Wallace, 727) "refusing to recognize their constitutional obligations) and one constitutional obligation can be no more binding than another) assumed the character of enemies, and incurred the consequences of rebellion. These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union," and the same power which justifies the United States in suppressing a rebellion against the general obligations of the Constitution, may be invoked to compel obedience to a particular mandate of the fundamental law, or the statutes enacted to put that mandate in operation. "In the exercise of the power conferred in the guaranty clause," says Chief Justice Chase in the same case, "as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred \* \* \* and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution."

It was understood by the men who took part in the developing of the Constitution, and presumptively by those who took part in its ratification, that it was designed for the purpose of energizing and giving effect to the general government in all the powers necessary to accomplish the objects which made up the sum of delegated powers. We find Edmund Jennings Randolph, who sat in the convention which framed the Constitution, taking an active part in its discussion, telling the Virginia convention which ratified the instrument, in speaking of the articles of confederation then about to be superseded, "I cannot otherwise conceive how

they could have formed a system that provided no means of enforcing the powers nominally given it. Was it not a political farce to pretend to vest powers, without accompanying them with the means of putting them in execution?" (Elliott's Debates, vol. 3, page 57.)

Edmund Pendleton, president of the Virginia convention, says in one of his speeches (page 68 of Elliott's Debates), "If the Union of the States is necessary, government must be equally so; for without the latter the former cannot be effectual. Government must then have its complete powers, or be ineffectual; legislate to fix rules, impose sanctions, and point out the punishment of the transgressors of these rules—an executive to watch over officers and bring them to punishment—a judiciary to guard the innocent, and fix the guilty, by a fair trial; without an executive, offenders would not be brought to punishment, without a judiciary, any man might be taken up, convicted, and punished without a trial."

Francis Corbin, a member of the Virginia convention (Elliott's Debates, page 24), says: "Yet we are told there is too much energy in this system. Coercion is necessary in every government. Justice, sir, cannot be done without it. It is more necessary in federal governments than in any other because of the natural imbecility of such governments."

\* \* \* This power is necessary in all governments; a superintending coercive power is absolutely indispensable. This does not exist under the present articles of confederation. \* \* \* The powers of the general government are only of a general nature, and their object is to protect, defend and strengthen the United States; but the internal administration of government is left to the State legislatures who exclusively retain such powers as will give the States the advantages of small republics, without the dangers commonly attended on the weakness of such governments."

James Madison, a member of the federal convention, and a delegate in the Virginia convention (Elliott's Debates, page 144), afterward President of the United States, says: "The uniform conclusion drawn from a review of ancient and modern confederacies, is, that instead of promoting the public happiness, or securing public tranquility, they have, in every instance, been productive of anarchy and confusion; ineffectual for the preservation of harmony, and a prey to their own dissensions and foreign invasions. \* \* \* The Germanic system is neither adequate to the external defence, nor internal felicity of the people, the doctrine of requisitions and quotas flourishes there. Without energy—without stability—the empire is a nerveless body. The most furious conflicts, and the most implacable animosities between its members, strik-

ingly distinguish its his history. Concert and co-operation are incompatible with such an injudiciously constructed system."

John Marshall, one of the greatest of the justices of the Supreme Court, sitting as a delegate in the Virginia convention (Elliott's Debates, 227), says: "A bare sense of duty, or a regard to propriety, is too feeble to induce men to comply with obligations. We deceive ourselves if we expect any efficiency from them."

"The defects of the confederation," says Edmund Randolph in the Virginia convention (Elliott's Debates, page 104), "consisted principally in the want of power. It had nominally powers—powers on paper which it could not use. \* \* \* Without adequate powers vested in Congress, America cannot be respectable in the eyes of other nations. Congress, sir, ought to be fully vested with power to support the Union, protect the interests of the United States, maintain their commerce, and defend them from external invasions and insults and internal insurrections; to maintain justice, and promote harmony and public tranquility among the States. A government not vested with these powers will ever be found unable to make us happy or respectable; how far the confederation is different from such a government is known to all America. Instead of being able to cherish and protect the States, it has been unable to defend itself against the encroachments made upon it by the States; every one of them has conspired against it."

It is possible that these great men, fully appreciating the needs of government; appreciating the necessity of reducing to a minimum the causes for disagreement between the States, and of providing a means of peaceable settlement, neglected to invest congress with the authority to carry out the provisions for the rendition of persons charged in any State with treason, felony or other crime? Is it possible that "we, the people of the United States," and of the several States, in whom is vested the sovereignty, both of the States and the nation, were lacking in the authority to vest in congress the power to demand of the executives of the several States the discharge of a simple ministerial duty necessary to give effect to the Constitution? The objection of the learned court that congress might, in the exercise of such a power, impose excessive duties, or duties inconsistent with the dignity of the office of governor, is very much in the nature of a special pleading, and has no real bearing upon the question, because it is not contended that congress has any right in general to prescribe the duties of a governor of a sovereign State, but simply that it may require of the governor, as the executive head of the State government, the discharge of a particular duty which the people of th-

State owe to the sisterhood of States. It is a very different thing calling upon the governor to give effect to an agreement proceeding directly from the people, in pursuance of a policy in which all are equally interested, and a general power of prescribing the duties of the governor, a distinction important to the intelligent consideration of this question. The executive, as a constituent element of the body politic; as a party to the agreement to surrender persons charged in any State with "treason, felony or other crime," upon the demand of the executive of the State having jurisdiction of the crime, knowing the obligation, accepts office bound by an oath to support the Constitution of the United States, and he is, for this purpose, as completely within the jurisdiction of a law of congress as though there were no State lines. He is acting, not as the governor, but as the State; his refusal becomes the refusal of the State to comply with its constitutional obligations, and it is idle to hold that a State may be coerced into obedience while its executive officer may disregard the obligations assumed by the State with impunity. The governor is the officer chosen by the people of the State to speak for them in all matters in which the State is a party; he is the only officer who can lawfully appear and act for the State in its political capacity, and he is, therefore, the only person who could, by law, be charged with a ministerial duty in the discharge of an obligation which the people of the State had assumed. He enters upon the discharge of his duties bound by an oath to support the federal Constitution, which declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land," and this law of congress, passed in 1793, "in pursuance" of the clause of the Constitution now under consideration, is, for the purposes of this discussion, as much a part of his oath-bound obligations as though the statute had been, in fact, a part of the federal Constitution. If the Supreme Court cannot coerce the executive of a State, compelling him to discharge the obligations which the people have taken upon themselves in their sovereign capacity, and which, as States, they are bound to perform, then, indeed, has a fatal defect been discovered in the instrument which we are all proud to acknowledge and obey, both in letter and in spirit, except when we happen to be vested with that "little brief authority" common to governors of the States.

BEN. S. DEAN.

JAMESTOWN, N. Y., *December 25, 1896.*

By a majority of two the Alabama senate has passed a bill permitting women to practice law in that state.

#### BEFORE THE FINAL BAR.

CHARLES W. BROOKE, the well-known criminal lawyer, died at the Smith infirmary, New Brighton, Staten Island, Feb. 7. Mr. Brooke was born in Philadelphia in April, 1836, and was graduated from the University of Pennsylvania, being in the same class as Bishop Potter and Henry Watter-son. He began active life as a bank clerk in 1858. He served in the war of the rebellion. Mr. Brooke went to New York in 1871. He took part in many important cases, among them being those of the bank of England forgers, the sisters Woodhull and Claflin, accused of libel; the boodle aldermen, "Napoleon" Ives, and the Buchanan, Meyer and Fleming murder trials.

Hon. Robert S. Emmett, Jr., assemblyman from the Second Westchester district, died in Albany, Feb. 7, after an illness of four weeks with typhoid fever. The deceased was but 28 years of age, a prominent practicing lawyer in New York city. He was a graduate of Columbia college. He was a brother-in-law of Judge Martin J. Keogh, of the Supreme Court, second district.

#### STATEMENTS IN PRESENCE OF THE ACCUSED.

THE ruling of Mr. Justice Hawkins at the Old Bailey in *Regina v. Greatrex-Smith*, serves to call attention to an important point in the law of evidence. The defendant, a doctor, was charged with using instruments to procure miscarriage. The person upon whom they were said to have been used was dead. Shortly before her death, and knowing that she was dying, an inspector sent for the defendant and in his presence took down in writing the statement of the dying woman as to the cause of her death and the alleged use of instruments, which was signed by her. It was not taken as a dying deposition, no written notice had been given to the defendant to attend, and the statement was not made on oath nor in the presence of a magistrate, nor did the defendant admit the truth of any of the statements affecting him. The statement was at the trial tendered as evidence of a conversation held in the presence of the defendant, but was rejected because there was no evidence that the defendant assented to or admitted its truth, or as leading up to evidence of the conduct of the defendant. This ruling recalls the proper legal position of such statements. They are inadmissible except as explaining admissions or confessions, and the learned judge justly criticised the procedure adopted as permitting police officers to manufacture prejudice by extracting statements from dying persons.—*London Law Journal.*



**Notes of Recent American Decisions.**

**ATTORNEYS—DISBARMENT.**—Where an attorney was guilty of forgery, but was acquitted on the plea of insanity, the court is warranted in disbarring him, and in refusing his re-enrollment after discharge from an insane asylum; the evidence not being sufficient to prove that he did not know right from wrong. (*In re Kennedy* [Penn.], 85 Atl. Rep. 995.)

**BILL AND NOTES—VOID CONSIDERATION—SALE OF LOTTERY TICKETS.**—Under Code, § 4029, providing that all notes or other contracts, mortgages, etc., when any part of the consideration thereof is money laid, staked, or bet at or upon any game or wager are absolutely void, a note and chattel mortgage, part of the consideration of which is the price of tickets for raffle of a piano, are absolutely void. (*Koster v. Seney* [Iowa], 68 N. W. Rep. 824.)

**CARRIER OF GOODS—CONSTRUCTION OF CONTRACT—LIMITATION.**—While a consignment of cotton was on a compress company's platform, a railroad company executed to the owner a bill of lading therefor, and bound itself to transport it. The bill provided that the company and connecting carriers should not be liable for loss of or damage to the cotton "while in transit, or while in depot or place of transshipment, or of landing at place of delivery." While yet on the compress company's platform, the cotton was burned: *Held*, that the cotton was not constructively in transit. (*Armory Manufg. Co. v. Gulf, C. & S. F. Ry. Co.* [Tex.], 87 S. W. Rep. 856.)

**CHattel MORTGAGE—TAKING POSSESSION.**—The discretion conferred upon a mortgagee by a stipulation authorizing him to take possession of the mortgaged chattels at any time he feels himself insecure is not an arbitrary one, but depends upon some act of the mortgagor, done or threatened, which tends to impair the security. (*Brown v. Hogan* [Neb.], 69 N. W. Rep. 100.)

**CRIMINAL EVIDENCE—RAPE—AGE OF PROSECUTRIX.**—On a trial for rape, where the prosecutrix was under the age of consent, she may testify to her age, though her knowledge of it is derived from statements of the parents or from family reputation. (*People v. Ratz* [Cal.], 46 Pac. Rep. 915.)

**CRIMINAL LAW—LARCENY.**—The defendant having been indicted for the larceny of a skiff, and the proof showing that he was found in possession of the property, apparently stolen recently, it was competent for him, as a witness in his own behalf, to negative the existence of felonious intent by stat-

ing that he had taken the skiff for the purpose of evading arrest under a warrant for robbery, and had carried with him a friend by whom it was to be returned to the owner. (*State v. Dillon* [La.], 20 South. Rep. 913.)

**FRAUDULENT CONVEYANCE.**—A conveyance made by a debtor for the express purpose of protecting his interest in the property against a pending suit is fraudulent and void as against the plaintiff in that suit, and equally fraudulent and void as against the debtor's assignee in insolvency. (*Thompson v. Robinson* [Me.], 35 Atl. Rep. 1002.)

**FRAUDULENT CONVEYANCES—PREFERRED CREDITOR.**—J. was in embarrassed circumstances, and his creditors were urging him to secure their claims. He was indebted to his son for services actually rendered at a stipulated price while he was solvent. J. voluntarily executed his note, secured by a deed of trust of his personal property, in favor of his son; *Held*, a valid transaction.—*Wilson v. Jones*, U. S. C. C., W. D. [Va.], 76 Fed. Rep. 484.)

**GUARDIAN AND WARD—LIABILITY OF SURETIES.**—The sureties of a deceased guardian are liable for losses sustained by the ward because of the guardian's failure to make any effort to collect a note due the estate while the maker was still solvent. (*Ames v. Williams* [Miss.], 20 South. Rep. 877.)

**INSANITY—MANAGEMENT OF ESTATE.**—Where the wife is not a party to proceedings to have a receiver appointed for an insane husband's estate, the validity of the marriage contract cannot be attacked by *ex parte* affidavits. (*In re Hybart* [N. Car.], 25 S. E. Rep. 963.)

**INSURANCE—PAROL CONTRACT TO RENEW POLICY.**—An oral contract to renew a policy of insurance is valid, though the premium was not paid at the time of renewal, if credit was given, or it appears from the circumstances and the situation of the parties that such payment was not required. (*King v. Cox* [Ark.], 37 S. W. Rep. 877.)

**JUDGMENT—LIEN—FRAUD.**—A judgment creditor, who advises the debtor to make a fraudulent conveyance in order to cheat another creditor, does not thereby lose the lien of his judgment. (*Fidler v. John* [Penn.], 35 Atl. Rep. 976.)

**MARINE INSURANCE—INTOXICATION.**—Incompetency of the master is not established as a defense against a claim of loss on a marine policy by proof of a single instance of more or less intoxication, where previous good character and competency are established. (*Rogers v. Aetna Ins. Co.* [U. S. D. C., S. D. N. Y.], 76 Fed. Rep. 569.)

**MORTGAGE OF MARRIED WOMAN—ESTOPPEL.**—A married woman, who was at the time a minor, executed a note and a mortgage purporting to convey

her separate real estate to secure the note. The mortgage was void because not executed in accordance with the statute: *Held*, that fraudulent representations made by her at the time the mortgage was executed, that she was 21 years of age, would not estop her to assert the invalidity of the mortgage, though the representations were material inducements towards the making of the loan. (*Carolina Interstate Building & Loan Assn. v. Black* [N. Car.], 25 S. E. Rep. 975.)

**PARTNERSHIP — POWERS OF SURVIVING PARTNER.** — A surviving member of a partnership has full power to control and dispose of the firm assets for the purpose of winding up its affairs, and may execute a mortgage thereon to secure a firm creditor; and such a mortgage is not rendered invalid by the fact that it also secures money borrowed by the surviving member after the death of his partner, which was used in payment of partnership debts. (*Burchinell v. Koon* [Colo.], 46 Pac. Rep. 982.)

**RAILROADS — RECEIVERS — CLAIMS FOR SUPPLIES.** — Railroad receivers coming into possession of earnings of the road should pay therefrom all debts for supplies contracted within a reasonable time prior to the receivership, before spending any part thereof in betterment of property or payment of interest on mortgage debts. (*Southern Ry. Co. v. American Brake Co.* [U. S. C. of App., Fourth Circuit], 76 Fed. Rep. 502.)

**REMOVAL OF CAUSES — CORPORATIONS.** — Corporations created by acts of congress are entitled to remove to the federal courts suits brought against them in the State courts on the ground that such suits are suits "arising under the laws of the United States." (*Supreme Lodge of Knights of Pythias of the World v. Hill* [U. S. C. of App., Fourth Circuit], 76 Fed. Rep. 468.)

**TRESPASS — MEASURE OF DAMAGES.** — The measure of damages recoverable in an action of trespass for an injury to realty, by the inadvertent removal of part of coal, is its value as a part of the realty, and not as a chattel after its removal. (*Warrior Coal & Coke Co. v. Mabel Min. Co.* [Ala.], 20 South. Rep. 918.)

**WILLS — CONDITIONS AND RESTRICTIONS.** — In an action to construe a will, where there is nothing to prevent the application of the rule that if a testator intends one thing, and yet declares the opposite by the terms of his formal and final expression of intent, the latter must control, it is proper to exclude evidence to show the personal intent of testator, as distinguished from the intent which the will exhibits on the point at issue. (*Mersman v. Mersman* [Mo.], 87 S. W. Rep. 909.)

### Legal Notes of Pertinence.

IF, as was suggested by several penologists in last Saturday's *Mail and Express*, the present law which restrains convicts in New York State prisons from engaging in most kinds of manual labor turns the attention of prison wardens to educational courses for the idle convicts, it may not be such a deplorable measure after all. Perhaps making shoes, caning chairs and sewing undergarments may not be the best method of reforming criminals. The new Constitution may be the means of transforming the penitentiaries from workshops into trade schools. In this change free labor could have no chance for complaint, and the convict who really desires to reform would have the best possible training for an after life of usefulness. — *N. Y. Mail and Express*.

The Alabama Supreme Court has decided the anti-gambling law of the State to be constitutional, and all of the pool rooms have discontinued business.

The following interesting story is told of Judge Nathan Goff, of West Virginia, who is understood to have been selected by President-elect McKinley as one of his cabinet: "An incident which has greatly attached Judge Goff to the people of his native State was the patriotic letter which he wrote when confined in the dungeons of Libby prison during the late Civil War. Judge Goff, then a Union soldier, was taken prisoner Jan. 20, 1864, and was confined for four months in Libby. A rebel spy named Armsey was likewise captured and incarcerated within the federal lines and condemned to be shot. Goff was held as a hostage for the spy, and word was sent to the federal government that he would be shot if Armsey was executed. Goff heard it and wrote these lines to President Lincoln: 'If Armsey is guilty he should be executed regardless of its consequences to me. The life of a single soldier should not stand in the way of adherence to the great principle.' The letter is on file in the war office."

A curious case has just been decided by the Supreme Court of Ohio. Jacob Schumucker bought a farm belonging to the estate of a farmer named Cadwallader. Schumucker and his hired man, according to the testimony of the latter, found two pailfuls of gold and silver money on the farm. Schumucker refused to divide with the hired man, who sued for a share. Thus the find came to the knowledge of the Cadwallader heirs, who sued for the whole of it. The Supreme Court awards it all to Schumucker on the ground that no one proves a better right to it. The theory of the decision seems to be that the purchaser of the farm bought all there was on it, unless the ownership of any-

thing found thereon by some one else could be clearly proved. This shut out the hired man because the farm wasn't his, and his only claim to ownership of the treasure was that of a finder. And it shut out the heirs because they could not prove ownership otherwise than as legatees, and that, such as it was with respect to the treasure, has been disposed of by sale.

A bill has been introduced in the Illinois Legislature to repeal the libel law passed at the last session, which provided that no person can collect punitive damages from a newspaper in case of libel, and that malice must be shown.

That a railroad collision is costly, as well as disastrous, has been demonstrated by the amount of money which the West Jersey and the Philadelphia & Reading have paid out as a consequence of the Atlantic City disaster, when forty-four persons were killed and a large number injured, last summer. It has cost the road thus far nearly \$1,000,000 to settle claims for damages, and all the cases have not been settled yet. The accident was caused by a Reading flyer crushing into a West Jersey excursion train, on which were the Order of Red Men returning from a day's outing at the seashore. One of the latest claims to be settled is that of Mrs. Samuel Myta, of Bridgeton. She brought suit for \$90,000 for the killing of her husband and daughter, and the injury of herself and son. The road has settled with her, and the amount is said to have been \$30,000.

The Supreme Court of Indiana has just rendered a notable decision. It held that where a gas company, having the monopoly of furnishing natural gas to the people of a town, through its negligence, fails to furnish the gas at a time when the weather makes a fire necessary, and the consumer is unable to obtain other fuel, and this fact causes the consumer's children to become sick and die, the gas company is liable to damages for death of the children.

Perhaps the most remarkable criminal case on record is that of Weatherholtz, in Virginia. Mrs. Weatherholtz was shot dead by some one hidden in the barn. Her husband was fairly convicted of the deed. The jury brought in a verdict of murder in the second degree. The court set the verdict aside and ordered a new trial, because the evidence clearly indicated murder in the first degree. On second trial the defendant's attorney moved for a discharge. The man could not again be tried for murder in the first degree, and, as a verdict of guilty in the second would surely be set aside, Weatherholtz was discharged. There is not and never was a doubt he "laid in wait" and shot his wife, killing her. Yet he escaped scot-free.

### Humors of the Law.

Counsel (in will contest) — Did you see Mr. Timson, the testator, a short time before his death?

Witness — Yes; I saw him every day for a week before he died.

Counsel — What, in your opinion, was his mental condition at that time?

Witness — I am satisfied that he was very much unbalanced. He had a singular delusion which nothing could remove.

Counsel — What was the nature of the delusion?

Witness — Mr. Timson imagined he had made a will that could not be broken; he repeatedly said so. And he held to this delusion till the end.— *N. Y. Journal.*

It is an old story, and probably all the lawyers know it. It is told here only for purposes of preservation, for it is too good to be lost. But if, meantime, any man should find it for the first time an additional purpose will have been served.

Emory A. Storrs had owed a tailor for a number of years, and had given the ninth part of a man no assurance that he would pay the bill in as many years to come. The lawyer was easily the wit of the bar and the best extempore speaker in Chicago. So brilliant were his attainments that a prominent place was accorded him in entertaining Lord Coleridge, chief justice of England, on the visit of that great man to Chicago. Storrs was as generous as he was impecunious. If the man had had a fortune, he would have spent it like a king. In nothing but the lack of money was he anything less than magnificent. He invited the lord chief justice to a supper at Kinsley's and the invitation was accepted. It was to be a pretty sumptuous affair. But so capable a promoter was Mr. Storrs that the funds were all provided, and the guests gathered for the supper, the lord chief justice among them. Right here the base tailor came along and levied on the very food and drink to satisfy his bill. His constables had possession, and the supper waited. In that terrible embarrassing moment the claim was satisfied by friends of the lawyer, and then Mr. Storrs proved his mettle by saying the best thing of his life.

"It is the first time in the history of the world, I believe, that the Lord's supper was ever levied upon."

A man who can say that — under those circumstances — has a right to get into debt. — *Chicago Post.*

Justice — "You are charged with stealing Colonel Julep's chickens. Have you any witnesses?"

Uncle Mose — "I heb not. I don't steal chickens befo' witnesses."

### New Books and New Editions.

**BEACH ON RECEIVERS.**—A new and enlarged edition, with extended consideration of receivers of Corporations, by Charles Fisk Beach, Jr., of the New York Bar, with elaborate additions to the text and notes, and material changes therein, by William A. Alderson, of the St. Louis Bar. Baker, Voorhis & Co., New York.

The second edition of this valuable work, originally published nearly ten years ago, is by no means a mere reprint; it is much enlarged, and in many respects greatly altered, Mr. Alderson having been given authority by the publishers to change the text and notes, and add thereto in any particular desired. That he has accomplished this work admirably is shown by an examination of the volume. His clear and vigorous discussion of important and mooted questions, and the expression of his own views upon questions as to which courts have disagreed, and concerning propositions not yet adjudicated have greatly increased the value of the original work as a thorough text-book, making it much more than a mere digest. Attention is particularly directed to the following entirely new and important sections: 1, 2, 3, 10, 11, 19-21, 28a, 32-34, 48, 51, 117, 119, 139, 146, 148, 161, 185, 205, 209, 260, 261, 264, 268, 298, 301, 305, 309, 327-329, 337, 338, 373, 378, 379, 383, 391, 392, 402, 403, 405, 412, 414, 419, 421, 423, 424, 425, 426, 476, 477, 651, 652, 653, 658, 659, 693, 696, 714, 721, 776, 803-823.

In these sections some important questions concerning receivers, not to be found mentioned in any other work upon the subject, are discussed, while the treatment of other topics is far more extended than that of any other author. The foregoing are only some of the new sections in the book, while there are material changes and elaborate additions to a large number of the original sections, some of which have been partially or wholly re-written.

It has evidently been Mr. Alderson's special object to make the new edition a practical treatise upon the subject; the procedure and practice in receivership proceedings having received particular attention. This is especially evidenced by the chapter upon the Principles Attending the Appointment of Receivers, Appeals, Proceedings to Obtain the Appointment, Pleadings, Suits by and Against Receivers, and the final chapter, which is a general statement of the Practice and Proceedings in Receivership Cases. The chapters upon Receivers of Railroads, Receivers of Corporations Other than Railways, and Receivers' Certificates will be found most comprehensive and elaborate. An estimate of the matter added to the original edition may be had by considering that the pages of the present edition are larger, and outnumber those of the first by 144, while a large number of additional cases is cited and considered. At the same time the arrangement of the contents of the book is entirely systematic and harmonious. The appearance of this work is especially timely in view of the growth and importance of the subject of this treatise.

**A TREATISE ON EXPRESS TRUSTS AND POWERS,** under the New York Revised Statutes and the Real Property Law of 1896, with an appendix showing the sources of the sections cited, and a table of Comparative Texts of the Revised Statutes and the Real Property Law, by Stewart Chaplin, author of Suspension of the Power of Alienation. New York: Baker, Voorhis & Co., 1897.

A careful examination of this work bears out the claim that it covers in a detailed and systematic manner the entire field of Express Trusts and Powers under the Revised Statutes and the Real Property Law of 1896. It thus deals with a broad and most important class of questions constantly arising in connection with the settlement of property, real and personal, the drawing, construction and validity of wills and deeds, and the administration and execution of trusts and powers. The revolution which was effected by the Revised Statutes in the law of trusts and powers; the great body of case law peculiar to this State; the recent and numerous changes effected by the Real Property Law; and the fact that the general text-books in this field have a very limited value for use in New York, all combine to lend special importance to the appearance of this book as the only work devoted to Trusts and Powers as they exist in New York.

It cites twenty-seven hundred cases, nearly all decided in New York. In addition to tables of cases and statutes cited, and an unusually full index furnished with abundant cross references, it contains also a table showing the source of each section cited from the Real Property Law; a table giving, side by side in parallel columns, the text of principal section cited and the text of the corresponding section of the Revised Statutes, and a table of index topics showing at a glance all the headings employed in the index—a novel feature which cannot fail to be of material service in facilitating the convenient use of the index.

While it is true that our statutes have deprived the general treatises on Trusts and Powers of much of their value for local use, there has been hitherto no attempt to present a systematic and detailed statement of the law of New York in this field. Mr. Chaplin's work will be found careful and accurate as well as exhaustive.

**AMERICAN STATE REPORTS,** containing the cases of general value and authority subsequent to those contained in the American Decisions and the American Reports, decided in the Courts of Last Resort of the several States, selected, reported and annotated by A. C. Freeman, and the associate editors of the American Decisions. San Francisco: Bancroft-Whitney Company, 1896.

This is volume fifty-one of the American State Reports, and contains cases selected and re-reported from the State Reports of Florida, Georgia, Indiana, Iowa, Maine, Maryland, Minnesota, Missouri, New Jersey (law and equity), New York, Pennsylvania, South Carolina and Wisconsin. In this volume 147 cases are reported.

## The Albany Law Journal.

ALBANY, FEBRUARY 20, 1897.

### Current Topics.

**A**MONG the decisions which were handed down by the New York Court of Appeals on the twelfth instant, the one entitled *Charles W. Little v. A. Bleecker Banks* is of interest to the profession. From the acquaintance which the litigants have with the members of the bar generally, and the nature of their business, lawyers throughout this State, and even embracing a wider circle, will be attracted from the nature of the controversy and the decision.

Mr. Banks, of this city, entered into a contract in 1877, whereby for three years he was to have the publication of the "New York Reports." The contract provided that he was to sell the volumes without specifically naming any period during which he was required to sell.

The contract was let pursuant to the code provision, limiting the period for such contracts to three years. Under the contract referred to, volumes 69 to 80, both inclusive, were published.

In August, 1890, the plaintiff, Little, made a demand of Mr. Banks for volumes 79 and 80, tendering the original contract price. In Mr. Banks' absence from his place of business the demand was refused, and on ten successive dates was the demand repeated. Thereupon Mr. Little began this action, claiming one thousand dollars liquidated damages, so fixed in the original contract; being \$100 each for ten demands and refusals.

Mr. Banks defended principally upon the ground, and claiming that the time within which he was required to furnish the volumes had expired; that he was no longer bound by the terms of the contract to deliver the volumes at the contract price, nor subject to the penalties for a refusal.

The first trial resulted in a verdict for the plaintiff for a thousand dollars; the trial judge having refused to allow the defendant to in-

troduce evidence tending to show that the demands for the volumes had not been made at the place designated for the sale of the volumes. On appeal by the defendant, the General Term reversed the judgment for error in this respect, declining to pass upon the main question urged on behalf of the defendant, that the contract had expired.

Upon a new trial there was again a verdict for the plaintiff for a thousand dollars, from which the defendant again appealed to the General Term, which reversed the judgment, upon the ground that the contract required the defendant to give the public only a reasonable time to obtain the volumes after their publication. The case is reported in 77 Hun, 511.

From this determination the plaintiff appealed to the Court of Appeals, giving the usual stipulation for judgment absolute in case of affirmance.

The contention of the plaintiff was, that under the contract it was the duty of the contractor to publish and sell the volumes produced under the contract during the terms of the copyright. This contention was combated on behalf of the defendant, inasmuch as such a construction would entirely nullify the provisions of law relative to the copyright of these reports; the contract containing a clause in accordance with the Code provisions on the subject, that the contractor shall have no interest in, or any concern with the copyright. For many years it has been the policy of the State to prevent the copyright from being taken or held by the publisher. It was urged on behalf of the defendant, that because of no time being specified within which he must sell, the ambiguity thus existing would be construed by the courts to mean a reasonable time; and that thirteen years from the making of the contract and ten years after its expiration was not a reasonable time.

This view was approved by the Court of Appeals, for the judgment of the General Term was affirmed without opinion.

As we have already stated, it is a matter of interest to the profession; for while it will not practically affect the cost of the volumes to the members of the bar—and as we understand subsequent contracts make specific provision for the sale of the volumes—it seems to illus-

trate that an unconscionable attempt to seek advantage, by means of suits for penalties, will not find great encouragement.

That a prosecuting attorney is a judicial officer, and therefore not liable in an action for libel for reading in court an indictment in which he has maliciously included as a co-defendant one against whom no evidence was produced before the grand jury, and against whom no bill was in fact found, is held in *Griffith v. Slinkhard* [Supreme Court of Indiana], 44 N. E. Rep. 1001.

The Supreme Court of New York, Appellate Division, First Department, recently handed down a decision in the case of the People, etc., respondents, v. John B. Doris, appellant, which will be heartily approved by every person who desires to see the stage purified and elevated. The defendant was convicted, under section 385 of the Penal Code, of the misdemeanor of maintaining the public nuisance. The nuisance consisted of a public performance, in a theatre in New York city of a pantomime called "Orange Blossoms" which, as the information charged, was offensive to public decency. The pantomime commenced with the scenic representation of a bed chamber, to which a bride and bridegroom resort late upon the night of their wedding day. They were accompanied by the bride's parents. After the clock strikes twelve, the parents depart, and the young couple are left alone. The husband then falls on his knees before his wife. She raises him up, and, as she complains of a headache, he takes her to the bed and suggests that she lie down. She requests him to leave the room. He refuses declaring that they are married. She insists however, and takes him to the door. There he puts his hand up to indicate that he will be back in five minutes, and then he goes out. The woman then proceeds to undress herself completely, and to put on her nightgown. She apparently removes even her slippers, garters and stockings. In removing her clothing, however, she dexterously limits the exposure of her person. When she is entirely prepared to retire, she gets into bed, and turns down the light. At that moment there is a knock at the door, and she says "Entrez." Upon this the curtain falls. The

word "entrez" is the only word spoken throughout. The rest is dumb show.

Judge Barrett, who wrote the opinion well said that the one all-pervading feature of the performance was its suggestiveness. Take that away and nothing would be left at all calculated to draw a crowd. It is well settled that whatever outrages public decency and is injurious to public morals is indictable. In answer to the contention of the defendant's counsel, that public decency was not offended because the actress who played the part of the bride exposed very little of her person, the court remarks that such a performance as that under consideration was really much more dangerous to public morals than any mere vulgar exhibition of nudity; the latter may arouse impure thoughts, but it is more apt to excite disgust. "The greater danger lies in an appeal to the imagination; and when the suggestion is immoral, the more that is left to the imagination, the more subtle and seductive the influence." As to the second claim of the defence, that the suggestiveness of the exhibition was connected with lawful marriage and not with illicit relations; the court well remarks:

"The appellant's second position is somewhat startling. Its logic would justify an advance into even a grosser domain than that of suggestiveness. According to this view, no public display of any form or expression of marital intimacy could be held to be indecent. The proposition is preposterous. The picture is none the less licentious because it is painted upon a clean canvass. The aim here was not to honor, but to degrade marriage; and the defendant's guilt is enhanced, not diminished, by his utilization of its sacred confidences to serve his criminal purpose."

Thus not only the question whether a so-called dramatic performance, offensive to decency, can be suppressed as a nuisance is decided in the affirmative, but broad, general principles are laid down with reference to the important question of the limits of dramatic and theatrical license.

Apropos of Senator Guy's bill which proposes to make legal in this State the acceptance of a verdict of ten, instead of twelve, men in civil cases, Mr. R. Vashon Rogers, well-

known barrister of Kingston, Ont., kindly writes the ALBANY LAW JOURNAL, enclosing a copy of an act which was passed by the Ontario legislature two years ago, and which Mr. Rogers declares has worked in practice in an apparently satisfactory manner. The matter is of sufficient importance to warrant the publication of the text of the Canadian statute, which is given herewith :

Chap. 16, 1895, Ontario Statutes.

"In all civil cases at the time of the passing of this act or thereafter depending in the High Court of Justice or in a County Court, or in any matter or cause within the jurisdiction of the Provincial legislature where issues are tried, or where damages are assessed by a jury it shall be sufficient if ten of the jurors empanelled for the trial or assessment shall agree instead of twelve as heretofore required ; and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the judge.

"2. If at the trial of any action or issue or assessment of damages now pending or hereafter brought a juror should die or become incapacitated by illness or any other cause from continuing to sit or act on the jury, or if it should be discovered that one of the jury sworn has an interest in the result, or is a relative of any of the parties to the suit within the degree of first cousin, the presiding judge in case of such illness, interest, relationship or other cause may discharge such juror, and may in any case direct that the trial or assessment shall proceed on such terms as he thinks fit with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the judge.

"3. A verdict rendered or question answered under the provisions of this act, shall have the same effect as the verdict or answer heretofore given by twelve jurors."

The Supreme Court of the United States recently handed down a decision of considerable importance with respect to the rights of seamen, under the laws of the United States. It was in the case of Robert Robertson et al., appellant v. Barry Baldwin, being an appeal from a judgment of the District Court for the Northern District of California, rendered Aug. 5, 1895, dismissing a writ of *habeas corpus* issued upon the petition of Robertson et al. The petition set forth, in substance, that the petitioners were unlawfully restrained of their liberty by Barry Baldwin, marshal for the

Northern District of California, in the county jail of Alameda county, by virtue of an order of commitment made by a United States commissioner, committing them for trial upon a charge of disobedience of the lawful orders of the master of the American barkentine Arago; that such commitment was made without reasonable or probable cause, in this: That at the time of the commission of the alleged offense petitioners were held on board the Arago against their will and by force, having been theretofore placed on board said vessel by the marshal for the district of Oregon, under the provisions of R. S. section 4596, subdivision 1, and sections 4598 and 4599, the master claiming the right to hold petitioners by virtue of these acts ; that sections 4598 and 4599 are unconstitutional and in violation of section 1 of article III, and of the fifth amendment to the Constitution ; that section 4598 was also repealed by congress on June 7, 1872 (17 Stat. 262), and that the first subdivision of section 4596 is in violation of the thirteenth amendment, in that it compels involuntary servitude.

The record showed that the petitioners had shipped on board the Arago at San Francisco for a voyage to Knappton in the State of Washington ; thence to Valparaiso ; and thence to such other foreign ports as the master might direct, and return to a port of discharge in the United States ; that they had each signed shipping articles to perform the duties of seamen during the course of the voyage ; but, becoming dissatisfied with their employment, they left the vessel at Astoria, in the State of Oregon, and were subsequently arrested under the provisions of R. S. sections 4596 to 4599, taken before a justice of the peace, and by him committed to jail until the Arago was ready for sea (some sixteen days), when they were taken from the jail by the marshal and placed on board the Arago against their will ; that they refused to "turn to" in obedience to the orders of the master, were arrested at San Francisco, charged with refusing to work in violation of R. S. section 4596; were subsequently examined before a commissioner of the Circuit Court, and by him held to answer such charge before the District Court for the Northern District of California. Shortly thereafter they sued out this writ of *habeas corpus*, which, upon a hearing before the District Court, was dismissed,



and an order made remanding the prisoners to the custody of the marshal.

The record raised two important questions. First, as to the constitutionality of R. S. sections 4598 and 4599, in so far as they confer jurisdiction upon justices of the peace to apprehend deserting seamen and return them to their vessel; second, as to the conflict of the same sections and also section 4596 with the thirteenth amendment to the Constitution, abolishing slavery and involuntary servitude. The majority opinion, written by Justice Brown, holds that the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the "judicial power" as defined by the Constitution, and may be lawfully conferred upon State officers. As to the second contention, the court holds that the question as to alleged conflict between sections of the Revised Statutes referred to and the thirteenth amendment depends upon the construction given to the term "involuntary servitude." "Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into?" On this point the court says :

"If the former be the true construction, then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; — not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void

upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 Geo. IV, ch. 34, sec. 3), it was enacted that if any servant in husbandry, or any artificer, calico printer, handcraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect."

But the court goes farther, holding that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not, within its spirit, a case of involuntary servitude. Services which have, from time immemorial, been treated as exceptional, should not be regarded as within its purview, and from the earliest historical period the contract of the sailor has been treated as an exceptional one, involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained, and numerous ancient and modern authorities are cited upon this point. The judgment of the court below was affirmed.

Justice Harlan writes a dissenting opinion, in which he quotes the constitutional provision that involuntary servitude can only exist lawfully in the United States as a punishment for crime, of which the party shall have been duly convicted, and holds that a condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude. Justice Harlan adds : "If it be said that government may make it a criminal offence, punishable by fine or imprisonment, or both, for any one to violate his private contract voluntarily made, or to refuse

without sufficient reason to perform it, a proposition which cannot, I think, be sustained at this day in this land of freedom, it would by no means follow that government could, by force applied in advance of due conviction of some crime, compel a freeman to render personal services in respect of the private business of another." Justice Harlan is also equally clear that the decision of the court cannot be sustained under the clause of the Constitution granting power to congress to regulate commerce with foreign nations, and among the several States. [It may be here remarked that the shipping articles signed by the appellants left the term of their service uncertain, and placed no restriction whatever upon the route of the vessel after it left Valparaiso, except that it should ultimately return to some port of the United States.] Justice Harlan holds that the condition of one who contracts to render personal services, in connection with the private business of another, becomes a condition of involuntary servitude *from the moment he is compelled against his will to continue such service.* He may be liable in damages for the non-performance of his agreement, but to require him, against his will, to continue in the personal service of his master is, in the opinion of Justice Harlan, to place him and keep him in a condition of involuntary servitude. He goes on to argue that if congress, under its power to regulate commerce with foreign nations and among the several States, can authorize the arrest of a seaman who engaged to serve upon a private vessel, and compel him by force to return to the vessel and remain during the term for which he engaged, a similar rule may be prescribed as to employes on railroads and steamboats engaged in commerce between the States. Justice Harlan concludes his dissenting opinion in the following words:

"In my judgment the holding of any person in custody, whether in jail or by an officer of the law, against his will, for the purpose of compelling him to render personal service to another in a private business, places the person so held in custody in a condition of involuntary servitude forbidden by the Constitution of the United States; consequently, that the statute as it now is, and under which the appellants were arrested at Astoria and placed against

their will on the barkentine Arago, is null and void, and their refusal to work on such vessel after being forcibly returned to it could not be made a public offense authorizing their subsequent arrest at San Francisco."

While Justice Harlan argues well and plausibly, there seems to us no doubt that the majority opinion is the correct one, and that it is sound sense as well as sound law.

A very interesting case, particularly to agriculturists, was recently decided by County Judge Watson T. Dunmore, of Oneida county, N. Y. It is known as the "Sweet Corn Case," and particularly concerns those farmers who are engaged in furnishing green corn to canning factories, of which there are between fifteen and twenty in Oneida county. An agreement was made April 17, 1895, between William Roth and Lyman P. Haviland. In the contract the former agreed to plant four acres of white sweet corn in the corn-planting season of 1895; he further agreed to cultivate the corn carefully, pick the same and deliver it to Mr. Haviland the same day it was picked at the factory operated by Mr. Haviland in the town of Camden, or at any other place or places in the town of Camden at such times and in such quantities as Mr. Haviland should direct, and in good canning condition. In the contract Mr. Haviland agreed to pay Mr. Roth, on or before November 30, 1895, fifty cents for each and every 100 pounds of husked white sweet corn, the same to be husked by Mr. Haviland's employes. Mr. Roth further agreed to plant for no other packer in the season of 1895; to plant the seed corn selected by Mr. Haviland and to deliver no corn on Saturday afternoon.

Mr. Roth, the second week in May, 1895, planted four acres of white sweet corn, the seed having been furnished by Mr. Haviland. When the case was tried before Justice of the Peace Spinning, Mr. Roth testified that it became "fit for harvest about September 8 or 10." Between September 6 and 8 he was told by Mr. Haviland's agent "to get right into it when it was fit and bring it along." Mr. Roth further testified that he picked September 9 and 10 and delivered to the factory. On the latter date Mr. Haviland's agent told him not to deliver any more until he heard from him. Mr. Roth told him he was afraid of early frosts.

Other persons were drawing corn, and Mr. Haviland's agent said it was because they could not handle so much corn. On September 13, Mr. Roth received word to continue the delivery, and he picked and drew on the same day. Mr. Roth was then told he could draw again on Saturday. On Saturday he went to the factory and was told he could not draw until Tuesday following. At this time the corn was in good condition. A heavy frost occurred on Saturday night, September 14. On the following Tuesday Mr. Roth picked and delivered one load and was told to deliver another the next day. Mr. Roth drew another load on Wednesday, but Mr. Haviland refused to receive it. Mr. Roth testified that at this time the frost seemed to have affected the ears of corn. Mr. Haviland looked at it and said the corn was of no use to him, and that if it was all alike he did not want any more. Mr. Roth told him that it was all alike. Mr. Roth further testified that when he made the contract he knew that corn when struck by the frost was not in good canning condition, and that he did not think that the load that Mr. Haviland refused was, as a whole, in good canning condition. He also testified that the load he delivered on Wednesday was plainly affected by the frost; that the balance of the corn was just as bad, and that he knew it could not be delivered in good canning condition. That, for all he knew, the corn, except for the frost, would have remained in good canning condition during the week following the frost. All the corn that was delivered was paid for, and the action was brought to recover the damages sustained by the failure of Mr. Haviland to receive all the corn before it was injured. There was no substantial dispute as to the facts.

Judge Dunmore, in his opinion, recited the provision of the contract which provided that the plaintiff should deliver the corn "at the factory operated by the defendant, in the town of Camden, N. Y., or at any other place or places in the town of Camden, and at such time and in such quantities as the party of the second part (defendant) may direct, and in good canning condition. Plaintiff's contention was that the words "at such times and in such quantities, etc.," must be construed as applying only to the corn delivered elsewhere than at the factory, and not as apply-

ing to the corn delivered at the factory. On this phase of the subject the court said: "If that is so, then the clause, 'and in good canning condition' must be limited also as applying only to the corn delivered at places other than the factory. That construction would require defendant to pay for all the corn delivered at the factory whether in good canning condition or not. That is, plaintiff could have picked the corn before it was sufficiently matured for canning purposes or could have waited until it was too ripe, and yet defendant would have been obliged to pay for it. I do not think the contract will bear that construction. I think the words 'at such times and in such quantities,' etc., must be construed as applying to the corn delivered both at the factory and elsewhere. It is very clear to me that the parties intended by this contract that defendant should have the right to limit the quantity of corn delivered at the factory so that it would not spoil upon his hands before it could be canned. Plaintiff contends that this construction of the contract would enable defendant, in case he did not intend to take more than half the quantity of corn contracted for, to postpone delivery until the crop was destroyed, and thereby avoid the performance of his contract and yet escape liability for non-performance. I do not think so. If the postponement of delivery by defendant had been in bad faith, and not because he had all the corn he could handle, plaintiff very likely could have given some evidence of it. But no evidence was given upon the trial tending to prove any such fact, and no such claim was made at the trial so far as the record discloses.

"But in any event, the contract being free from ambiguity, should not be given an unnatural construction or one not contemplated by the parties at the time it was made. The parties by their contract agreed that the corn should be delivered at such times and in such quantities as defendant directed. Defendant exercised the power given him by the contract, and gave directions as to the time and quantity of delivery. There is no evidence which would sustain a finding that he acted in bad faith. Defendant doubtless was obliged to take the corn before it became too ripe. Had he delayed receiving the crop until it was not in

good canning condition, because of being too ripe, very likely the delay would have been unreasonable; because, evidently, the parties contemplated when the contract was made that defendant should receive the crop before it became too ripe. Plaintiff, however, testified that this corn, except for the frost, would have remained in good canning condition during the week following the frost, so far as he knew, and no evidence was given to the contrary. I therefore do not think the evidence would sustain a finding that defendant unreasonably delayed the delivery of the corn. Had the parties contemplated that the loss by frost should be borne by one of them, the contract should have so provided. I am of the opinion that the justice erred in reaching a conclusion that defendant had failed to perform his contract, in not accepting the entire crop before the frost."

The governor of Massachusetts, in his latest message to the legislature, deals with the live subject of franchises to street railways. He expresses some original and interesting ideas on this problem. In theory, he says franchises are granted solely for the convenience of the citizens, and if it is found that the right of using the streets is profitable beyond a moderate return on the capital invested, it is clearly just to require that the fares be reduced or the service improved. Unfortunately this simple remedy is not easy of application. Stock-watering and similar practices are resorted to by corporations owning valuable franchises, and the reasonable demands of the people are denied and resisted. The governor favors legislation providing for a return to the city either in the shape of a fixed tax or rental or toll upon the cars, or else by a percentage of the receipts or profits. On the other hand, he thinks it fair that companies have the assurances that their franchises, granted for a certain time, would not be revoked or changed through caprice or unreasonable hostility. He also believes that there ought to be the right of appeal from the local municipal council upon questions of public convenience to some higher and more important tribunal, such as the board of railroad commissioners. It is to be remarked that Massachusetts is backward in the sphere of franchise regulation. At pres-

ent there is no legal authority to impose any tax whatever on street railway corporations, and cities are not able to exact compensation for privileges conferred. The suggestion for opportunity to appeal to a higher tribunal in cases not necessarily involving litigation is especially valuable.

The Supreme Court of the United States has granted the petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, in the case of the United States v. the Steamer Three Friends. The petition for the writ was filed by Attorney-General Harmon, on behalf of the United States, and grows out of the recent decision of United States District Judge Locke, of Florida, that the Cuban insurgents were not a people, state, district or colony within the meaning of section 5283 of the Revised Statutes, under which the libel was brought, and that consequently the expedition in which she was engaged was not a political one. It will be remembered that while the steamer libeled was engaged in attempting to land arms and ammunition on the Island of Cuba in aid of the insurgent forces, it was fired upon by a Spanish man-of-war and returned the fire. The question presented is one of great delicacy and importance. The cause was argued in the Supreme Court on Monday, February 15, and the decision will be awaited with considerable interest, not only by the friends and advocates of Cuba Libre, but those who are opposed to the United State taking other than a neutral position.

#### NEW YORK LEGISLATURE.

##### BILLS INTRODUCED WHICH ARE OF INTEREST TO THE LEGAL PROFESSION.

SENATOR MULLIN has introduced a female suffrage constitutional amendment.

Senator Page: That the City Court of New York shall hereafter consist of eight justices, instead of six, the two additional justices to be elected within the present city of New York, at the next general election in November.

Senator Page: Exempting from taxation property leased to religious corporations.

Senator Ellsworth: Authorizing the court to appoint a special district attorney when the district attorney is unable to attend or is disqualified from action.

**Senator Ellsworth:** Extending to surgeon dentists the same exemption from service as trial jurors that is now accorded to them in New York and Kings counties and to physicians, pharmacists and veterinaries throughout the State.

**Senator Coggeshall:** Defining adultery as a sexual connection between a married woman and a man other than her husband or between a married man and a woman other than his wife, and providing a punishment for the offense of a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not less than one year nor more than five years.

**Senator Coggeshall:** Reducing the rate of interest charged by pawnbrokers from 8 to 2 per cent per month on sums less than \$100 and from 2 to 1 per cent on loans exceeding \$100.

**Senator Mullin:** An anti-railroad ticket scalping bill.

**Mr. Palmer:** Providing that in the case of a new trial, the sureties shall pay, in addition to the judgment or part thereof remaining unsatisfied, the taxable costs and disbursements of the new trial, and in case of a reference, also the referee's fees therein.

**Senator Wray:** Exempting veterans of the civil war from jury duty.

**Senator Brackett:** Increasing the number of railroad commissioners from three to five, and fixing their salaries at \$5,000 a year, a reduction of \$3,000.

**Mr. Benham:** Amending the Raines law so that the two-thirds of the revenue from excise collections not paid to the State shall be applied to the poor fund.

**Mr. Sanger:** Adding a section to the election law, compelling all candidates voted for at an election, all persons who acted as agents for such candidates, all representatives of political committees and organizations, and all treasurers of political committees to file an itemized statement, under oath, thirty days after election, of all sums expended, handled, advanced or contributed to them during the campaign.

**Mr. Van Kearen:** Repealing the law which prohibits barbering on Sunday.

**Assemblyman Geo. C. Austin,** of New York, has introduced a bill governing marriages, which has many excellent features. It provides that in case of a ceremonial marriage a license shall be necessary, and a return thereon shall be made by the officiating clergymen to the local board of health within 30 days, under a penalty of \$250 fine for failure to do so. Local boards of health shall submit a record of all marriages to the State Board of Health. Certificates of common-law marriages shall also be filed with the State Board of Health, and verbal agreements to live together as man and wife

shall be void unless a certificate to that effect is filed with the local board of health and in turn with the State board. Residents of this State who go into another State to be married in order to escape our marriage laws, must on returning to this State to live, file with the local board of health a certificate of such marriage. The bill aims to prevent an adventuress from claiming property as a common-law wife unless the record of the marriage is on file with the State Board of Health. The bill has been revised by the statutory revision commission and has been submitted to the State Board of Health.

**Assemblyman Leonard** has introduced a bill which, if passed, will compel every dealer in merchandise who sells by weight to use what is known as the dead-weight system, and discard the use of spring scales. The bill was introduced at the instance of several New York city retailers who do not use spring scales, and who assert that all scales of that pattern are unreliable.

The department of public instruction proposes a very radical change in the school system of the State, and a bill is now in course of preparation which will soon be introduced in the legislature by Senator Mullin. The bill proposes to provide what is known as the township school system throughout the State; that is, to place all of the school districts in each township under the direction of a township board of education, the members of which are to be elected by the voters of the township, there being three or five members of the board, as may finally be determined. The bill will further provide that the weak districts shall be wiped out, and that there shall be a sort of centralization of school advantages, and that all pupils in the country districts shall be afforded free conveyance to and from school.

**Mr. Coggeshall** has introduced four bills prepared by the Gerry society. Two of them amend the Civil Code relative to minor children by defining dancing and singing as meaning even the appearance of a child upon the stage. Another amends the Penal Code so as to permit an appeal to be taken from the sentence of commitment by a police magistrate to the County Court. The fourth provides that in case a magistrate fails to commit a child to any institution, application can be made to any other magistrate.

**Mr. Coggeshall** has also introduced a bill prepared by the labor unions of Buffalo providing for the inspection of beer and for labeling all casks either "standard" or "inferior," according to whether the beer is made of pure hops or is adulterated.

**Senator Humphrey** has introduced a bill which proposes to make it a misdemeanor for any person to treat or offer to treat another person to strong

liquor in a place where the liquor is sold. A fine of \$5 shall be the penalty for the first offense, and imprisonment for the second.

Senator Grady has introduced a bill to add a subdivision to section 640 of the Penal Code, which is intended to prevent the desecration, mutilation or improper use of the United States or State flag.

Senator Coggeshall has introduced a bill which is intended to make the collateral inheritance tax law immediately applicable to large estates like the Fayerweather and the Crouse estates. It provides for the immediate taxation of vested estates which are liable to be defeated or abridged by the happening of some contingency, and provides for a refund of a proportionate amount of tax in case such estates are ever, in fact, defeated or abridged; also provides for the taxation of survivorship interests in joint tenancy, a provision which has heretofore been lacking in the law.

Mr. Barker has introduced a bill providing that if prisoners whose sentences have been commuted shall be convicted for a felony during the time they would have had to serve without commutation, they shall serve the remainder of such term before commencing a new sentence.

#### PUNISHMENTS UNDER THE ITALIAN PENAL CODE.

**P**ENOLOGY has always been a favorite science among Italian jurists. In fact, it may safely be said that since 1764, when Baccaria published his famous book on Crimes and their Punishments, penal science has been the branch of jurisprudence which has received most thorough and detailed study among the jurists of Italy.

It is hardly necessary to state here the influence exercised by Baccaria's book on the penal jurisprudence of all countries. Suffice that it had fourteen French and four German translations, besides others in Dutch, Spanish, Russian and Greek. English jurists, too, felt its influence; it had three English translations, and it is well-known in what high esteem Baccaria was held by Lord Mansfield.

The work of penal reform started by this book has been steadily carried on in Italy, finding its latest expression in the Italian Penal Code.

The political condition of Italy in the past century, and in the earlier part of this, tended, in some measure, to foster an interest in the study of jurisprudence. The country was split up into small States, each having a more or less perfect system or code of laws. Conflict of laws frequently arose, and the widely differing political and economic conditions of the various States, as well as their physical proximity, offered excellent opportunities for a comparative study of their laws.

When the unification of Italy had been realized, it was one of the first thoughts of her builders to frame a Code of Laws for the new nation. Naturally the condition of Italy, previous to her unification, made such codification a most difficult and laborious task. Old codes had to be abolished and the jurisdiction of the new courts had to be adjusted with due regard to the jurisdiction of those then existing. Commission after commission was appointed under different ministries to study the various projects proposed. In 1876, Mancini, one of Italy's most illustrious jurists, was given the ministerial portfolio of justice. He pursued with great vigor the work of codification, and in November, 1876, presented to parliament a most learned report based on his own studies and observations, and on suggestions made by the various jurists and scientists whom he had consulted.

The work proceeded with more or less speed under various ministries till in 1881 Zanardelli was appointed minister of justice; he it was who, after various interruptions, had the honor of completing and having approved by parliament the Penal Code of the Kingdom of Italy in 1888.

There is nothing especially novel or interesting to the American student of law in the division or formal arrangement of the Italian Penal Code. It is divided into three parts or books, the first treating of crimes and their punishments in general, the second of the various kinds of felonies, and the third of misdemeanors, thus following out the well-established classification of crimes according to the intrinsic nature of the transgression.

But it is in the application of punishments that we shall find the most interesting difference between the Italian and the best American Penal Codes.

Even a cursory examination brings out the fact that the Italian Code omits the *names* of crimes, using the *nomen juris* only in the title of the section, and solely for the convenience of indexing. Even more practical is the plan adhered to throughout the Code of giving the extremes of crimes without defining them, except in so far as some idea of them must necessarily be expressed in words.

In providing punishments for the various crimes, the framers of the Code endeavored to combine repression with sufficient latitude in the power of applying it; and the efficacy of the penalty, as provided by the Code, grows out rather of its *intensity* than out of its *duration*.

All punishments may be divided into two classes; *i. e.*, those that are restrictive of personal liberty, and those that are not. Capital punishment (except under court-martial proceedings) does not exist. Italian jurists have almost unanimously been opposed to what Beccaria strikingly calls, "A war waged by the nation against one of her subjects."

Four of the six punishments provided for felonies, and one of the three provided for misdemeanors fall under the first class above mentioned.

Felonies are punishable in any of the following six ways :

1. By the *ergastolo*, applied only in cases of life imprisonment; 2, by *reclusione*, and 3, by *detenzione*, which, as we shall see, are distinct kinds of imprisonment applied to different kinds of crime; 4, by *Confino*, which is a sort of jail liberties; 5, by *multa* or fine, and 6, by exclusion from public offices.

Misdemeanors are punishable by, 1st, arrest; 2d, *ammenda* or fine, and 3d, by suspension from the exercise of a trade or profession.

The most severe punishment known to the Italian law is the "*ergastolo*" or life imprisonment. The punishment is undergone in a special prison, where the condemned is obliged to pass the first seven years of his term at hard labor and in absolute isolation from others. At the expiration of the seven years, he is allowed to work with others, but he must observe absolute silence till death ends his term.

The punishments known as "*reclusione*" and "*detenzione*" may be said to be parallel punishments; they are the same as regards their gradation and duration, but vary as to their nature and intensity. The difference is intended to carry out the distinction in the intrinsic nature of crimes (other than those punishable by the *ergastolo*), i. e., those crimes which result from a perverse or criminal nature, and those which result not from anything intrinsically dishonorable, but rather from the heat of passion or of strong affection. It must be stated, however, that *reclusione* is the normal kind of punishment, while *detenzione* is the exception which is applied in those special cases where circumstances and the nature of the case clearly show that severe reformatory discipline is unnecessary.

The punishment of *reclusione* may extend from three days to twenty-four years. It is undergone in special prisons, at hard labor. If it does not exceed six months, the entire term must be served in solitary confinement. If it exceeds six months, one sixth of the entire term must be passed in solitary confinement, which fraction must, however, be not less than six months nor more than three years. During the balance of the term, no conversation is allowed and there is solitary confinement at night.

The punishment of the *detenzione* may extend for the same period as in *reclusione*. There is, however, no solitary confinement except at night, and although hard labor is part of the penalty, yet the condemned has the privilege of choosing the kind of work. The period of actual imprisonment in both *reclusione* and *detenzione* may, after a certain fixed period of

good behavior, be changed into conditional freedom (i. e., license to be at large) for the unexpired term.

The punishment of the *confino* consists in obliging the condemned to reside for a period, not less than a month nor more than three years, in some part of the kingdom at least sixty kilometers from the place where the crime was committed and from where the condemned and the family of his victim reside. Failure to keep within the prescribed limits changes the punishment of the *confino* into that of the *detenzione* for the unexpired term.

*Multa* is a fine applied only in cases of felonies. It cannot be less than ten, nor more than ten thousand *Lire*; (two to two thousand dollars). Failure to pay, changes the *multa* into *detenzione* at the rate of one day for every ten *lire*; but such substituted punishment cannot exceed one year, *in toto*. The condemned may, if he so desires, expiate such substituted punishment by labor on some public work, in which case two such days count as one of *detenzione*.

Lastly, felonies are punishable by exclusion from public office (*interdizione*). This may be perpetual or temporary. If the former, it deprives the condemned of his electoral franchise and of every other political right; it bars him from all elective or public offices and revokes all academic degrees, rights, privileges and honorary titles. It also cuts off every interest or income derived from any such position or title.

The suspension is temporary when it does not exceed five years.

The severest punishment for a misdemeanor is that of *arresto* (arrest), which may be a period of from one day to two years. Hard labor is part of it, and so is solitary confinement at night. Women and minors, however, may, on their first offense, and if deemed advisable by the court, serve their term in their own house, provided such term does not exceed one month.

The *ammenda* is a fine of not less than one nor more than two thousand *lire* (twenty cents to four hundred dollars). Lastly, the punishment of suspension from the exercise from some trade or profession may be applied for a period not exceeding two years.

In certain well defined cases, the punishment may consist in what the Code calls a "*ripreensione giudiziale*," which is an admonishment by the court and an explanation of the consequences of future misconduct. This judicial admonishment is made in public, and the accused must, of course, attend in person. Such admonishment is effectively supplemented by a bond or recognizance to keep the peace for a time not exceeding two years, executed by the accused with two sufficient sureties.

The Code also provides an elaborate system of special vigilance or surveillance to which criminals



are subjected after the expiration of their term for a period not exceeding three years.

In crimes there are no degrees under the Italian Code; but provision is made by a simple and practical method to increase or diminish the punishment to be applied according to the presence or absence of extenuating circumstances. The Code simply fixes the extremes of punishments applicable, and then provides that when certain circumstances intervene, there shall be a fixed fractional increase or decrease of the punishment which would have been applied had not such circumstances existed. It is next to impossible to give, in a few words, a clear idea of this system which Zanardelli, in the face of more conservative, but less scientific, codes, introduced into the Italian law. All that can be done in this brief outline is to translate the section of the Code on this point and illustrate it by one or two examples.

Section 29 of the Italian Code reads, in part: "Whenever it is provided by law that a sentence shall be increased or diminished by a fractional part thereof, such increase or decrease shall be computed on that quantity of punishment which the court would apply if the circumstances which increase or diminish it had not existed. If various circumstances concur, the increase or decrease in the sentence, by reason thereof, shall be computed upon the quantity of punishment resulting from the preceding increase or decrease; if damaging and extenuating circumstances concur, the former shall be considered first. In every case the following circumstances are to be considered last and in the following order: Age, mental condition, circumstances under section 59 and second offence."

Let us now take some examples. Larceny, in its simple form, is punishable by a term not exceeding thirty months of *reclusione*. But suppose that the thing stolen is of great value; in applying sentence, the court must first fix the punishment irrespective of such circumstance; if the court finds that in its simple form the offence should be punished by twenty-four months (thirty months being the extreme), it must then increase this by one-third, or make the total thirty-two months, one-third being the fractional increase provided by the Code when the circumstances of great value exist. Again, take the case of arson, which, where no special circumstances intervene, is punishable by a term of from five to ten years of *reclusione*. If committed at night, the Code provides that the punishment shall be increased by one-third. But before the court can consider this circumstance, it must weigh all other particulars connected with the offence, as, for example, the means used, the damage which resulted, the danger and alarm which it created, etc. Now, suppose

the court finding the case a grave one, considers nine years an appropriate punishment (ten being the maximum), it must then, by reason of the crime having been committed at night, increase the punishment by one-third, making the sentence one of twelve years. Supposing instead that the jury finds the accused guilty of *attempted* arson, then the court, in passing sentence, would have to consider the attempt as consummated, and then apply the Code provision which makes attempted arson punishable by one-half the punishment provided for arson. So that if the court considered nine years an appropriate sentence if the attempt had been consummated, it must then reduce such sentence to four and one-half years so as to bring it within the penal provisions for attempted arson.

As to the effect of a penal sentence on the civil status of the condemned, the Code is explicit. A sentence to the *ergastolo* or to the *reclusione* for a period exceeding five years carries with it perpetual exclusion from public office.

The sentence to the *ergastolo*, being perpetual, deprives the condemned of all marital and domestic authority, renders him incompetent to make a will, and annuls a will executed previously to the passing of sentence.

The penal sentence does not merge the civil remedy against the offender and his estate, but the injured party or his representatives may join a civil suit for damages and costs with the criminal prosecution; in crimes which offend the honor of a person, the court may, moreover, give damages to the injured party, though none are proved. The offender is likewise obliged to pay the expenses of the prosecution.

In crimes involving the taking or damaging of property, the Code provides that if the offender, before trial, returns the property or makes some reparation, his punishment shall be diminished, not as a matter of judicial clemency, but of statutory right.

And now, it will naturally be asked, "Does the elaborate system of punishments, provided by the Italian Penal Code, insure the safety of the people and the suppression of crime in Italy?" The answer is, of course, that no code, however perfect, can suppress crime. But the fact is undoubtedly true (the popular American idea to the contrary, notwithstanding) that crime in Italy is steadily decreasing. Careful criminal statistics prove it beyond a doubt.

This is due, in a great measure, to the improved political and economical conditions of the country under the constitutional government of the House of Savoy. But it is safe to say that such decrease is due also, in a substantial measure, to the preventive and repressive influence of the new Penal Code.

Less juggling with its provisions (and its provisions are so framed as to make juggling with them very difficult), a speedier trial of the accused than is had under our Codes, and the certainty of fixed and well-defined punishments, with little or no abuse of executive clemency, have had the salutary effect of creating a proper regard for the majesty of the law among a people who, through centuries of foreign despotism and local misgovernment, had come to look upon it as either a false token or an instrument of tyranny; and this wholesome result must not only be the best test of the efficacy of the Italian Penal Code, but also the highest monument to the indefatigable labors of Mancini, Pessina, Zanardelli and all those who gave so much thought and study to its consummation.

GINO C. SPERANZA,  
*of the New York Bar.*

#### JUDICIAL VERBOSITY.

THE greatest criticism that can be made upon the length of opinions handed down by our courts should be aimed at the needless inclusion of unimportant matters. Few lawyers, if any, will criticize a judge for the length of his discussion of law questions, at least when it includes a review and analysis of the legal authorities thereon. But lawyers may well complain when their burden of expense for law reports is needlessly enlarged by swelling volumes with worthless matter. That detailed statements of facts are worthless to the profession except so far as they need to be stated to make the law questions clear, is hardly to be disputed. Yet now and then opinions are found which for page after page repeat all the verbosity of the pleadings and the testimony. In some cases, doubtless, the judge goes into these matters with unnecessary particularity in order to show that he has done full justice to the parties on the facts of the case. But has a judge any right to inflict this rubbish on all who have to buy his reports without any other reason than the satisfaction of the parties to that case? Is it not an absurdity and a wrong to print as a part of the opinion of the court the whole undigested record sent up on appeal? Yet this, or something very like it, is sometimes done. In the reports of a very few states it is hardly an exception. The effect is to becloud what there may be otherwise of excellence in the opinion and to create a presumption against the intellectual quality of the writer. Yet sometimes such opinions are written by very able men whose ability is in other ways incontestably demonstrated by these same opinions. If they would stop to consider more carefully the question, what they ought to include in their opinions, the result would be good.—*Case and Comment.*

#### A LEGISLATIVE NUISANCE.

TIM Sullivan is in hot pursuit of Orrin L. Forrester, and it is an open question which of these gentlemen will first break into the legal profession through the back door. Mr. Sullivan is the distinguished Tammany Hall Senator, while Mr. Forrester is an humble but perniciously active Assemblyman, and known as an anti-civil service Republican. Wide apart as they are politically, they meet on non-partisan ground when it comes to evading the Regent's examination as a preliminary to practice at the bar. On January 15 we called attention to a bill introduced in the Assembly to exempt Mr. Forrester from this embarrassing examination provided by the law of the State. On January 28 Senator Grady — of course it is Grady — introduced a similar measure in the Senate for the relief of his friend Mr. Sullivan.

As scarcely a month of the session has passed, this may be regarded as an unusually lively inauguration of this business of "beating the Regents" by a legislative courtesy exercised in favor of men who can advance no valid excuse beyond their inability to face a test which the leading jurists of the State have declared to be essential to a proper protection of the profession from incapacity.—*N. Y. Mail and Express.*

#### A WHOLESOME DECISION.

THIS decision of our Connecticut Supreme Court in *Drinkall v. Spiegel*, sheriff, has importance as well as interest. Lawyers will note and cite it as a new "leading case." Everybody who believes in the enlightened modern methods of dealing with imprisoned criminals — especially young criminals — will welcome it with lively satisfaction. The facts in the case are recited elsewhere. Briefly, a "paroled" man from Elmira reformatory, finding himself in imminent danger of being taken back to that institution because of a breach of the conditions of his release on probation, invoked the intervention of our courts. His attorneys contended that he was no fugitive from justice, and that the authority of the reformatory over his body ceased and determined at the New York State line. The justices say that this contention is incorrect, and that the reformatory can lawfully collar its parole-breaking probationer in Connecticut (or in Georgia or in Oregon) as well as in New York. It's a decision that makes for the public welfare, and for the welfare of the whole class of conditionally released prisoners themselves. Now that they know how long the arm of the reformatory is, they will think twice before breaking their parole.—*Hartford Courant.*

**Notes of Recent American Decisions.**

**CONTRACT — PAROL EVIDENCE.** — The rule excluding parol evidence of a written contract does not apply where a controversy is between persons not parties to the contract, and the contract is collaterally involved. (*Archer v. Hooper*, [N. Car.], 26 S. E. Rep. 148.)

**CARRIERS — PASSENGERS — WHO ARE PASSENGERS.** — A passenger, after alighting at his destination, ceases to be a passenger when he undertakes to cross the train to the opposite side from the depot, to see the engineer on private business; and therefore the railroad company is not liable for injuries received in attempting to recross the train by reason of his being thrown beneath the train, on account of his striking a box placed on the baggage car platform over which he was attempting to cross. (*Hendrick v. Chicago & A. R. Co.* [Mo.], 38 S. W. Rep. 297.)

**CARRIERS OF GOODS — WHEN RELATION BEGINS.** — Plaintiff delivered a wagon to defendant road for shipment after 5 o'clock P. M. The shipping clerk had left, but the wagon was received, and plaintiff was informed that the bill of lading would be made out the next day: *Held*, that the relation of carrier was assumed by defendant, though the bill of lading was not yet issued. (*Golf, C. & S. F. Ry. Co. v. Compton* [Tex.], 38 S. W. Rep. 220.)

**CONTRACT — ANTI-TRUST STATUTE — VALIDITY.** — A contract to sell an unlimited quantity of goods, prohibiting the vendee from dealing in the product of any other person, and requiring him to give prompt notice to the vendor of any competition which might arise in the traffic and sale of such goods at the place where the vendee was engaged in business, is void, under the anti-trust statute. (*Texas Brewing Co. v. Meyer* [Tex.], 38 S. W. Rep. 263.)

**CONTRACT — RIGHT TO RESCIND.** — If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and cannot get relief against it. He has but one election to confirm or repudiate the contract, and, if he elects to confirm it, he is finally bound by it. (*Hutton v. Dewing* [W. Va.], 26 S. E. Rep. 197.)

**CRIMINAL LAW — QUALIFICATION OF JUDGE.** — Where a judge is disqualified from sitting in a case, the judgment rendered by him is a nullity, though the parties agree to waive objections to the jurisdiction. (*January v. State*, [Tex.], 38 S. W. Rep. 179.)

**FRAUDULENT CONVEYANCE — TRANSFER TO CREDITOR.** — The transfer of property by the in-

solvent debtor, alleged to be in fraud of creditors, will not be set aside merely and only because the transferee is a creditor, and the indebtedness the consideration for the transfer. If, under the circumstances, the transfer was to the advantage of the creditors, or at least not injurious to them, the transaction is not within the scope of the revocatory action; one of the elements required in that action being injury to creditors. (*Baldwin v. McDonald* [La.], 21 South. Rep. 48).

**MUNICIPAL CORPORATION — STREET RAILROAD.** — It is a good defence, to an action against a city for damages caused by a structure in a highway which renders it unsafe and inconvenient for travelers, that such structure was authorized by the legislature. (*Redford v. Coggeshall* [R. I.], 36 Atl. Rep. 89).

**PUBLIC LANDS — RIGHTS OF PRE-EMPTOR.** — The wife of a pre-emptor of public land has no vested rights in such land until completion of the residence necessary to entitle her husband to a patent, and on her death prior to that time her heirs take no interest therein. (*Votaw v. Pettigrew* [Tex.], 38 S. W. Rep. 215.)

**RAILROAD COMPANIES — FRIGHTENING HORSES — CROSSINGS.** — A railroad company is not liable for injuries caused by a horse's taking fright at a hand car left by the company's employes near a crossing on its right of way, in the absence of a showing that such an object near a crossing is reasonably calculated to frighten horses. (*Texas & P. Ry. Co. v. McManus* [Tex.], 38 S. W. Rep. 241).

**SEDUCTION — EVIDENCE — PROMISE TO MARRY.** — A defendant may be convicted for seducing a woman whom he had engaged to marry, though the promise to marry was not repeated at the time of the intercourse, and no allusion to the marriage contract was then made. (*Bailey v. State* [Tex.], 38 S. W. 185).

**USURY — ELIMINATION BY CONSENT.** — Where parties consent to eliminate all items that might render the transaction usurious, the fact that some of the items are inadvertently left uncorrected will not invalidate the transaction. (*Jarvis v. Southern Grocery Co.* [Ark.], 38 S. W. Rep. 148).

**WILL — CONCLUSIVE AS TO FACTS ALLEGED.** — Where testator in his will in directing how his estate shall be distributed among his children, states that he has made certain advances to a certain amount to either of them, evidence is not admissible to disprove either the fact or the amount of such advancements, but the will is conclusive as to these facts. (*Elihu J. Farmer v. M. T. Cope*, executor, et al. Sup. Court [Ohio], Weekly Law Bulletin P. 132).

**Notes of Recent English Cases.**

**CONTRACT — PERSONAL SERVICE — AGREEMENT BY EMPLOYED TO "ACT EXCLUSIVELY FOR" EMPLOYERS — ABSENCE OF NEGATIVE COVENANT — BREACH — INJUNCTION.**—In a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons. (*Mutual Reserve Fund Life Assn. v. New York Life Ins. Co. and Harvey*, Ct. of App. L. T. Rep. Vol. LXXV, 528.)

**INSURANCE — POLICY AGAINST BURGLARY — EXECUTION BY INSURERS — NONPAYMENT OF PREMIUM — WAIVER OF PREPAYMENT — RECITAL.**—On the 14th Dec. a proposal for an insurance against loss by burglary, containing a clause that no insurance should be considered in force until the premium had been paid, was signed by the plaintiff and sent to the defendants, an insurance company. A policy of insurance from the 14th Dec., 1895, to the 1st Jan., 1897, was duly executed by the defendant company a few days later, which contained recitals of the proposal, and that the first premium had been paid. It also contained a proviso that no insurance should be held to be effected until the premium due thereon should have been paid. This policy, after its execution, remained in the possession of the company, and the plaintiff did not pay anything by way of premium. On the night previous to the execution of the policy the plaintiff's premises were broken into and he suffered loss thereby. *Held*, that the policy was a completed contract, and that the defendant company had waived the prepayment of the premium, and were liable under the policy. (*Roberts v. The Security Company, Limited*, Ct. of App. L. T. Rep. Vol. LXXV, 531.)

**RAPE — COMPLAINT — EVIDENCE.**—Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negating consent on her part. (*Queen v. Lillyman*, Part 8, Vol. II [Q. B.] Law Reports, p. 167.)

**SALE OF GOODS — GOODS DELIVERED "ON SALE OR RETURN" — GOODS PAWNEED BY BUYER — TITLE OF PAWNEE — SALE OF GOODS ACT 1893 (56 and 57 Vict. c. 71), s. 18, R. 4.**—When a person to whom goods have been delivered "on sale or return" pawns them, the property therein passes, and the pawnee acquires a good title against the person who delivered them "on sale or return." (*Kirkham v. Attenborough*; *Kirkham v. Gill*, Ct. of App. L. T. Rep. Vol. LXXV, 543.)

**Legal Notes of Pertinence.**

**ATTORNEY-GENERAL HANCOCK**, of New York, has written an opinion deciding that where a supervisor was elected last March and died shortly after, and the vacancy was filled by appointment, the person to be elected to the position at this time, will serve only for the remainder of the unexpired term of two years, filling out the term broken by death. The question arose in Allegany county, N. Y. A similar opinion was written by the attorney-general with reference to filling a vacancy in the position of town clerk arising in a similar manner. The attorney-general has also decided that the board of managers of the Home for Veterans, at Oxford, may appoint one of their number as superintendent, but that they must give him none other than the statute specifies in the way of compensation.

The Appellate Court of Indiana has recently held that the duty of the porter of a sleeping-car to take charge of a passenger's baggage, and to assist in removing it from the car at its destination, being, under the rules of the particular company, within the scope of his employment, he is not to be regarded as a mere gratuitous bailee; and, therefore, when the porter of a sleeping-car, in pursuance of his customary duties, took charge of a passenger's baggage, for the purpose of removing it from the car at the passenger's destination, and it was lost or stolen through the negligence of the company's employes, the company was liable therefor. (*Voss v. Wagner Palace Car Co.*, 44 N. E. Rep. 1010 [on rehearing], affirmed 43 N. E. Rep. 20.)

After a brief discussion the Kansas legislature has decided to permit women to wear bloomers and corsets. It is now in order for the women to meet and decide to allow the men to wear trousers and whiskers.

The South Dakota senate has passed an anti-trust bill.

A bill has been introduced by a populist member of the Kansas senate, which provides for letting out all county offices to the lowest bidder. This looks very much like a bill to foster bribery.

Kansas is the subject of a good deal of raillery and abuse, and something new crops up very often to keep her before the people. Late reports from there state that the new Chief Justice of Kansas appointed his brother-in-law on the Live Stock Board, his law partner as clerk of the court, and his nephew as stenographer, while other poor relations are yet to be provided for.

The Hon. Martin I. Townsend, whom Trojans love to refer to as their "Grand Old Man," recently celebrated his 87th birthday.

Representative Hood, of the Missouri Legislature, has introduced a bill forbidding railway conductors and brakemen from flirting with female passengers.

Paul Bourget brought and won a suit against his French publishers, some months ago, to compel them to give him an accounting. His example inspired his fellow-novelist, Galdos, to a similar course, and the Madrid Lower Court has pronounced in his favor. As in Bourget's case, there is no question of violation of contract, but the plea is that an author has a right to know, from actual inspection of accounts, not merely from statements rendered, just how his books are selling.

Justices of Madison County, Indiana, met at Anderson and formed a novel organization for the purpose of putting an end to credit marriages and also the cutting of rates. During the last six months they have seldom got over \$1 for marriages, and in most cases 50 cents was all the groom could spare. One of the squire's books showed thirteen and another eleven, none of whom had paid. Hereafter it will be \$2, payable in advance.

The Iowa Supreme Court holds that it can enforce its order to compel the Governor to commission a brigade officer of the State Guards in spite of his power to pardon for all offenses, even of contempt of court.

The hat of an attorney was sold from the steps of the city hall in Detroit a few days ago by a constable to satisfy a judgment of \$1 obtained by a former servant girl of the lawyer.

Early in the present month an office building in Philadelphia was partly destroyed by fire. A lawyer had an office in it. The remnant of the building was barred against the tenant and all others by the fire department. The lawyer opened an office in another building and the owner of the burned structure demanded rent from him for the old place, alleging he could still get access to the office through the roof — which was true. And there is common law to support the suit.

A Scotch judge has decided that if you can get anything out of a nickel-in-the-slot machine and still keep your nickel you cannot be held guilty of robbery. He holds that there must be a possibility of reciprocity in the matter of penalties, and if the machine will take your coin and give you nothing in return — as it will when it is out of order, or out of the commodity it dispenses — you are entitled to take advantage of it when you can.

After a State has lost its lien for taxes and has no color of right to enforce collection thereof, a statute attempting to revive its right is held, in *Kipp vs. Elwell* ([Minn.] 33 L. R. A. 435), to be unconstitutional for lack of due process of law.

A Colorado judge has ruled that gold contracts are perfectly legal. Of course they are. A citizen has a perfect right to contract for payment in gold, or in dried fish, or in baled hay, or in broken bottles, if it suits his fancy or his interest. This is not a matter with which courts and legislatures have anything to do.—*San Francisco Bulletin*.

The new speaker of the Japanese house of commons is a Yale man, '79, who was registered in the law school as Kazuo Hatoyama.

The Arkansas senate has passed a bill, introduced by Senator Witt, providing that hereafter none but qualified electors shall hold any position within the gift of the Arkansas legislature. The army of females who besiege the members at every session to secure their vote for a clerkship is responsible for the action of the senate.

Discharging a jury during the progress of a criminal trial upon information by telephone that one of the jurors is sick, and without further proof of that fact, is held in *State v. Nelson* ([R. I.] 33 L. R. A. 559), to constitute a bar to a second trial under a constitutional provision against a second trial for the same offence after acquittal.

One riding a bicycle down a narrow path at the rate of five or six miles an hour when it is occupied by many other persons going in the same direction, is held, in *Myers v. Hinds* ([Mich.] 33 L. R. A. 356), to be liable for negligence if he runs into a pedestrian when his wheel strikes an obstacle, at least if it does not appear that he was unable to see and avoid it by the exercise of due care. Such an accident casts upon him the burden of disproving his negligence.

A man who burns his own house is held, in *People v. De Winton* ([Cal.] 33 L. R. A. 374), to be guilty of arson only when some part of the house at least was in the possession of another person. The California statutes are said not to have changed the common law on this point.

Forcible robbery of a city treasurer is held, in *Healdsburg v. Mulligan* ([Cal.] 33 L. R. A. 461), to be a defence to an action upon his bond, where the Constitution and laws of the state make him a bailee and not a debtor.

The purchase of goods on credit, intending not to pay for them, is held, in *Swift v. Rounds* ([R. I.] 33 L. R. A. 561), to render the purchaser liable to an action for deceit.

An ordinance against animals running at large in the streets is held, in *Elliot v. Kitchens* ([Ala.] 33 L. R. A. 364), to be inapplicable to a colt three months old following its dam when she is driven along the street with the colt directly in front of, or by her side, until separated from her and chased away by a horse running at large.

### Humors of the Law.

Lawyer — "John!"

Clerk — "Yes, sir."

Lawyer — "Take this morning's paper, find the marriage list and send one of my cards to each of the persons whose name appears there and be sure to underscore the words 'divorce business a specialty.'" — *Cleveland Leader*.

In his interesting reminiscences of Erie County Bench and Bar, published in the January number of the *Western Reserve Law Journal*, John T. Beecher gives this very humorous incident in the career of Lucas Selkirk Beecher:

"Near the close of Mr. Beecher's practice his hearing became impaired. A farmer who lisped called at his office to employ him to bring an action against the L. S. & M. S. R'y to recover damage for negligently killing some of his pigs. Mr. Beecher understood the farmer to claim that the Company had killed *three thousand* of them, and said to the client interrogatively '*Three thousand and all at one fell swoop?*' Whereupon the farmer shouted, 'No! No! Great God, no! three thows *and* pigths.'"

Mrs. Brown — Well, your husband's will is law.

Mrs. Jones — Oh, yes, it is; but it's like an excise law; it can't be enforced. — *Puck*.

Judge — How did you come to steal this chicken?

Prisoner — Heredity, your Honor.

Judge — What do you mean, sir?

Prisoner — My ancestors landed on Plymouth Rock. — *Wrinkles*.

Joseph David is one of the best jury lawyers in town, says the *Chicago Post*. One day while the lawyers were sitting around in one of the North Side court-rooms waiting for the conclusion of a case, so they could file motions, demand *habeas corpus* and otherwise conserve the liberties of the people, he and Seth F. Crews, famous for stories as for successes at the bar, fell a-sparring at each other.

"David had a case one time," said Mr. Crews, "in which he asked for \$30,000 against an insurance company. It was something about failing to keep a contract to employ a general manager, or something of that kind. The plaintiff knew he couldn't recover anything near \$30,000, if he could get a verdict at all. But David worked for him tooth and nail, and he proved how many visits he had made and how much time he had lost, and demanded, in his argument, all his declarations had alleged — damages for \$30,000.

On the jury was a little fat man, a plumber, with a great big diamond in his shirt front. The diamond

was the most conspicuous thing in the jury-box, and David made up his mind he must argue up to the level of that diamond. The jury went out, after a while, and on the first ballot they were for a verdict. Then each man fell to figuring on the amount. Some said \$5,000, some \$10,000 and some clear up to the \$30,000 demanded.

"Then they came to the little plumber. He had covered five sheets of legal cap, and when they asked him what he thought was right, he said: 'I think the plaintiff ought to have \$70,000.'"

"They couldn't budge him. He had figured the thing all over twice. He said he wanted to treat the insurance company right, but he would never consent to assess the defendant a cent less than \$70,000.

"The foreman knew something of law, and he explained that a plaintiff could not recover more than he demanded. They sent out for the papers, and the plumber was convinced he would have to go back on his figures. They argued the thing several hours longer, and then agreed on \$16,000. Then David asked the little plumber how he reached the \$70,000 conclusion.

"'I reached it by honest calculation,' said the man. 'He made so many visits and he lost so much time, and so many other jobs that would have paid him so much. At straight plumbers' rates he was entitled to \$70,000—and if I didn't believe it I wouldn't be wearing diamonds to-day.'"

A British sailor being a witness in a murder case was called to the stand and was asked by the counsel for the crown whether he was for the plaintiff or defendant.

"Plaintiff or defendant?" said the sailor, scratching his head. "Why, I don't know what you mean by plaintiff or defendant. I come to speak for me friend," pointing to the prisoner.

"You're a pretty fellow for a witness," said the counsel, "not to know what plaintiff or defendant means."

Later in the trial the counsel asked the sailor what part of the ship he was in at the time of the murder.

"Abaft the binnacle, me lord," said the sailor.

"Abaft the binnacle?" replied the barrister.

"What part of the ship is that?"

"Ain't you a pretty fellow for a counsellor," said the sailor, grinning at the counsel, "not to know what abaft the binnacle is!"

A Paris lawyer ran after and overtook a thief who had snatched a watch chain from the lawyer's companion, a young actress, and was amazed to discover that the culprit was a client whose acquittal he had secured for a similar offence committed a few months before.

## The Albany Law Journal.

ALBANY, FEBRUARY 27, 1897.

### Current Topics.

THE anti-trust movement noticeable throughout the United States in the introduction, in various legislatures, of bills intended to limit the power of these combinations, has in the State of New York taken the form of a legislative inquiry, the progress of which is being watched with the greatest interest throughout the country. While, perhaps, the results of this legislative investigation will not be radical in their influence, and the trusts are not known to be trembling, some light is certain to be thrown upon their operations and the methods by which they control trade, limit production and regulate prices. One very notable result of the investigation already has been the position assumed by a portion of the daily press of the country as open apologists and defenders of trusts. This section of newspapers, while not large, is active, zealous and persistent in claiming and attempting to prove that trusts are a blessing instead of a great and growing evil. The leading champion of the trusts is the New York *Sun*, which not only insists that these corporations are a healthy, legitimate and beneficent development of modern industry, resulting in the lowering of the prices of commodities to consumers, improvement in the quality of products, and increases in the wages of labor, but goes so far as to declare any manifestation of anti-trust feeling to be a "conspiracy against capital and character." The present inquiry it characterizes as an attack having its origin in criminal stock-jobbing and blackmail, a movement fostered by pestilential influences. Without going into a discussion of this question, it is pertinent to point out that the statutes and common-law decisions of the courts of New York have put trusts under the ban and pronounced them criminal conspiracies, inimical to the best interests of the people of the commonwealth. This is a stubborn fact which must be kept in mind throughout the discussion of this vitally important question. If these laws are bad, they should be repealed; so long as they are

VOL. 55 — No. 9.

on the statute books they should be enforced. Newspapers and individuals which are now inveighing against the anti-trust movement, would be much more valuable as well as much more consistent if they would turn their attention to the repeal of the statutes which make trusts illegal. To characterize as a conspiracy the attempt to enforce and execute existing laws will hardly strike the average law-abiding citizen as a proper or safe proceeding for a great public journal. The inquiry now in progress has emphasized the fact that many of these great combinations, organized under the loose corporation laws of New Jersey, have been permitted to carry on their operations in other States which, like New York, have rigid statutes against the formation of similar corporations at home. This plan possesses many obvious advantages for the trusts, by no means the least of which is the opportunity afforded their promoters to deny to the legislative investigators access to the combination's books and records, on the ground that they are foreign corporations outside the jurisdiction of the authorities except of the State in which they were incorporated. But assuming there were no legal prohibition of the artificial restraint of trade, does it necessarily follow that trusts are legitimate and beneficent institutions? That some trusts reduce prices is doubtless true, but is it certain that with free and normal competition, under the laws of supply and demand, the reduction would not have been greater? Is it not a fundamental proposition in political economy that competition is better than monopoly for the great mass of consumers? Is it reasonable to suppose that monopolies will confer any greater benefits upon consumers than conditions compel them to do? Under monopoly the consumer undoubtedly gets some advantage, but is it safe for him to place himself at the mercy of the combinations? These are questions which are very properly being asked at the present time. It should be borne in mind that the law does not seek to interfere with the organization of corporations, joint-stock companies and partnerships; nor is there any attempt made to limit the amount of capital a corporation may invest or to prevent the securing of trade in any legitimate way; but contracts in restraint of trade, under which wholesale dealers are bound by severe penalties not to sell at less than the daily



quotations of the trust, nor on more liberal terms as to credit or cash discount, are contracts in restraint of trade which the laws expressly provide against, for the reason that they prevent free and competitive dealing. It is a sufficient answer to the claims and pretensions of the trusts that they really cheapen commodities, to say that if that were true they would have no reason to fear the competition of weak and independent rivals. Combination and consolidation along recognized and legitimate lines are not aimed at by the law, and for that reason the attempt in the legislature to extend the New York investigating committee's inquiry to the operation of the departmental stores, which have, in recent years, crushed out so many smaller concerns, is not likely to be productive of legislative results; but the law does seek to prevent fraudulent and secret methods of restricting trade, which too often include the payment of dividends on watered stock, deception, compulsion and violation of corporation laws.

Another excellent example of the sort of proposed legislation which should be summarily disposed of by elimination of the enacting clause, and upon which a hearing was recently given by the assembly judiciary committee, is the measure introduced in both houses, which seeks to incorporate the New York Law school, giving to the trustees of that institution power under stipulations as to period of instruction and satisfactory examination to confer the degree of bachelor of laws and master of laws, and to award suitable diplomas in testimony thereof. The board of regents, representing the educational interests of the State, has very properly protested against the passage of this bill. The board has shown that the New York Law school is already a corporation with a charter granted by the regents, and that their object in seeking to have this special act passed is to make themselves independent in the matter of degrees, which at present are conferred only on those who meet the State standard established by the regents. The Constitution, as is well known, declares that corporations may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be obtained under general

laws. The university law confers on the regents the power and duty of incorporating institutions of learning, and provides that no authority to confer degrees shall be given any institution unless it has resources of at least \$500,000. The New York Law school confessedly fails to meet this requirement. It is noteworthy that the whole argument before the judiciary committee took the form of an attack upon the integrity of the board of regents, which was charged with undue discrimination and prejudice against the New York Law school—a charge which the membership and high record of the board in the cause of higher education and professional standards in this State is sufficient to refute, without argument or discussion. The bill ought never to have been introduced, because it seeks to take away from the regents the very authority which the general law, passed in accordance with the mandate of the Constitution, conferred upon them. It is true that there are six or seven similar institutions in the State, all of them, except the New York Law school, separately chartered, and having power to confer degrees and grant diplomas upon their own examinations; but it is also true, as stated in the committee hearing by President Raymond of Union college, that the right to confer degrees has been waived by all of them in so far as they do not conform to the requirements of the board of regents.

While it can hardly be said that the Western States, as a rule, lead in the matter of enacting wise legislation, in one respect they can be followed by the law-making bodies in the more conservative East. We refer to the fixing of punishment for the detestable crime of train-wrecking. A number of Western States where this form of criminality has most flourished have seen fit to render the law more stringent, and fix the penalty of death for convicted train-wreckers in all cases where one or more deaths result. The effect of this drastic policy has been most salutary in diminishing the number of crimes of this sort. In the New York State legislature, Senator Mullin has presented a similar bill, which ought to be placed on the statute books without delay. Reckless criminals who resort to train-wrecking are morally, and should be made legally, murderers, by the

statutes of every State in the Union. It is a fact worthy of note that the Alabama legislature has just passed such a law without a dissenting voice.

The question of restricting the introduction of bills in the legislatures of the various States is one that is claiming attention on the part of reformers, or, perhaps, more properly speaking, would-be reformers. That the evil is a real one, and a growing one, may be easily inferred from the statement of the single fact that in the legislature of New York, although it has been in session less than two months, more than 900 bills have been introduced, while there seems to be no material diminution in the supply. No one needs to be informed that the great majority of these bills are either bad, useless, or positively vicious in their character. Very many of them have been presented and are being pressed solely for the purpose of grinding personal axes. That some method should be adopted to stop this flood of bills, no one will dispute who has given the matter any serious, impartial and disinterested consideration; but how to do it is the question? Without now going into the reasons for it, the fact is indisputable that for some years there has been a great and growing tendency in the various State legislatures to enact every personal or popular whim, some of them positively asinine, into law. Our information is to the effect that a bill is to be introduced in the legislature of New York to divide the responsibility of that body with the statutory revision committee. We are not aware, nor do we believe, that the latter body favors the proposed law, which, in our opinion, would be most unwise if not positively vicious legislation. The bill referred to is understood to provide as follows:

"A member or a member-elect of the legislature who intends to present a bill at the next session must, on or before the 15th day of December next preceding such session, submit the same to the commissioners for examination and revision. It shall be their duty to examine a bill so submitted and make such corrections and changes therein as may be necessary to produce uniformity in style, plan or arrangement of the statutes. A bill so submitted must be endorsed with the name of the member or the member-elect proposing it, and at the opening of the

session of the legislature such bills, if endorsed by a senator, shall be delivered by the commissioners to the president of the senate, and if endorsed by a member of the assembly, to the clerk of the assembly. After the opening of the annual session and before the first day of March next following, a bill shall not be introduced unless endorsed with the approval of a majority of the commissioners. After the first day of March a bill shall not be introduced unless endorsed with the certificate of the governor or acting governor, to the effect that there appears to be a necessity for its consideration by the legislature."

This would be the virtual abdication by the legislature of its constitutional authority. It would render the statutory revision commission, which is not a permanent body, superior to the legislature. The right to go to the legislature with a bill is co-extensive with a right of petition. There is doubtless need of some regulation of the matter, but in our opinion this proposed remedy would be worse—very much worse—than the disease.

The Supreme Court of Tennessee, not long ago, passed, incidentally, upon the novel question of the right of counsel to shed tears before a jury. It was in the case of *Ferguson v. Moon*, for breach of promise and seduction. It had been assigned as error that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, "shed tears and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant." The court confesses itself unable, after diligent search, to find any direct authority on the point, the conduct of counsel in presenting their cases to juries being a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court concludes:

"No cast-iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel

which no statute or Constitution could take away. It is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason; but for other errors indicated the judgment is reversed and cause remanded for a new trial."

The *London Law Journal* is entirely satisfied with the composition of the Venezuelan Arbitration Commission, declaring unreservedly that it must command the confidence of all who are parties to, or are in any way interested in, the great argument which it has to decide. The English bench contains no more distinguished jurist than Lord Herschell, and no more highly equipped practical lawyer than Sir Richard Henn Collins. As to the American representatives the *Journal* says: "Chief Justice Fuller is one of the greatest ornaments of one of the greatest appellate tribunals in the world—the Supreme Court of the United States; and Mr. Justice Brewer's impartiality and courtesy, while acting on President Cleveland's commission, speedily silenced the criticisms which some of his extrajudicial utterances on the Anglo-Venezuelan controversy aroused in this country."

The question of the right to use armorial bearings, which recently came up in an English court, while possessing only an academic interest on this side of the water, because we in this republic don't need such things, may be of sufficient importance to warrant brief reference. As a general rule there is no law against a person using arms to which he is not entitled, provided he pays the tax to which he becomes liable by using the arms, the exception being in the case of the royal arms. A case, in which the question came up, was tried at the Morley-lane Police Court when a butcher carrying on business in the Edgware road was convicted and fined £15 for exhibiting the royal arms

over his shop. The defendant did not attempt to show any express authority, but he endeavored to show implied authority in various ways, more or less ingenious. The defence which his counsel pressed most strongly was that, as the defendant was the holder of letters-patent for an improved method of hanging carcasses of meat in his shop, and as the document supplied to him bore the royal arms, therefore he had authority to use the arms. This was altogether too far-fetched, albeit decidedly ingenious, for the court, who promptly refused to listen to such a nebulous plea.

One of our English exchanges notes a decision as to what is not contempt of court, and embodying a judicial statement as to what constitutes the offence. The editor of a provincial newspaper, on the return of a rule to show why he should not be committed for contempt for publishing in his paper an editorial notice calculated to prejudice the fair trial of four men committed for trial on a charge of night poaching, through his counsel, offered an apology, and, on his paying the costs, the Court discharged the rule. After the hearing of that case, he published in his paper a comic account of the proceedings, and it was now sought to commit him for contempt because it brought the court into ridicule. But Justices Wright and Bruce refused to act, for such a report would not tend to prejudice the fair trial of the accused. As Mr. Justice Wright said, "These applications are quite mistakingly called applications for contempt of court. They are really applications to prevent the course of justice being interfered with. It was unfortunate and bad taste to report in such a way, but the court did not sit to punish bad taste."

The advocates of woman suffrage are not idle, by any means. The committee on constitutional amendments of the Massachusetts legislature has made a report recommending that the word male be stricken out of the suffrage clause in the Constitution of that State. While it may not get any further than this stage, the woman suffragists are elated over the temporary success. The Nevada senate has passed a woman suffrage bill, and the California legislature is likely to resubmit the equal suffrage proposition which was defeated at the polls last

November. On the other hand, the Maine and Nebraska legislatures have defeated propositions granting women the ballot, and similar bills before other State legislatures in the East are likely to meet the same fate. There is no doubt that the West is much more favorably disposed towards giving women the ballot than the East.

This reminds us that the Women's Franchise bill is making some progress in its passage through the English parliament, having recently been given its second reading. It is proposed by this bill that every woman who is the inhabitant, occupier as owner, or tenant of any dwelling-house, tenement or building within the borough or county where such occupation exists, shall be entitled to register as a voter on the register for such borough or county in which she is so registered as aforesaid, and when registered to vote for a member or members to serve in parliament, provided that such woman is not subject to any legal incapacity which would disqualify a male voter. The bill would probably apply to married women, but it would have been wiser to have made this quite plain.

It seems altogether probable that the Supreme Court of the United States will be called upon ultimately to render an opinion concerning the validity of divorces granted by the courts of certain western States, particularly the Dakotas and Oklahoma. The recent decision of Justice Russell of the United States Supreme Court in the McGowan case, in which it was held that neither the wife nor the husband can acquire temporary residence in another State for the purpose of securing a divorce, has, in the opinion of eminent lawyers, laid the groundwork for the entire "fake divorce" system which has flourished so remarkably for some years past. The case is now pending in the New York Court of Appeals, but whatever may be the decision there, it has been definitely arranged that the matter shall be carried to the United States Supreme Court for a definite and final adjudication of the questions involved. To this end it is stated that five husbands who have been victims of Dakota decrees have subscribed \$10,000 each to a fund to be used in taking the

appeal to the highest court in the land. Should this august tribunal decide that the decrees heretofore issued by the courts in question are invalid and of no legal effect, there will be a remarkable condition of affairs presented. Women who now regard themselves as wives will realize that they have been living for a greater or lesser period under conditions not sanctioned by the law; husbands will find themselves in a similar predicament, while the number of children who will thus be branded is too large to be calculated.

Coming events are popularly supposed to cast their shadows before. Whether this be true or not, the following very neat reference to a possible future occurrence, by a writer in the *Chicago Post*, will interest lawyers as well as laymen, as it concerns the family of a very distinguished member of the legal profession:

"While we do not believe in too free discussion of such delicate matters as are now disquieting the Harrison household and convulsing society at the Indiana capital, the announcement by Mr. Miller, general spokesman for the Harrison family, that 'the case is still in *statu quo*' leads us to express the fear that it will soon be ruled out by the statute of limitations. Our friends, the ladies, have taken strong exception to Mr. Miller's attempt at facetiousness, and have plainly intimated that there are some things in this world too sacred for a clumsy joke on legal lines. We quite agree with them, and we sincerely hope that the poor, unoffending woman, who is quietly and unostentatiously trying to live up to the scriptural injunction, will be permitted to remain unmolested until the most respectful congratulations are in order."

The problem "What shall we do with our ex-Presidents?" seems to be solving itself.

[Since the above was written the expected event has transpired, and mother and daughter are doing nicely.]

The English law journals are just now animatedly discussing the very interesting question whether a guest at a hotel may remain as long as he or she pleases to do so, and incidentally arises the obligation of the inn or hotel keeper. The older authorities define an inn as

a place "instituted for travelers and way-faring men," and as an inn-keeper is one who takes upon himself a public employment, it naturally follows that he is bound to afford proper entertainment to every traveler who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason is shown for refusing him. The animus of the discussion is found in the case of *Lamond v. Richards*, in which the Divisional Court was called upon to decide whether the proprietors of the Hotel Metropole, at Brighton, had a right to refuse to harbor a lady who had been in the hotel nine months, and who stated in court that she intended to remain there until it was burnt down. It seems to be quite clear, under these circumstances, that the lady was not a traveler, and the real question to be decided, therefore, is whether the common-law liability of an inn-keeper to entertain persons as guests applies only in the case of travelers, or has a wider application. The mere fact that a guest has been installed in an inn or hotel for a considerable time hardly prevents him from being considered a guest, provided he lives there in a transitory condition; but it has been said that if one boards or lodges in an inn under a special agreement, he is not a guest in the legal sense. The *London Law Journal*, in referring to the question, cites the fact that in *Rex v. Luellin*, decided nearly two hundred years ago (12 Mod. 445), it was held that an indictment against an inn-keeper for refusing to receive a sick person was bad for not saying he was a traveler; and there is no authority for saying that a person who enters an inn as a traveler has, though he ceases to hold that character, a right to remain in the inn as long as he pleases. The case referred to has been, or will be taken to the Court of Appeals, and the judgment will be awaited with interest. The county judge held that the defendant had ceased to be a wayfarer, and that the defendants were, therefore, under no obligation to let the plaintiff remain in their hotel. The Divisional Court upheld the ruling of the county judge on this point.

Litigation in the Bell Telephone case at Boston, begun ten years ago, is going on as merrily as if the patents were still in force. As a matter of fact, however, all the patents affected by the suit expired three years ago.

## REGISTRATION OF LAWYERS.

### BILL INTRODUCED FOR THAT PURPOSE IN THE NEW YORK LEGISLATURE.

THE movement inaugurated by the New York State Bar Association, to secure the registration of all persons practicing law within the State of New York, has taken form in the introduction of a bill for that purpose in the legislature.

This bill provides that every person duly licensed and admitted to practice as an attorney-at-law, or as an attorney and counselor-at-law in the courts of record of this State, must, before January 1, 1898, subscribe and take an oath or affirmation, which must be substantially in the following form, the blanks being properly filled:

STATE OF NEW YORK, }  
..... County, } ss.:

I, ....., being duly sworn (or affirmed), do depose and say that I am a natural born citizen of the United States (if naturalized, state when and where) and now reside at ..... (or, if a resident of an adjoining State and admitted to practice in the courts of record of this State, and whose office for the transaction of law business is within this State, state the fact). That I was duly and regularly licensed and admitted to practice as an attorney-at-law or as an attorney and counselor-at-law in the courts of record of this State at the ..... term, 18 .... of the General Term (or Appellate Division) of the Supreme Court held at ...., and that I took the constitutional oath of office and subscribed the roll or book of attorneys.

Subscribed and sworn to before me }  
this .... day of ... .. 189 . }

This oath or affirmation must be filed in the office of the county clerk where the affiant has his principal place of residence, except that a person regularly licensed and admitted, and whose office for the transaction of law business is within this State, but who resides in an adjoining State, must file the said oath or affirmation in the office of the county clerk of the county where he has his principal office for the transaction of law business. Said oath or affirmation must be filed by the county clerk, and preserved in a bound book or volume to be kept for that purpose, which shall be known and designated as the ..... county register of attorneys and counselors-at-law, which book shall be alphabetically indexed, and is hereby constituted the register of persons admitted to practice law in the courts of record of this State for the county in which it is filed and preserved.

Every person who is hereafter duly licensed and admitted to practice as an attorney and counselor-at-law in the courts of record of this State by an appellate division of the Supreme Court, shall

subscribe and take and file the aforesaid oath or affirmation as provided in the first section of this act, before he begins or is entitled to begin to practice for another as an attorney and counselor-at-law in the courts of record of this State or in any court in the county of New York or in the county of Kings. A person who practices any fraud or deceit or knowingly makes any false statement in the oath or affirmation in and by this act required to be made and filed is guilty of perjury.

It shall be the duty of the county clerk of each county of this State, during the month of January, eighteen hundred and ninety-eight, and during the month of January in each year thereafter, to certify in writing, under oath and his seal of office, to the clerk of the Court of Appeals, in the alphabetical order of the first letter of his surname, the name and residence, and time when, and place where admitted, of all persons who have taken the oath or affirmation aforesaid, and have filed the same in his office, with the date of the filing thereof. The county clerk of each county in this State shall also certify under oath and his seal of office, during the month of January, eighteen hundred and ninety-eight, to the clerk of the Court of Appeals, the names of all persons who have subscribed, since the first Monday of July, eighteen hundred and forty-seven, the roll or book of attorneys on file in his office and the date of such signing. It shall be the duty of the clerks of the appellate divisions of the Supreme Court, during the month of January, eighteen hundred and ninety-eight, to certify under oath and the official seal of the court, the names of all persons who, during the years eighteen hundred and ninety-six and eighteen hundred and ninety-seven, took the constitutional oath of office for attorneys and subscribed the roll or book thereof kept in his office, and in like manner, to make and file a report during the month of January in each year thereafter of the names of all persons who, during the preceding year, took the constitutional oath of office for attorneys and subscribed the roll or book thereof kept in his office.

It shall be the duty of the clerk of the Court of Appeals to compile the statements contained in the certificates filed in his office as aforesaid, and to enter in a bound book or volume to be kept by him for that purpose, which shall be known and designated as the "official register of attorneys and counselors-at-law in the State of New York," in the alphabetical order of the first letter of their surnames, the names and residences and, in a proper case, the office address, and the time when and place where admitted, and whether the constitutional oath of office was taken and the roll or book of attorneys was subscribed, and the name of the county and the date the oath or affirmation afore-

said was filed therein, of all persons who have been certified to him as aforesaid, which said "official register of attorneys and counselors-at-law in the State of New York" is hereby declared to be a public record and presumptive evidence of the right of the individuals therein named to practice as attorneys and counselors-at-law in the courts of record of this State or in any court in the counties of New York and Kings.

On and after January first, eighteen hundred and ninety-eight, it shall be unlawful for any person to practice or appear as an attorney-at-law or as attorney and counselor-at-law for another in a court of record in this State or in any court in the county of New York or in the county of Kings, or make it a business to practice as an attorney-at-law or as an attorney and counselor-at-law for another in any of said courts, or to hold himself out to the public as being entitled to practice law as aforesaid, or to assume to be an attorney or counselor-at-law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this State, and without having taken the constitutional oath and subscribed his name in the roll or book of attorneys kept by the court for that purpose, and without having subscribed and taken the oath or affirmation hereinbefore set forth and filed the same in the county clerk's office as hereinbefore provided. Any person violating the provisions of this section is guilty of a misdemeanor, and it shall be the duty of the district attorneys to enforce the provisions of this act and to prosecute all violations thereof.

Every person filing with the county clerk the oath or affirmation hereinbefore provided shall pay to the county clerk at the time of such filing the sum of one dollar, fifty cents of which the county clerk shall retain for his services specified in this act. The other fifty cents he shall pay to the clerk of the Court of Appeals at the time he files his certificates, as hereinbefore provided, the said sum to be retained by the said clerk of the Court of Appeals for his services specified in this act.

The act is to take effect on the first day of September, eighteen hundred and ninety-seven.

#### WEALTHY ENGLISH LAWYERS.

THE largest estate, says the *St. James Gazette*, of any member of the legal profession reported last year, was that of Sir William Robert Grove, F. R. S., eighty-five, author of "The Correlation of the Forces," justice of Common Pleas 1871-75, and a judge of the High Court 1875-87, who left personal estate to the amount of £215,900. Lord Blackburn, of Killearn, eighty-two, Lord of Appeal 1876-86, left in personalty £139,965; the Hon. George Denman, seventy-six, M. P. for Tiverton

1859-72, justice of Common Pleas 1872-75, and a judge of the High Court 1875-92, £12,283; Sir Robert Stuart, eighty, formerly chief justice of the Northwest Provinces of India, £13,420, and Henry Tullie Rivaz, forty-six, judge at Lahore, £1,427. Among other wills noticed were those of five County Court judges, namely: His Honor Thomas Ellison, seventy-seven, Sheffield, £9,006; his Honor Henry Holroyd, seventy-six, Southwark and Wadsworth, £21,725; his Honor William Digby Seymour, seventy-three, also recorder of Newcastle-on-Tyne and formerly M. P. for Sunderland and for Southampton, £5,284; his Honor Thomas Hughes, seventy-two, Chester, formerly M. P. for Lambeth, author of "Tom Brown's Schooldays," £5,079; his Honor George Washington Heywood, fifty-four, Manchester, £22,853. The Hon. Slingsby Bethell, sixty-five, reading clerk and clerk of private committees of the House of Peers, left personalty of the gross value of £16,012. The wills were reported of George Parker Bidder, Q. C., fifty-nine, £25,904; Richard Searle, Benchet of the Middle Temple, £25,820; George Godfrey Farrant, of the Inner Temple, £94,894; James Langworth, Prince's Gardens, £105,471; and Francis Hobson Appack, Elcot Park, Berks, £241,600; but this last named amount was, no doubt, not entirely earned at the bar.

#### A UNIQUE PETITION TO COURT.

**MR. CHARLES K. DARLING**, editor of the "Early Laws of Massachusetts," furnishes the following copy of a petition preferred to the General Court in 1656:

*To the Honored Generall Court of Magistrates And Deputies Assembled at Boston, These Humbly presented:*

Honoured in the Lord Whereas your pore Petitioner John Smith Inhabitant in Charlestowne Having Ignorantly — through mistake Transgressed against an order of Court, And being sentenced by the Court at Charlestowne to pay a fine of five pounds, I humbly Request of this Honoured Court Remission of the same, having unwittingly offended, for I having by hard Labour earned a littell money of one of my naybours Hee would pay mee nothing but strong-watters, wheroff I had no need, But desired usefuller pay for my families occasions, But not obtaining other, I must take it, And A stranger coming to mee bought ten shillings worth of it off mee, and hee had it off mee as it cost mee, Now I humbly entreat this Honoured Court to bee pleased to pass by my Transgression, and to forgive mee my fault, my purpose and promise Beeing to bee more watchfull in tyme to come: soe trusting in your gentellness I cease to be troublesome untill you, humbly praying the Lord to prosper you all in your souls and Bodies Heer, And to Bless you with all happiness in the world to come.

Soe desires your Pore  
Petitioner

JOHN SMITH.

It was thought "meete that the fine be remitted Ten shillings so as to be payed in to the Courtes Treasy. upon notice thereof."

#### HAS THE PHYSICIAN EVER THE RIGHT TO TERMINATE LIFE?

Read before the Medico-Legal Society, Indiana.

Read before the Medico-Legal Society, New York.

(By Clark Bell, Esq., LL. D., President Medico-Legal Congress.)

**P**ERHAPS no part of the proceedings of the late Medico-Legal Congress held in the Federal Court rooms in the city of New York, September, 1895, gave rise to more criticism than the comments upon this subject introduced by Mr. Albert Bach, of the bar of New York city, and one of the officers of that congress, in the discussion of the papers of Mr. Gustave Boehme, and of Dr. L. Forbes Winslow, on the subject of suicide, in which the author, Mr. Gustave Boehme, had asserted the right of every human being to end his life under certain conditions.

As it is in such cases better to go by the record, I quote from the language used by Mr. Bach in that discussion, from advance sheets of the bulletin of the Medico-Legal Congress:

The question of the right of a human being to end his own terrestrial life has been frequently mooted. There is opened up, by the mere putting of the question, a broad field of argument — and there have been and are able advocates of both the affirmative and negative sides of the propositions involved. In behalf of the negative side, it has been asserted that God's given life is too sacred to be terminated by the wilful act of man; that the duty we owe not only to our dependents, but to our fellow-beings in general, is too imperative to be shirked by the so-called cowardly act of suicide; that the commandment "Thou shalt not kill" applies as well to the act of self-destruction as to the wrongful slaying of another; that the welfare of humanity at large demands that the continuance of human life should in no way be interfered with by man, unless under sanction of law; and that our laws not only neither permit self-killing nor recognize any justification therefor, but specifically prohibit it, and provide a punishment for attempted suicide. Those holding the affirmative side of the question contend that under certain circumstances and conditions suicide is justifiable, and in support of their contention they paint and present to us pictures of human suffering so agonizing, so irretrievably hopeless and irremediable in the light of experience, as to make many waver in their opinion that earthly pains and woes should be forever evidenced, no matter howsoever excruciating, rather than be ended by suicide. The advocates of self-killing cite history to prove that the act in the past, and among certain people at present, has been considered the only honorable, manly and respectable way to meet defeat or disgrace, and they ridicule those who enact laws providing punishment for attempted suicide, and scoff at such laws as stupid and ineffectual. There is not sufficient time afforded me to make a comprehensive statement of my views on this subject. I will merely say that I deem our statute law appertaining to attempted suicide absurd and farcical, for the reason that it will not deter any one from attempting suicide, and, furthermore, it induces would-be suicides to see to it that their efforts in that direction are entirely successful.

Personally I can conceive of conditions that would justify a person in ending his life, and in some instances I am convinced that such self-inflicted death would be beneficial to the community at large. There is considerable cant and hypocrisy connected with the discussion of this subject, but before a scientific body such as this is, we should express our views fearlessly. I admit that the advocacy of advanced and progressive doctrine before weak-minded persons may do harm, but feel that I will not particularly shock any one here present by stating that I believe that there are cases in which suicide is morally justifiable, and that there are also cases in which the ending of human life by physicians is not only morally right, but an act of humanity. I refer to cases of absolutely known incurable, fatal, and agonizing disease or condition, where death is certain and necessarily attended by excruciating pain, when it is the wish of the victim that a deadly drug should be administered to end his life and terminate his irremediable suffering. And I may add that I know that physicians do so end life, although they term it "producing euthanasia." If those very physicians were to use English words rather than their Greek equivalent, we would find them producing an easy, painless death, instead of euthanasia.

These sentiments were met then by Dr. Isaac N. Quimby of New Jersey, who said:

I must disagree entirely with the learned jurist in his statements regarding the right of any human being under any circumstances to take his own life—and there are no culmination of circumstances that would justify a physician in taking the life of his patient. The agony of the sufferer, or even his consent, in no wise alters the case; neither does the certain fatality of the disease change the matter. Human life is sacred, and no law, human or divine, can be found that would justify a physician terminating the life of a patient, and I must protest and dissent in behalf of my profession from the statements made by Mr. Bach.

The physician who errs in a fatal case or where agonizing pain is endured by the sufferer, must not do so to end life, and he would be amenable both to the law of God and the State if he attempted to do so. No self-respecting physician would even consider such a murderous proposition.

Judge Abram H. Daily took part in the discussion thus: "I ask Dr. Quimby this question: Is it right to prolong the agony of a patient if the physician knows positively that death is inevitable in a short time?"

Dr. Isaac N. Quimby (with great emphasis) replied: "To the bitter end. A physician has no right to terminate the life of a patient, even when to prolong that life is to cause the most agonizing tortures."

Dr. Forbes Winslow, added: "I quite agree with Dr. Quimby in the views he expresses as to such a case."

The sentiments avowed by Mr. Bach were denounced in vigorous terms by the *New York Sun*, editorially, and that branch of the discussion was continued in the *Sun* newspaper, between the editor of that journal and Mr. Bach. And on both sides of the Atlantic the views of Mr. Bach met with general disapproval from medical men.

Among the many medical criticisms that have fallen under my eye, one of the most interesting, to me, was the views of Sir Benjamin Ward Richardson, giving an incident of his own practice, in No. 44 of Vol. XI, of his journal the *Asclepiad*—which will form an interesting part of the discus-

sion here, under the heading of "Lethal Death in Painful Diseases," and from which I quote:

#### OPUSCULA PRACTICA.

"There are mites in science as well as in charity."

BENJAMIN RUSH.

#### *Lethal Death in Painful Diseases.*

The *New York Medical Journal* for September 21, 1895, has a paragraph on what it calls "Euthanasia by Homicide," and in which it says that, at the Medico-Legal Congress lately held in New York, it was implied, if not directly stated, that physicians often killed patients deliberately in some merciful way, when they were suffering from inevitable fatal disease or injury. One speaker found no fault with this alleged practice, but rather commended it, as well as the destruction of new-born monsters, which was also said to be resorted to by physicians. Such practices, it was stated, especially that of taking the life of monsters, had occasionally found advocates among members of the medical profession, but had never been sanctioned by any representative body of medical men; indeed, they had been utterly condemned by the great body of the profession, and physicians all over the world would resent any statement to the contrary, no matter if it were made approvingly. The writer supposed, "That there are conceivable instances under which it would be justifiable to kill a person for his own sake; but these are no more apt to involve physicians than persons of other occupations. Medical men aim to prolong life; they do not destroy it because it is painful to such a degree that the sufferer thinks he would prefer death."

This paragraph brings to my mind a case which occurred to myself, in which the facts were of singular import. The late Mr. Jervis asked me to go to an hotel, not far from here, where he was attending a patient, in conjunction with the late Mr. Caesar Hawkins. He wished me to go without him or Mr. Hawkins, but I declined until Mr. Hawkins himself sent me a short letter to the same effect, and in which he pressed me earnestly to concede. I was informed that the patient was suffering from malignant disease of the throat, and had taught himself to administer chloroform to himself with the intention of relieving pain, or, if it so happened, of destroying life. It was felt that if he destroyed life, he would be guilty of suicide, and that not only would the feelings of the family be harrowed, but that there might be a dispute about property in the administration of the estate. The patient had read my edition of Dr. Snow's work on "Chloroform and Anæsthesia," a work that was then attracting a good deal of notice, and he wished to see me, hoping that I would ratify his treatment, while the others, including both practitioners, trusted that I should have influence enough to stop him. On my visit, I found a deep, wide, malignant ulcer at the back of the pharynx of the sick man, involving a pulsating vessel, which could be seen pulsating. The patient inquired of me how long he should be likely to live, and if an operation were possible. I was obliged to confirm what my predecessors had said—namely, that an operation was impossible, and that death might be imminent from the rupture of the vessel, whilst, unfortunately, it was certain under any circumstances. He, then, lying down in bed, took up an inhaler which he had primed with chloroform, and put himself to sleep, on which the inhaler fell from his hands. It seemed a very happy sleep, and I watched him for half an hour or more. On his recovering consciousness, he explained that he had no other mode of relief; that he could not swallow properly; that he spoke with difficulty, but



was soothed at once by the chloroform when he inhaled it, whilst any kind of medicine, administered by the mouth, produced such intense pain, that he would rather die than bear it. I explained to him all the difficulties, in the proposed hypodermic injection, which was not very well known at that time, and injected him twice with morphia, but without affording the same relief as he had obtained by the chloroform. He said that he had used the chloroform for seventeen days, and that, according to his own judgment, the ulcerous surface had contracted, and was much less painful, so that he could swallow better. I went several times, and myself administered the chloroform, but in spite of everything, he not infrequently got it for himself, and slept under it for the greater part of day and night. This went on for three weeks, with a skilled attendant; and, I am bound to say, as a matter of precise fact, that he improved. I have no doubt that contraction of the open surface occurred; that the pulsation was not so marked; that he spoke better and more cheerfully; and that he swallowed better, more freely and with less pain. I should have been content to go on with the treatment, being deeply interested in seeing how prolonged sleep would act in such a case. Also, I lost any dread that death would follow the application, and I was given to feel that if I were exactly in that man's state of hopeless misery, I should like to be treated precisely in the same way. He was removed, however, from our care, taken to some health resort, was there peremptorily refused the chloroform, and in about four weeks died from pain, sleeplessness, inability to swallow food, and the consequent exhaustion, with wide extension of the malignant mischief.

The question is: What is the right thing to do in an extreme case of this kind? I hold tenaciously to the general opinion of the profession, that it is best not to recognize what may be considered slow suicidal attempts, but I think the plan carried out by this patient was justifiable. It was so on all grounds, and it was, perhaps, consistent to attend to the wishes of a patient in such a dilemma. But what was most important was the circumstance that the method seemed useful, and straightforwardly was useful, as a mode of cure. Menander said that all diseases were curable by sleep,—a broad statement, in which, nevertheless, there may be something that is true, for good sleepers are ever, as I think, the most curable patients; and I would always rather hear that a sick person had slept, than had taken regularly the prescribed medicine during sleeping hours.

There has always been a popular impression that a physician had the right to prevent the birth of monstrosities or monsters, when they occur. Such has been the popular belief, and, so far as I know, none such are permitted to live by medical attendants. Medical men can best state what their own practice would be in such cases. If the cord was not tied, it would usually prove fatal.

Neglect to tie the cord properly would result in death. Some physicians may neglect to tie a cord when they are unwilling to kill, knowing that death would probably ensue.

This has been held to be manslaughter in the mother, and would be so held as to the physician who acted from intentional design. (*Reg. v. Conde*, 10 Cox C. C. 547; *Reg. v. Bubb*, 4 Cox C. C. 455; *Reg. v. Mabbitt*, 4 Cox C. C. 239; *Reg. v. Edmds*, 8 C. & P. 611.)

The English law, however, does not allow the

destruction of life in monstrous births. (Tayler's *Medical Jurisprudence*, 566-601, 11th Bell's American edition.)

Though a monster could not inherit under English law and tenancy by the curtesy would not vest. *Id.* 598.

But able medical men have insisted that the Cæsarian operation, hysterotomy, is legally justifiable when the life of the mother is in danger.

It was by an ancient view in England, however, usually supposed to be performed only after the death of the mother, but cases have occurred where it has been successfully performed and the life of mother and child both saved; but the act could not be classed as criminal, even though the death of the living child had to be sacrificed to save the mother's life.

The courts have sustained the right of a physician to destroy a living unborn child, in order to save the life of the mother, as in a case of deformity of the pelvis in the mother, where normal delivery of the child was impossible.

As this rests upon judgment and opinion as to the physical ability of the mother, it should be exercised with great caution, and only on full consultation; and even then, not if any doubt exists, because:

a. The Cæsarian operation in such a case might save the mother and the child.

b. Because, in many cases, after experienced physicians have decided that natural birth was impossible, by reason of pelvic malformation, and the Cæsarian operation decided upon, natural birth has followed before the operation was performed. (Cases cited by Tayler in a French hospital, p. 507, 12th Am. edition, Tayler's *Medical Jurisprudence*.)

c. The operation of symphyseotomy, or enlargement of the pelvis by separating the bones by which an enlargement of the pelvis, at the brim, is made of more than an inch, is effected without serious risk, and even larger temporary expansion in the pressure of delivery.

Also a case in Scotland in 1847 is reported in *Edinburgh Monthly Journal*, 1847, ii. p. 30, and is quoted by Taylor.

#### MEDICAL RESPONSIBILITY.

Medical responsibility in this class of cases arises usually at an earlier stage than at the full period where the Cæsarean operation would be possible. It is usually performed by what is called among medical men "inducing premature labor."

It is regarded as justifiable by physicians in three classes of cases:

1. Certain cases of disease.
2. Deformity of pelvis preventing natural normal delivery, and

8. Excessive vomiting in pregnancy, which threatens the mother's life.

Casuists have denounced this as both immoral and illegal, but high medical authorities justify its morality and its legality. (Ramsbotham's *Obstetrical Med.*, p. 328, 5th ed.)

Taylor's *Medical Jurisprudence* (12th ed., p. 520) fully justifies this practice, on both moral and legal grounds, because medical men claim that when it is *bona fide* applied and with the hope of benefiting the mother, and not with a criminal design, it can not be held to be unlawful.

And this view is maintained under English law, notwithstanding the fact that no statute law in England makes any exception in favor of medical men in such cases, nor is there any exception in the statute regarding wounding as to surgical operations.

And this even when the death of the child is actually intended and accomplished, but fully believed to be necessary.

The Roman Catholic Church forbids the sacrifice of the child even though the life of the mother might in all probability be saved thereby.

This would doubtless control or affect the action of a surgeon of that faith, but medical authorities in England and America justify the destruction of even a seven-months child to save the mother of the child. (*Vide* Dr. A. F. Currier, Vol. II, Hamlin's *Work*, p. 460-1.)

The question raised by Mr. Bach as to the right of the physician to terminate the life of a patient suffering from an agonizing and fatal disease, on the request and even entreaty of the patient to end his agony and terminate his sufferings, presents some peculiar ethical questions.

Take the case of a man suffering from cancer of the throat, near the fatal moment, when the disease will eat into the carotid artery and the act is demanded as one of humanity and friendship to the afflicted sufferer—as substantially that presented by Mr. Bach in his remarks at the Medico-Legal Congress.

Dr. Edward P. Thwing, one of the most charming of men, and a highly esteemed physician, and also a clergyman, who recently passed to his reward in China, read a paper on this subject, before the Medico-Legal Society, in 1888, entitled "*Euthanasia in Articulo Mortis*" from which I will read a few selections as indicating the conduct, motives, and action of one medical man of the highest standing and purity of life. (*Medico-Legal Journal*, Vol. 6, p. 282.)

#### "EUTHANASIA IN ARTICULO MORTIS."

By EDWARD P. THWING, M. D., PH. D.

Death is ordinarily painless. The phenomena which precede it often indicate extreme suffering, but the final juncture of dissolution measured by moments or hours is

generally one of physical and mental placidity. And yet we have in medical nomenclature the word *euthanasia*. It expresses a fact. Some deaths are agonizing. The spectacle is harrowing to survivors, even if assured that the conclusive movements are partly or wholly automatic and intelligent. The propriety of an anæsthetic in such cases is naturally suggested.

Now the question arises just here, has a dying man a right to demand euthanasia thus induced? Or has his family this privilege? How far can the medical man extend relief to the dying? Is a *coup de grace* allowable? Clearly enough he cannot, morally or legally, abridge life by an hour.

Common law guards this point by the most sacred sanctions. It rests on the divine precept, "Thou shalt not kill." The character of the patient's sufferings, whether resulting from some terrific casualty or from hopeless disease, their intensity and probable duration, are matters not relevant to the issue in a legal point of view.

The patient's prayer to be put out of misery must be disregarded. Galens, dictum, "*Dolor dolentibus inutilis est.*" we admit. Equity which is good sense used in the interpretation of law on the part of its administrators, will regard the intent of the physician who humanely assists the patient in, or out of, his sufferings; still, the letter of the statute stands. We may not give the mercy stroke. Hence the cynic phrase of long ago, "*Durum sed ita lex scripta est.*"

On the other hand, while a criminal suit might be brought against a practitioner for hastening death, a civil suit for damages might be brought for professional neglect if he does not do for his patient all that he should do, even in the article of death.

The following case presents no novel features in its medical aspects, but it is cited to elicit a discussion, here and elsewhere, of its forensic relations.

Last June a telegram called me to a distant city to a person stricken with apoplexy and hemiplegia. The age of the patient, a widow of sixty-six years, the severity of the attack and her plethoric habit, promised a fatal issue within a day or two. She lingered however, five days, speechless from the first and comatose. Her vigorous constitution yielded but slowly. Automatic movements like pulling of the clothes, lifting the hand to the head and other signs of restlessness, continued until near the end. The head and eyes were turned to the paralyzed side—which is unusual—the pupils were equal, the face flushed and livid, pulse dicrotic and loud rhonchal, stertorous, respiration twenty-seven, extremities cold, and the bruit humorique in the precordial region marked. Signs of suffocation appeared.

The attendant physician had left the case in my hands forty-eight hours before, believing that life would soon be extinct. The reality of suffering I could not admit, but the appearance of its actions, purely reflexed, was painful to me. As her surviving kinsman, I took the responsibility of administering a mild anæsthetic, moistening a handkerchief at intervals from a vial containing two drachms of chloroform and six drachms of sulphuric ether. The handkerchief happened to be one just saturated freely with cologne by the nurse, so that the substance inhaled, as well as the method of inhalation produced a bland, anodyne effect.

Essential oils have sometimes been used, in foreign practice, to cover the repulsive odor of ether. The handkerchief was not held so near the nostrils as to prevent the free admixture of atmospheric air, and the facial expression of the unconscious sufferer was carefully studied. In two or three minutes the stertor ceased. The spasmodic

actions of the arms were arrested. Respiration became easy and a general quietude secured. Euthanasia was gained and apparently painful dissolution avoided.

Fifteen minutes after drawing the anæsthetic, the final breath came, without the slightest spasm of the glottis or respiratory muscles, without any other physical struggle or sound. At the autopsy was revealed excessive sanguineous effusion, red softening and clot in the interior, ascending convulsion, calcic and fibrous degeneration, thrombosis of the basilar vein, and other vascular obstructions. One of the five physicians present gave a case where he had, at the request of the parents, administered ether to a child suffocating in membranous croup, and produced euthanasia, not less to the relief of the parents than to that of the patient.

The queries, therefore again return. Has the dying man a right to ask of us this or some other form of assistance? If he is speechless, may his family demand it? How far may the medical man extend this boon to the dying?

This paper created as much remark as did the view of Mr. Bach at the Medico-Legal Congress, and Mr. Leslie Stephens assailed the author of the paper and the Medico-Legal Society for allowing it to be presented, by a very strong denunciatory article entitled, "*Murder According to Law.*"

I am of those who regard it as beyond the right of the physician at law to intentionally destroy life in cases of this character.

And I believe that the advance of scientific knowledge has been so great in the use of anæsthetics and remedies to allay human suffering, that it is now in the power of the intelligent physician to relieve suffering and pain in all stages of disease, however agonizing, and it is the right not alone of the physician, but his bounden duty, not to terminate human life, but to extend the relief of well-known remedies to assuage pain in all stages of disease; but that this right and this duty exists even in alleviating the agonies of death itself, not as a cause of death, but as robbing it of its terrors and its agonies.

An old doctrine has recently been brought forward as to the hopeless and incurable insane and some others of the defective classes of humanity, and the power and right of society, in its own interest and defense, to consider the propriety of arresting life in the interest and for the welfare of the living.

The savage regards it a sacred duty to end the life of any member of the tribe who becomes incurably mad, and I recall a tragic description of the method employed among an aboriginal tribe of American Indians, witnessed by a lady, long a resident and teacher among them, where, from a high sense of public duty, all the men became the ministers of a rite that ended a life, no longer of value to its possessor or of the slightest use in the tribe in the chase or in war.

The doctrine of Malthus rests on a lower plane

than the ethics of the aborigines, and it is difficult for us, with our training and environment, to pass judgment upon it.

If a great man is smitten with paresia, and he commences that living death, "that dying at the top," as Dean Swift died, who shall say that philanthropy, humanity or the sacred teachings of religion demand the extension of a life, past consciousness, past even suffering, and that duty makes its prolongation a necessity higher than the humanity which kills our beast when it has suffered irrecoverable injury.

We shoot a favorite, highly prized and loved horse to, as we say "end its misery," who has broken a leg, or met with such an accident as cannot be cured; but we do not thus reason, of the man or woman who stricken, with a suspension of all the faculties of consciousness, lives on unconscious of suffering or the value of life.

Under our civilization no power is given by the law to end even such a life; but the inherent right of society to regulate its affairs in its own best interests must be conceded to be broad enough to justify any legal enactment, passed under the forms of and not inconsistent with the organic law of any community, authorizing the terminating of human life in such cases. This would require legislation in England, and, indeed, in all English-speaking countries where the principles of the common law was the basis of the organic law of the land. (From advance sheets of the *Medico-Legal Journal.*)

#### NEW YORK LEGISLATURE.

##### BILLS INTRODUCED WHICH WILL BE OF INTEREST TO THE LEGAL PROFESSION.

**A**MONG the bills introduced in the New York legislature of special interest to the legal profession are the following:

By Mr. Eldridge, providing that all railroads must hereafter be constructed so as to avoid public crossings at grade.

By Mr. L. E. Brown, exempting from taxation after January 1, 1898, all mortgages on real estate in the State of New York.

By Mr. Dempsey, amending the Code of Civil Procedure by providing in actions to recover damages for personal injuries, if the plaintiff dies pending such action from the effects of an injury, action may be continued by an executor or administrator to recover damages for causing such death.

By Mr. Wilcox, requiring all railroads to carry free of charge the governor, lieutenant-governor, heads of State departments and their deputies, members of the legislature and the clerks of the

senate and assembly upon the certificate of the secretary of state.

By Mr. Bondy, creating the office of commissioner of jurors for each county of the State having a population of more than 150,000 and less than 190,000, at a salary of not less than \$1,500 nor more than \$2,000 per annum.

By Mr. Wilcox, amending the Penal Code by prohibiting the playing of base ball on Sunday and imposing a fine of \$50 for each offence.

#### LAWS OF 1897.

THE following bills, passed by the legislature of the State of New York during the present session, have become laws by the approval of the Governor:

Chap. 1. By Senator Ellsworth, entitled an act making appropriation for contingent expenses of the legislature.

Chap. 2. By Assemblyman Cole, entitled an act to provide for the construction of a town hall in the town of Perry, Wyoming county.

Chap. 3. By Assemblyman Roehr, entitled an act to authorize the appropriation of money for certain benevolent and charitable institutions in the city of Brooklyn and for the police pension fund of said city.

Chap. 4. By Senator Krum, entitled an act to legalize and confirm certain acts of boards of supervisors of the several counties of the State.

Chap. 5. By Senator Raines, entitled an act to further amend chapter 65 of the Laws of 1871, entitled "An act to revise and consolidate the laws in relation to the village of Geneva, in the county of Ontario," and the acts amendatory thereof.

Chap. 6. By Assemblyman Nixon, entitled an act making an appropriation for the use of the health officer of the port of New York for the purpose of preventing the invasion of infectious and contagious diseases.

Chap. 7. By Senator Mullin, entitled an act to provide for the representation of the State of New York at the Centennial Exhibition, at Nashville, Tennessee, and making an appropriation therefor.

Chap. 8. By Assemblyman Nixon, entitled an act to reappropriate the unexpended balance of a former appropriation.

Chap. 9. By Assemblyman Nixon, entitled an act making appropriation for payment of confidential clerks of the justices of the Supreme Court in the Second Judicial District, not including the county of Kings, pursuant to chapter 892 of the Laws of 1896.

Chap. 10. By Assemblyman Hoes, entitled an act to legalize the several acts, transactions and pro-

ceedings of the president, trustees and board of trustees, water commissioners and board of water commissioners of the village of Philmont, in the county of Columbia.

Chap. 11. By Senator Raines, entitled an act repealing chapter 217 of the Laws of 1862, entitled "An act to authorize persons convicted of vagrancy in the county of Ontario in certain cases to be sentenced to the work-house in the county of Monroe."

Chap. 12. By Senator Brush, entitled an act to change the name of Washington park in the city of Brooklyn.

Chap. 13. By Senator Brush, entitled an act to amend chapter 538 of the Laws of 1895, entitled "An act to amend chapter 429 of the Laws of 1894, entitled 'An act to amend chapter 585 of the Laws of 1863, entitled "An act to authorize the city of Brooklyn to make yearly provisions for the celebration of Memorial Day including the year 1893."'"

Chap. 14. By Assemblyman Bondy, entitled an act to amend chapter 520 of the Laws of 1893, entitled "An act to make the office of clerk of Onondaga county a salaried office and to provide for the management of said office and to fix the salary of said clerk and deputies."

Chap. 15. By Senator Coggeshall, entitled an act providing for the sale of certain lands belonging to the State of New York.

Chap. 16. By Assemblyman Hill, entitled an act to amend chapter 47 of the Laws of 1837, entitled "An act to incorporate the Young Men's Association of Buffalo," as amended by chapter 333 of the Laws of 1886, in relation to a free public library in the city of Buffalo, and to authorize appropriations therefor.

Chap. 17. By Senator Coggeshall, entitled an act to change the corporate name of the New York Casualty Insurance Association.

#### THE LAW AS A CALLING.

MR. AUGUSTINE BIRRELL is quaint law lecturer before University college this year, and, in beginning his course only a few days since, he overflowed with literary allusion. The best idea of life in the olden time in the Inns of Chancery was to be gained, he said, from the brief but lively reminiscences of Mr. Justice Shallow, formerly of Clement's Inn." Touching the law as a calling and the motives which led men to embrace it, Mr. Birrell said:

Of all the great professions the law had numbered most victims. Men had enlisted in the army, had run away from comfortable homes to go to sea, had taken holy orders; and these things they had done from the love of adventure, from the hope of glory, for the fear of God, but hardly were those

the motives which had prompted men to seek admission to an Inn of Court. Most distinguished lawyers, if they were to be believed, had begun their acquaintance with the law with not a little of that aversion which Mrs. Malaprop thought so safe in the early days of matrimony. The poet, Gray, perhaps the best read man in a well-read century, remarked: "In the study of the law the labor is long and the elements dry and uninteresting, nor was anybody (especially those that afterwards made a figure in it) amused or even not disgusted at the beginning." The lecturer did not think it could be said that affection for the law, regarded as a science rather than a source of income, had been, since the days of the commonwealth, a note or mark of English lawyers. Moreover, the profession was an unpopular one with those who did not belong to it. Dr. Johnson was nearly alone in his admiration either of English law or English lawyers. Lord Bolingbroke, Dean Swift and Jeremy Bentham — representatives of the fashionable world, the wits and the jurists, had directed their sneers at them.

### Notes of Recent English Cases.

**CHEQUE—LEGAL TENDER—SOLICITOR—AGENT.**—Where a mortgagor's solicitor tendered to the mortgagees' solicitor a sum of cash in payment of the principal, interest, and costs due upon the mortgage, and also a cheque for a further sum due from the mortgagor in respect of auctioneer's charges. *Held*, that the mortgagees' solicitor not having authority to accept a cheque, the tender was bad. (*Blumberg v. The Life Interest and Reversionary Securities Corporation, Limited*, Ct. of App. Chan. Div. L. T. Rep. p. 627, Vol. LXXV.)

**LIBEL — FACT OF LIBEL — QUESTION FOR JUDGE — PRIVILEGED OCCASION — EXCESS OF PRIVILEGE.**—In cases of libel it is a question for the judge whether the words complained of are capable of being construed by a reasonable man in a libellous sense, apart from any question of malice. Where an alleged libel has been published on a privileged occasion a finding by the jury that there was an excess of privilege, there being no evidence of malice, is no ground for entering judgment for the plaintiff. Judgment of the Court of Appeal affirmed by House of Lords. (*Nevill v. Fine Arts and General Ins. Co.*, L. T. Rep. p. 606, Vol. LXXV.)

**MASTER AND SERVANT — NEGLIGENCE — DRIVER OF CART — BREACH OF DUTY — DAMAGE — EFFECTIVE CAUSE.**—A tradesman sent out a horse and cart with a driver and a lad for the purpose of delivering goods at his customers' houses. The driver's duty was simply to drive, and he was forbidden to leave the horse and cart unattended.

The lad's duty was simply with regard to the goods in the cart, and he was forbidden to drive. The driver negligently left the horse and cart standing in a street while he went into a house, telling the lad to wait in the cart till he returned. The lad drove the horse on with the intention of turning the cart round so that they might start immediately the driver came back, his object being that his master's business might not be delayed. In doing this he negligently drove into and injured the plaintiff's vehicle. In an action against the tradesman, tried before a county court judge without a jury, the judge gave judgment for the plaintiff. *Held*, that the negligence of the driver in the course of his employment was an effective cause of the damage, and that his master was therefore liable. (*Euglehardt v. Farrant & Co.*, and *Lipton*, Ct. of App. L. T. Rep. p. 617, Vol. LXXV.)

**TRADE FIXTURE—MOTIVE POWER MACHINERY SUPPLIED UNDER HIRE-AND-PURCHASE AGREEMENT — FIXTURE ANNEXED TO FREEHOLD — MORTGAGE OF FREEHOLD — DEFAULT OF HIRER IN PAYMENT OF INSTALMENTS UNDER AGREEMENT — REMOVAL OF FIXTURE — RIGHTS OF MORTGAGEE IN POSSESSION AS AGAINST OWNER OF FIXTURE.**—The vendor under a hire-and-purchase agreement of motive power machinery, which he has allowed the purchaser to affix to his land, has no right to recover possession thereof on the failure of the purchaser to pay the stipulated instalments, as against a mortgagee in possession of the land; but his remedy for the price, or for damages for the loss of the machinery, is against the purchaser personally. The effect of the hire-and-purchase agreement, coupled with the annexation of the machinery to the soil, is that the machinery becomes a fixture—*i. e.*, part of the soil—when it is annexed to the soil, subject, as between the vendor and the purchaser, to the vendor's right to unfix it and take possession of it if the purchaser fails to pay the stipulated instalments, which right, however, imposes no legal obligation on any grantee of the land from the purchaser, nor can the right be enforced in equity against any purchaser of the land without notice of the right. (*Hobson v. Gorringe*, Ct. of App. L. T. Rep. p. 610, Vol. LXXV.)

The United States Circuit Court at Boston has decided in favor of Dwight Braman on the motion of the Atchison to dismiss the case against the company for \$8,300,000 bonds. This suit is probably the most important now in railway affairs in the country. It was brought by Dwight Braman & Co., who acted as fiscal agents of the St. Louis & San Francisco railway in New England against the former directors of the Atchison.

### Legal Notes of Pertinence.

A special deposit of money at interest with a savings institution, the regular depositors in which are stockholders, is held, in *Heironimus v. Sweeney* ([Md.] 33 L. R. A. 99) to be entitled to be repaid out of the assets, when the institution is insolvent, before any dividend to the regular depositors.

A deposit of public money by a county treasurer in a bank designated by him as a depository for public funds, and which has given a bond to secure its payment is held, in *Allibone v. Ames* [S. D.] 33 L. R. A. 565, not to constitute a loan within the meaning of a law making loans of such funds unlawful.

A constitutional provision making all railroad companies common carriers is held, in *Wade v. Litcher & M. C. L. Co.* ([C. C. App. 5th C.], 33 L. R. A. 255), to be inapplicable to a corporation organized for private business purposes which operates a railroad upon its own property for purposes connected with its business.

A warrant of attorney to confess judgment on a note "in any court of record" is held, in *First National Bank v. Garland* ([Mich.], 32 L. R. A. 83), to be sufficient to sustain a judgment of a court of the State in which the note was made, when sued upon in another State, even if the judgment could not have been confessed outside the State in which the note was made.

One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer which he had a right to terminate at any time, is held, in *Raycroft v. Tayntor* ([Vt.] 33 L. R. A. 225), to be not liable to an action by the employee for damages, whatever motive may have prompted him to procure the discharge.

A peculiar case of injury to lateral support by digging a sewer trench in a street and permitting quicksand and water to run into it, and then removing them by pumps, causing the surface of the land to crack and settle and injuring the buildings thereon, is held, in *Cabot v. Kingman* (Mass.), 33 L. R. A. 45, to make the sewer commissioners liable if they knew the nature of the soil or ought to have known it, and did not require any unusual and extraordinary precautions to be taken by the contractor.

The Supreme Court of Tennessee recently passed upon a very interesting question of law, arising out of a series of transactions which, as the court says, "are certainly unique in character." One Robertson, the owner of certain real estate, executed a deed of it to a fictitious person, and then drew a deed of trust to secure bonds, signed it by that

fictitious name, procured a certificate of acknowledgment, had it recorded, and delivered it to the grantee. The property was held under the deed of trust by the grantee, but the purchaser at the sale, one of the creditors of the owner of the land, becoming aware of the irregularity of the transaction, filed a bill charging that the deed was ineffectual to convey title, because there was no such grantee, and that the deed of trust was ineffectual to convey title to the trustee, because it was a forgery. The first contention was upheld, on the ground that a deed to a fictitious person is void, and leaves the title in the grantor; but the second was rejected, and it was held that the title passed, and that the sale under the trust was valid. (*Wiel v. Robertson*, 37 S. W. Rep. 274.)

In *Hallyburton v. Burke County Fair Association* and another, decided by the Supreme Court of North Carolina in December, 1896 (26 S. E. R. 114), it was held that the owner of a horse who enters him for a race at a fair, in charge of an expert rider, without knowing that the horse is unruly, is not liable for injuries to a visitor at the fair, standing near the railing around the track by the horse bolting the track, breaking through the railing, and running over him, where it appeared that the visitor could have seen the race from safe and suitable places provided for the purpose. It was further held that the fair association was not liable, it appearing, as aforesaid, that suitable places had been provided from which spectators might witness the race, and furthermore that plaintiff had been warned by an officer in charge of the fair grounds to leave the place where he was standing as being unsafe.

Professor G. Frank Lydston recently addressed the students of Kent College of Law, on "Criminal Anthropology." Here are the speaker's conclusions:

"The criminal class is the product of certain influences, of heredity, congenital and acquired disease, and unfavorable surroundings, involving pernicious teaching and example, and physical necessities. The result of these influences is a class of persons of low grade of development, physically and mentally, with the defective understanding of their true relations to the social system in which they live. Such persons have no true conception of that indefinite entity called morality and no respect whatever for the rights of others. These subjects are characterized upon the average by certain anomalies of development that constitute the so-called stigmata, or marks of degeneracy. In brief, it is to be understood that while all degenerates are not criminals, criminals are mainly, if not altogether, from the degenerate class. The apparent physical exceptions to the rule are not necessarily exceptions, for degeneracy of brain and nervous structure is not always manifested by external peculiarities."

### Humors of the Law.

**ONLY ONE CORRECT ANSWER.**—Gov. Mattox of Vermont, was at one time chairman of the committee appointed to examine candidates for admission to the bar at Caledonia county. He reported that one of the candidates was, in his opinion, unqualified, having answered correctly but one of the questions put to him. "Only one? Well, what was that?" asked the presiding judge. "I asked him what a freehold estate is," replied Mattox. "Important question," said the judge; "and what was his reply?" "He made it without the least hesitation," said the chairman with a twinkle in his eye; "of course that fact is in his favor." "Well, what did he say?" asked the judge with some impatience. "He said," returned the chairman, "that he didn't know."

A Welsh county court judge recently had before him a case in which a printer sued a pork butcher for the value of a large parcel of paper bags with the latter's advertisement printed thereon. The printer, having no suitable illustration to embellish the work, though the improved the occasion by putting an elaborate royal arms above the man's name and address, but ultimately the man refused to pay.

The judge, looking over a specimen, observed that, for his part, he thought that the lion and unicorn were much nicer than an old fat pig.

"Oh, well," answered the butcher, "perhaps your honor likes to eat animals like that, but my customers don't. I don't kill lions and unicorns. I only kill fat pigs."

Verdict for defendant.—*Answers.*

"We propose to show, gentlemen of the jury," said counsel for the defence, in Judge Chetlain's court the other day, "that it is impossible for the defendant to have committed this crime.

"In the first place, we will prove that the defendant was nowhere near the scene of the crime at the time the crime was committed.

"Next we will offer the indisputable testimony of persons who saw the defendant on the spot and who did not see the defendant commit the crime.

"We will show that no poison was found in the body of the deceased.

"Not only that, but we will prove that it was put there by the prosecution in this case.

"We will, furthermore, show that the deceased committed suicide.

"And last, but not least, we will prove beyond the shadow of a doubt that the deceased is not dead.

"In view of which corroborative facts, gentlemen of the jury, we respectfully ask for an acquittal."—*Chicago Law Journal.*

**NOT CONSIDERING THEM.**—"I judge, then," said the lawyer, "that your conjugal relations are not happy."

"Well," answered the client, "some of my conjugal relations don't care two straws how me and my wife gets along, and others of them, particularly my wife's mother, just delights to see us quarrel. But I don't see as it's their business; and, you bet, if I make up my mind to separate from my wife, I ain't goin' to ask whether my conjugal relations is happy or not!"—*Judge.*

His colleagues in the house may not know it, but tall Cy Sulloway has a reputation up in the Granite State for great flights of eloquence that are not without effect before juries. In fact, he is counted the best trial lawyer in the State, says the *Washington Post*. A member of the New Hampshire delegation tells of one of Mr. Sulloway's efforts before a jury in a liquor case that was earnest in behalf of the defendant, but failed to convince the twelve good men and true. It was a liquor case, and the defendant, whom Mr. Sulloway represented, was shown to have been guilty by the testimony of two witnesses. Under the moiety clause of the prohibition law they were entitled to a share of the fine.

Mr. Sulloway straightened up his full height before the court, and showing much indignation, said: "The only evidence, your honor and gentlemen of the jury, before whom my client rests his case with supreme confidence of a verdict for his acquittal, is given by two miscreants that have crawled up to this bar of justice. With what detestable objects can one compare treachery like this; with the naked dweller of Terra del Fuego who eats his half-raw flesh; with the Digger Indian, that feeds on the vermin which are nourished by his own body; or with the Wa-Wa mother, that drags from the embers the roasted body of her new-born babe? No; angels all are they, and not to be compared with these two walking epidemics, whose pestilential touch breathes contagion in the pure air of this hall of justice.

"I apologize to your honor for having detained him even this brief time, and to you, gentlemen of the jury, for using these few moments to present the evidence for the favorable verdict that I know your bosoms yearn to give him; and most of all I apologize to my client for having withheld from him, even this short while, the liberty which he is about to receive from this enlightened body of his fellow-citizens."

Mr. Sulloway probably had some presentiment of what the verdict was to be. He was not long kept in darkness, for within five minutes his client was pronounced guilty.

## The Albany Law Journal.

ALBANY, MARCH 6, 1897.

### Current Topics.

THE preliminary steps toward biennial sessions of the legislature of the State of New York will undoubtedly be taken at the present session, a concurrent resolution for the submission of a constitutional amendment to the people being now in preparation by Mr. Green, of New York. This great and needed reform has already been too long delayed. How best to check the "pernicious activity" of the law-makers, however, is a problem not easy of solution. There is no doubt whatever of the feeling of the public with regard to the matter. The plain and emphatic demand for shorter and less frequent sessions of the legislature is the best possible evidence of the fear and distrust with which the meetings of the law-makers are regarded. Past experience has shown that it is not safe to rely wholly upon the veto power, and the reasons need scarcely be pointed out to anyone who is familiar with latter-day political machinery and methods. While some governors might be relied upon to carry out their pledges to veto every bill presented to them for signature, which, in their deliberate judgment did not respond to some real popular demand and need, the majority of State executives, we are free to confess, would be more likely to be governed by political, if not personal, reasons. Equally unsafe is the plan to make the legislators themselves the judges of proper and improper legislation, and thus we are forced to seek some other and less heroic method of dealing with the evil of over-legislation. The most familiar, and, as we firmly believe, the most promising, one is that of limiting the frequency and length of the session, a plan which has been tried by many States with most satisfactory results. A recent inquiry by the *New York Evening Post* disclosed a very significant state of feeling in relation to this question. In thirty-nine States of the Union there are biennial sessions, and twenty-five secretaries of the States have declared that not only has the biennial system proved so satisfactory that there is no disposi-

tion to change it, but that the gratifying results of the restriction have stimulated a movement for further restriction. In several states there is a desire to make the interval between sessions even greater than it now is. The Colorado secretary of State, speaking for public opinion, says that one session in four years would be enough. The secretaries of Vermont, Iowa and Texas make similar statements, while the secretary of Arkansas says that the people of his State would be satisfied with one session in five years.

This latter demand for quinquennial sessions is clearly an extreme manifestation of the reaction from annual sessions, and their attendant evils, and the middle course would undoubtedly be wiser, especially for a great State like New York, whose vast and manifold interests require more legislation than some of the smaller ones. While very few new laws are needed, there are old laws to be amended or repealed, laws that prove obstructive or inapplicable to changed conditions. A much better way would be to limit the length of the sessions, as is done in Oregon, Washington and other States, to say, sixty or ninety days; then the press and public could be depended upon to bring pressure sufficient to prevent much time being wasted on special and private bills. Biennial and limited sessions would appear to offer the true solution of the problem of how to prevent superfluous and ill-advised legislation, which might be combined with the plan of requiring the filing of all bills with the secretary of state thirty days before introduction in the legislature and the giving of notice of intention to introduce them, together with a statement of the reasons and necessity for each proposed new law.

A very important as well as interesting decision by the New York Court of Appeals is printed in this issue of the ALBANY LAW JOURNAL. It is on the subject of breach of promise of marriage, in the case of *Yale v. Curtiss*, and holds that in order to support a recovery in this class of cases there must be evidence of a definite contract, a mutual promise to marry, a meeting of the minds of the parties; that such a contract to marry is not to be inferred from mere courtship, or even from facts tending to show an intention to marry on the



part of the defendant. While no form of words is required, and a formal offer and acceptance is not necessary, the court holds that there must be an offer and an acceptance "sufficiently disclosed or expressed to fix the fact that they were to marry as clearly as if put in formal words." The court makes it reasonably clear that mere flirtation, however "desperate," even though matrimonial intention may have existed, will not support the inference of a contract, and thus be actionable. In the case at bar, it seems reasonably clear, from a careful perusal of the opinion, which embodies a synopsis of the evidence taken on the trial, that the lady had good reason to believe her escort had serious intentions; but the court finds, and as we think justly, that there was not such a contract to marry as would come under the legal definition above given. This rule seems to us to be not only reasonable, but just. The highest court in this State is not disposed to favor the radical remedy for the evils attending so-called breach of promise suits, of abolishing them entirely, as has been strongly advocated by many jurists of high repute both in this country and in England; but it evidently leans against recovery in this class of cases by requiring plaintiffs to strictly fulfill the requirements of existing law and practice. The decision referred to very clearly defines the limit to which a man's attentions to a woman may go without laying himself liable to damages for breach of promise.

The publication of portraits, or alleged portraits, of individuals by newspapers and periodicals has, of late years, been carried to such an unwarrantable extent as to call forth an attempt at its regulation by means of legislation. Senator Ellsworth has introduced in the New York legislature a bill which seeks to prohibit the printing of the portrait of any individual living in this State without first having obtained his or her consent, in writing, to such printing or publication. Violation of the act is made a misdemeanor, punishable by fine of not less than \$1,000, and by imprisonment for not less than one year. The introducer of the bill declares that it is presented in entire good faith. An abuse certainly does exist. The sensational newspaper press, a leading feature of whose stock in trade is the

so-called "art department," regularly publish portraits, or alleged portraits, of individuals, most of which are little better than caricatures, with no resemblance whatever to the originals. No man or woman, however high in station, is exempt. While no one will deny that a good portrait adds zest and interest to a descriptive article, one which is so poorly executed as to bring, or tend to bring, the person illustrated into ridicule is certainly objectionable. It is well known that certain of the sensational newspapers, in their eagerness to "get ahead" of contemporaries, frequently resort to their fertile imaginations, out of which the pictures or portraits are builded. In this way many of the eminent citizens and social leaders of New York and other cities have had their portraits produced, with results not at all satisfactory. The correction of this abuse is aimed at by Senator Ellsworth's measure. That its passage will be stubbornly and bitterly opposed by the newspapers affected, as a clear invasion of their rights, is not to be doubted. That it will become a law is not probable; at the same time the bill may be properly regarded as a formal protest against an evil which, while it undoubtedly exists, may, nevertheless, not require such a radical remedy at this time.

Justice Lyon of the New York Supreme Court has rendered a decision holding that the so-called Prison label law is unconstitutional. At the November session of the Broome county grand jury Samuel K. Hawkins was indicted for selling prison-made goods to a Binghamton firm without attaching a label, contrary to a provision of the Penal Code passed by the legislature in 1896. Acting under the advice of the State Labor Commission, the district attorney of Broome county will at once carry the case to the Appellate Division of the Supreme Court.

Attorney George Bliss, of New York, writes the ALBANY LAW JOURNAL that for the purpose of testing the probable effect of the provision of the statute providing that no appeal shall be had to the Court of Appeals in negligence cases, where the decision is unanimous unless an order allowing it is obtained, he has caused to be examined the eight volumes of the Appellate Division Reports which embrace the decisions of the Supreme Court from

January 1st 1896, to July 1st, 1896. The result seems to be as follows: In these eight volumes 1101 cases are reported in full. Among them are 111 negligence cases in which the decision is apparently unanimous. There are also 660 cases reported in memorandum, some of which he is confident are negligence cases, but the memorandum reports do not show the number. If the same proportion of negligence cases is found in the reports for October, November and December as for the first six months of the year, the total of such cases in the year will be at least 148. This, as Mr. Bliss remarks, is a notable relief to the Court of Appeals calendar.

The *Montreal Legal News* calls attention to the fact that in England, by a curious survival of a more ancient order of things, juries in felony cases have to be locked up when the case is not concluded at the time the court rises. The judge has no discretion. It is surprising that a rule apparently so unnecessary, and in some cases involving considerable hardships, should have been tolerated so long, and it is equally surprising that when it is at last proposed to modify it by giving the judge a discretion, one of the superior judges writes to the newspapers disapproving of the suggestion. To add to this absurdity, the accused may go out on bail while the jury are kept under lock and key. In this respect Canada appears to be in advance of the mother country, for in the former the distinction between felony and misdemeanor has been wholly abolished.

Michigan presents the spectacle of a circuit judge being sued in his own court for damages for issuing a discretionary writ in the line of his official duty. Rollin H. Person, circuit judge, Lansing, Mich., was sued recently in his own court, together with one Schneider, for \$10,000. The facts of the case appear to be that Schneider rented a store building to one Dayton, a dealer in wholesale millinery, more than a year ago. Judge Person gave him a lien on the stock for unpaid rent, and for a year or more during the pendency of legal proceedings the store remained closed. Recently Dayton gained entrance to the store and removed the stock by night, but an order from Judge Person compelled him to return it. After tendering the amount of rent he claimed to be due, and having it refused, he replevined the stock, and

was proceeding with the inventory when a peremptory injunction, issued by Judge Person, ordered all proceedings by virtue of the replevin to stop. For this reason Dayton has instituted his suit for damages, his bill alleging that the orders issued by Judge Person were invalid, and charging collusion and oppression on the part of Schneider and the court. The case is one without precedent as far as known.

The very interesting question whether jurors should, while in the custody of the court, be allowed liquor at their meals is being discussed animatedly by press and people in Illinois. Judge Tuley, who presided over the recent O'Malley trial at Chicago, ordered the bailiffs to provide each juror with a drink of liquor at each meal. Whereupon the W. C. T. U., of Chicago, made formal and decided objections. The judge's idea in making the order seems to have been that it would not be proper or at least advisable to deprive persons who were habitually accustomed to take liquor with their meals of that privilege while they were in the jury-room. There will doubtless be radical differences of opinion on this point, and the great majority of people are more than likely to side with the ladies of the W. C. T. U. During the comparatively short time that the jurymen are sequestered they ought to be able to get along without artificial stimulants. If liquor were to be introduced into the jury-room, it might not be practicable to draw the line at one glass; and jurymen, as well as their verdicts, should be like the great Cæsar's wife—above suspicion.

The Kentucky Court of Appeals recently handed down an interesting decision in *Commonwealth v. Bossie, etc.*, to the effect that, as each person engaged in a game of chance is guilty of an individual offence under the statute, the one is not an accomplice of the other within the legal meaning of that term, and therefore one may be convicted upon the testimony of the other alone. The grand jury of Laurel county returned an indictment charging Jack Bossie, William Doan and Stephen Curtis with the offence of gaming, committed as follows, viz.: "The said Jack Bossie, William Doan and Stephen Curtis did, on the 22d day of May, 1895, \* \* \* unlawfully engage in a game of hazard and chance by engaging in

and playing a game of cards with William Curtis, in which game money and other property was bet, won and lost by each of them." Upon the calling of the cause for trial as to Bossie it was agreed that the same be submitted to the court for trial, and it was further agreed that the witness would prove the charge to be true, but that the witness was also engaged in the same game of chance. The contention of the defendant was that the witness was an accomplice of the defendant, hence no conviction could be had upon his testimony alone, and the court below so adjudged, and from that judgment appeal was taken. The opinion of the court, by Judge Guffy, held that the judgment of the court below was clearly erroneous. The witness was not an accomplice in the legal meaning of the term. Each one engaged in the game was guilty of an individual offence. In the case of *Whitaker v. Commonwealth* (95 Ky. 632), it was held by this court that in an indictment for incest the jury were authorized to convict upon the testimony alone of the female, the crimes of each being separable under the statute. To the same effect is the decision of the Superior Court in *Green v. Commonwealth* (6 Ky. Law Rep. 217).

Recorder Goff is being highly commended by some of the metropolitan newspapers for his vigorous denunciation of irresponsible medical experts, the majority of whom he declares to be charlatans and mountebanks. While this characterization is probably intemperate, it cannot be denied that grave abuses exist which ought to be corrected, if possible, and that speedily. It is not too much to say that some recent trials in the city of New York, in cases of homicide, have brought disgrace and reproach upon our institutions of law and medicine, having been marked by a riotous rivalry of paid expert testimony calculated to bring contempt upon the system of presenting such evidence to courts and juries. The root of the evil is undoubtedly disclosed by the recorder when he says that the expert is "willing to testify in the majority of cases on the side which offers the most money;" and, in the way of a remedy, he intimates that if it were possible to secure a competent board to name medical experts whose testimony could be regarded as reliable, it would be of great service

to the criminal courts. Speaking on this subject, one of the New York dailies inveighs against the plan of made-to-order testimony, calling attention to the well-known fact that few lawyers have any use for an expert whose testimony will not fit the side of the case for which he is engaged; while, on the other hand, the expert who cannot or will not adapt his conclusions to the contentions of the lawyer who employs him must step aside to make room for one who will. The recorder's plan to have a competent board name medical experts, while perhaps not entirely eradicating the evil complained of, would undoubtedly mitigate it to some extent if it were decided to be constitutional, which is very doubtful.

The question, "Is a gun always a gun?" has just been decided in *Commonwealth v. Murphy*, according to a Chicago exchange. In its decision, the court used the following language:

"It appeared in evidence that the defendant, with ten or twelve other men formed one company in the parade, and that all the men in this company carried ordinary breech-loading Springfield rifles, which had been altered and bored in the barrel near the breech, and the firing pins had been filed down, so as to make them immovable; and in this condition they could not discharge a missile by means of gunpowder or any other explosive. The defendant contends that these weapons were not 'firearms' within the meaning of the statute. The purpose for which these alterations were made is not disclosed. They would not be obvious to the ordinary observer while the rifles were carried in the parade. So far as appearance went, it was a parade with firearms which were efficient for use. To the public eye it was a parade in direct violation of the statute. The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still exist in the parade in which the defendant took part. To hold that such a weapon is not a 'firearm,' within the meaning of the statute, would be to give too narrow and strict a construction to its words. It was originally a firearm which was effective for use. The fact that it was disabled for use did not change its name."

## BREACH OF PROMISE TO MARRY.

EVIDENCE OF A DEFINITE CONTRACT NECESSARY TO SUPPORT THE ACTION.

## NEW YORK COURT OF APPEALS.

February 9, 1897.

NELLIE E. YALE, Respondent, v. WILLIAM R. CURTISS, Appellant.

The rule of law which formerly permitted contracts of marriage to be inferred from proof of such circumstances as usually attend an engagement has been changed by the statute permitting parties to testify in their own behalf. There must now, in the absence of fraud and deception, be evidence of a contract—a meeting of the minds of the contracting parties. Mere courtship, or even an intention to marry, is not sufficient. Thorough acquaintance with character, habits and disposition is essential in order to make such a contract intelligently, and the parties may, therefore, form such an acquaintance without having the inference of a contract attach. Where there is any evidence sufficient to uphold the decision of the General Term of the existence of such a contract their decision is final; but where there is no evidence sustaining the contract, or when the evidence given does not show that there was a contract, then the question becomes one of law which it is the duty of this court to review.

Appeal from a judgment of the General Term, Fourth Department, affirming a judgment entered upon a verdict.

Edward B. Thomas, for appellant; George W. Ray, for respondent.

Haight, J.—This action was brought to recover damages for a breach of promise to marry.

The plaintiff at the time of the trial was twenty-eight years of age, residing with her parents in the village of Norwich. She was engaged in the teaching of music, and was a member and regular attendant of the choir and of the Congregational church in that village. The defendant was born in Norwich, lived there until the year 1865, when he went to New York and became a clerk in the banking office of Fiske & Hatch, and remained there for the period of nineteen years. In the fall of 1884 he returned to Norwich, where he had inherited property upon the death of his father, and took up his residence with Mrs. Chapman, his sister. At the time of the trial he was forty-six years of age, had received an academic education, and upon his return to Norwich became a member and regular attendant of the choir of the Congregational church. On the 16th day of December, 1885, he was introduced to the plaintiff at a wedding in that village, and on or about the first of January thereafter he accompanied her home from an evening prayer meeting, and subsequently escorted her to a band concert. He then went to the city of New York and remained several weeks. After his return to

Norwich he again accompanied her home in the evening from church and prayer meeting from time to time during the spring and fall of that year, and occasionally during the summer, and these attentions continued through the year 1887 and until the early spring of 1888. He also escorted her to three entertainments during the spring of 1886, three more during the winter of 1886 and 1887, and one in the early spring of 1888. He also took her out riding on one or two occasions. After walking home with her he often entered the house upon her invitation and visited with her in the parlor until 10 or 11 o'clock, but never remained after that hour. He did not always escort her home when he met her at church. On some occasions he escorted other young ladies, and did not always accept her invitation to go in upon reaching her home. He never called upon the plaintiff at her house except when he called to take her to the entertainments mentioned, and the occasions on which he accompanied her home from church.

In the spring of 1888 he made the acquaintance of a Miss Hall in that village and began to keep company with her. He escorted her to a banquet and other entertainments, and in June announced his engagement to her, and in the spring of 1889 they were married. There was never any express offer of marriage made by the defendant to the plaintiff or an acceptance by her. It is claimed, however, that such offer and acceptance should be inferred from what was said and done. We shall, therefore, specifically call attention to the conversations from which it is claimed that a mutual promise to marry was understood between them. At the first time he accompanied the plaintiff home from prayer meeting in January, 1886, he spoke about the plaintiff being a friend of a Mr. Bishop, who lived in New York, and of her being there the winter previous, and said: "I am going to New York soon and I wish you were there this winter instead of last, because I would like to accompany you to entertainments which I am expecting to enjoy when I am there." In the summer of 1887, their minister, a Mr. Upton, was going to Europe. On one occasion when the defendant was accompanying the plaintiff from church he remarked that Mr. Upton was very anxious that he should accompany him to Europe, but he said that he preferred to wait until another year; that he would like to remain longer than Mr. Upton was going to remain. At this, the plaintiff stated that she hadn't any particular desire to go to Europe on account of her fear of crossing the water. Nothing more was said upon the subject until they reached her home, at which time the defendant said: "Honestly and truly, would you allow the fear of the water to prevent you from going if you could go just as well as not?" The plaintiff made no direct reply to this

question, but after a little said that it would be very lonesome for Mr. Upton to go alone, and that she thought it would be much pleasanter for him to go in a party; to which he replied: "Husband and wife is party enough for me if I go."

On another occasion, in the year 1888, at the time the defendant took the plaintiff out riding, we are told that they drove down South Broad street, and that in passing down the street he pointed out two vacant lots and asked her which location she liked best. He made no further remark with reference to the lots on that occasion, but on a former occasion he had remarked to her that he was going to build the nicest house in Norwich. On several occasions when the plaintiff had invited him in after he had accompanied her from church, he declined, saying he was going to make her a long visit some time, or by and by. When he first commenced going with her he made the remark several times that he would like to take her to entertainments which she would enjoy most. This is substantially the history of their courtship as detailed by the plaintiff, until the defendant had commenced keeping the company of Miss Hall, in the spring of 1888. She then tells us that her mother told her of a remark that she had heard to the effect that the defendant had only been going with her to please himself and to see how great a fool he could make of her. After hearing of this she met the defendant at church and told him that she would like to have an interview with him. He thereupon asked if he should accompany her home and she consented. She says that this occurred on the 15th or 20th of May. After they reached the house she invited him in and he entered and took a seat. She then repeated to him what she had heard, and asked him if it was true. He said: "No; I would be a beast of a man to go with a young lady for such a purpose as that." He further stated that he admired her from the very first; that he sought her acquaintance; that it was her face and eyes that he admired; that he had found her to be what her face represented, and that he had never met a young lady that he regarded more highly. To this the plaintiff replied: "Had I not regarded you as highly as you did me I never would have accepted your attentions as long as I have." He then remarked that he knew it; that he longed to make her happy; that he didn't know what he wouldn't do to rescue her from trouble, and that he would always protect her. He further stated that if the people were saying these unpleasant things about him he would give up prayer meeting and everything else.

She said: "No, don't on that account," and he then asked if she would go to prayer meeting if he would, and she replied, "certainly." He then

said: "Then I know I shall have one friend there, and he didn't know what he wouldn't do to protect her." He then stated that if she was not willing to take his word for it he would like to have her go to Mr. and Mrs. Chapman, for he went to Mrs. Chapman with all his secrets, and that she knew just what his regards for her were. The plaintiff then told him that she did not care to go to Mrs. Chapman; that she was willing to take his word for it; that the most she wanted to know was that he was true, and he said that he was, and just before he left made the further remark, "If I live I will make you happy." The plaintiff further testified that on that occasion he made the remark that he was unsettled in life on account of his business, and that he did not know what business he should engage in; that he made inquiry as to whether her father and mother were offended at him; that she invited him to call again and he replied that he would, but never did. She further testified that he never spoke any word of endearment to her except as above stated; that he never kissed her or offered her any caresses; that he always treated her with politeness and addressed her as Miss Yale. The defendant had not, at this time, called upon the plaintiff for several weeks, and she knew that he was paying attentions to Miss Hall and had met them at a banquet together. Very much of the conversation related by the plaintiff at this last interview was sharply controverted by the defendant, but inasmuch as the verdict of the jury was in her favor, we are confined on this review to her statements.

Does this evidence establish a mutual promise to marry? We think not. It is not pretended that there was any offer of marriage prior to the last interview. There is nothing in the talk with reference to Europe, in which she was justified in drawing the conclusion that he was offering to take her with him as his wife. The query made with reference to the location of the vacant lots is one that might well have been made of any person with whom the defendant was acquainted, without a thought of marriage. The expression with reference to his making her a long visit on declining her invitation to go into the house after seeing her home from church, would to the ordinary mind hardly suggest the idea of marriage. The most that could be reasonably claimed for it was that he intended some time to make her an independent call which should not be cut short by other engagements. We are thus brought to the expressions made use of by him at their last interview. In construing these, we must take into consideration the circumstances under which they were speaking. He, as we have seen, had formed the acquaintance, and on several occasions became the escort of another lady, and this was known to the plaintiff. Word had come to

her ears of an unpleasant remark with reference to her, and this she stated to him. It was with reference to this alleged remark that he made answer; to use her expression, he denounced it as beastly and denied the truth of the remark, and then, to assure her that it was false, he proceeded to state his admiration of her; what her face and eyes had represented to him, and that he had never met a lady that he regarded more highly. He spoke of protecting her and making her happy. Upon these expressions great stress is laid, and were it not for the circumstances under which they were spoken, it is possible there would be some support for the respondent's contention with reference to them, but these circumstances she well understood,

He doubtless had reference to the mental pain and suffering she had undergone by reason of the alleged remark, and he sought to remove that trouble from her mind and assure her of his protection from further trouble of that character. His expression which follows is in accord with this view, for he says: "If the people are saying these unpleasant things I will give up prayer meeting and everything else." He also told her to go to his sister, Mrs. Chapman, if she didn't believe him, and find out from Mrs. Chapman how he regarded her. The same explanation may be given with reference to his expression that he was "true." The plaintiff must have understood him as speaking with reference to her suffering, for she thereupon asked him to call again, and in answer to his question stated that she would like their relations to continue as before. Prior to that time their relations had been that of friends. This is hardly in keeping with the theory that they had each then and there pledged each other their troth and engaged to become man and wife.

The rule governing contracts of this character has been fully discussed in the case of *Homan v. Earl* (53 N. Y. 267). Formerly, contracts of this character were often inferred or implied from proof of such circumstances as usually attend an engagement, but after the statute was changed so as to permit parties to testify in their own behalf, they were expected to state all that was said and done so as to remove from the field of speculation facts that had heretofore been inferred, thus leaving the court to determine whether the facts sworn to constituted a contract. In determining this question, however, while we may not imply facts not sworn to, we may infer the meaning and intention of the parties. In the absence of fraud and deception there must be a contract; there must be a meeting of the minds of the contracting parties, and the evidence must be of such a character as to justify a finding that such was the case. No form of words is required. A formal offer and acceptance is not necessary, but there must be an offer and an acceptance

"sufficiently disclosed or expressed to fix the fact that they were to marry as clearly as if put in formal words." The language used must be such as to show that the minds of the parties met. Contracts of marriage concern the highest interests of life and should be sacredly guarded. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is sufficient, otherwise not. Mere courtship, or even an intention to marry, is not sufficient to constitute a contract. Thorough acquaintance with character, habits and disposition is essential in order to make an intelligent contract. The parties, therefore, may form such an acquaintance without having the inferences of a contract attach. Applying these rules to the facts of this case, it is apparent that the evidence falls short of that which is necessary to establish a contract.

In considering this case, we have recognized the rule that the evidence most favorable to the plaintiff only can be considered: That if there is any evidence sufficient to uphold the contract the decision of the General Term would be final; but when there is no evidence sustaining the contract, or when the evidence given does not show that there was a contract, then the question becomes one of law, which it is the duty of this court to review.

Our conclusion is that the plaintiff failed to show facts from which a contract lawfully could be inferred, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except O'Brien, J., not voting.  
Judgment reversed.

#### A LEGAL PROPOSAL.

Believe me, Bess, when I declare,  
A title deed's my heart,  
And you a party of the first,  
And I the second part.

That I have an attachment true  
Is useless quite to mention;  
In vain I seek to serve you and  
Arrest your sweet attention.

You know you owned some love for me  
When I the question mooted,  
But now it seems to me you act  
As if you were nonsuited.

My case is one in equity;  
I've pleaded with precision;  
You know the points; why will you, then,  
So long reserve decision?

I make no dilatory plea;  
I'm driven to distraction!  
Unless I soon obtain relief  
I'm sure I shall take action.

At first a civil suit I'll bring  
At Cupid's special session ;  
And there, a plaintiff lover, ask  
For judgment by confession.

Now, don't demur when this you read,  
But own you feel compunction ;  
For I my suit will prosecute  
In spite of your injunction.

And if, my judgment in despite,  
You will not hear me still,  
I'll get an order from the court  
T' administer your will.

I trust you'll file an answer brief  
To this my declaration,  
Or else I shall proceed to make  
A cross-examination.

—By an Undergraduate of the Chicago Law School.

### THE LEGISLATURE OF NEW YORK.

#### BILLS INTRODUCED WHICH ARE OF INTEREST TO THE LEGAL PROFESSION.

**BY SENATOR WRAY:** Increasing the limit of age of persons qualified to serve as jurors in Kings county, from sixty to seventy years.

By Mr. H. T. Andrews: Authorizing the board of estimate and apportionment of New York city to appropriate \$30,000 for the expenses of a commission to be appointed by the mayor of New York, for the purpose of revising and consolidating all acts relating to buildings and construction thereof in that city. The commission is to consist of five members, composed as follows: One architect, one builder, one architectural engineer, one lawyer and a fire underwriter. The commission must submit a report to the legislature on or before January 10, 1898, and each member shall receive for his salary \$3,500.

By Mr. Downs: Providing that the father, son or brother of a justice of the peace shall not appear as attorney in any action before him.

By Mr. Sanders: That pawnbrokers shall not charge for storage on any goods pledged with them and that they shall not charge over six per cent per year on money advanced.

#### LAWS OF 1897.

The following additional acts have been signed by Governor Black:

Chap. 18 — Senator Ford's, authorizing the consolidation of the International Missionary Alliance and the Christian Alliance.

Chap. 19 — Assemblyman Costello's, providing for the distribution of the session laws, giving one copy each to town clerks, district attorneys, clerks of boards of supervisors, surrogates, county treasurers, mayors and village clerks.

Chap. 20—Assemblyman Scherer's, increasing the pay of the day and night watchman at the Albany county jail from \$600 to \$800 per annum.

Chap. 21—Assemblyman Hill's, amending the law creating a commissioner of jurors for Erie county by providing that the names of jurors who have served during a preceding jury year shall not be placed in the box for service for the ensuing year.

Chap. 22 — Assemblyman McGraw's, to enable Rensselaer county to borrow not to exceed \$250,000 on county bonds to make good the deficiency in county funds arising through the defalcation of former County Treasurer Morrison.

Chap. 23 — Assemblyman C. H. Miller's, amending section 3314 of the Code of Civil Procedure permitting common councils or boards of supervisors to establish the mileage rate allowed jurors for traveling expenses while in attendance upon terms of court.

#### END OF A LONG-LITIGATED CASE.

**T**HE long-drawn-out litigation between Charles W.

Little and A. Bleecker Banks, referred to in last week's issue of the ALBANY LAW JOURNAL, has at last been finally disposed of, and judgment absolute rendered against the plaintiff in the case. At a Special Term held by Justice Edwards, at Hudson, N. Y., on Saturday, it was argued by Mills & Bridge for plaintiff and Rosendale & Hessberg for defendant. The latter made a motion that the decision of the Court of Appeals be the decision of this court. The action was first tried before Justice Fursman at Troy, February 4, 1890, to recover ten penalties of \$100 each upon a contract made for the printing of the reports of the New York Court of Appeals. A verdict was rendered for plaintiff, with an additional allowance of five per cent. A motion for a new trial was denied. In the General Term, November, 1892, the appeal was argued. A decision was handed down February 15, 1893, reversing the judgment and order appealed from and granting a new trial. It was re-tried in May, 1893, and a verdict of \$1,000 for the plaintiff, with an additional allowance of five per cent, was rendered. A motion for a new trial was made and denied. The defendant again appealed to the General Term in February, 1894. A new trial was granted in May. The plaintiff thereupon appealed to the Court of Appeals, and gave a stipulation to the effect that in case the judgment of the General Term was affirmed, judgment absolute should be recovered against the plaintiff and in favor of the defendant. The decision of the Court of Appeals was handed down February 12, directing absolute judgment for the defendant. Justice Edwards ordered that the decision and judgment of the Court of Appeals be made the decision of the General Term, with an additional allowance of \$50.

## ARE PUBLIC CORPORATIONS SUBJECT TO GARNISHMENT OR CREDITORS' SUITS?

**I**T is the purpose of this article to collate authorities showing how funds due employes, or other persons, from public corporations may be reached by creditors of such employes or persons. In other words, do garnishment proceedings or creditors' suits lie against municipal corporations?

By the statutes of many states municipal corporations are exempt from garnishment (*Holt v. Experience*, 26 Ga. 113; *Pendleton v. Perkins*, 49 Mo. 565; *School District v. Gage*, 39 Mich. 484; *Clapp v. Walker*, 25 Ia. 315), and the exemption under such statutes is applicable to all cases where a municipal corporation is sought to be charged and is not dependent upon the question whether the garnishment in the particular case will or will not interfere with the discharge of corporate duties. (*Jenks v. Osceola Township*, 45 Ia. 554.) In other states they are in like manner subject to this process (*City of Denver v. Brown* [Colo.], 18 Pac. Rep. 214), and again in others, by a liberal construction of the terms in the statute having a general application they are held to be liable. In Ohio, cities and towns are held liable under a statute subjecting to garnishment "any claims or choses in action due, or to become due," to the judgment debtor, and all "money, goods or effects" which he may have in the hands of "any person, body politic or corporate." (*City of Newark v. Funk*, 15 Ohio St. 462.)

In New Hampshire a similar statute was construed to permit garnishment of a town. (*Whidden v. Drake*, 5 N. H. 113; *Wendell v. Pierce*, 18 N. H. 502. But see *Brown v. Heath*, 45 N. H. 168), and in Connecticut a statute providing that debts due from "any person to a debtor" may be reached by garnishment, was held sufficiently comprehensive to embrace corporations both private and municipal. (*Bray v. Wallingford*, 20 Conn. 416.)

In Massachusetts a county was held chargeable as garnishee under a statute providing that "any person or corporation may be summoned as trustee of defendant." The court say: "There has never been a doubt that cities and towns are liable to be summoned as trustees and we find nothing in any of the statutes upon this subject that places counties upon a different footing in this respect." (*Adams v. Tyler*, 121 Mass. 380.) But a town cannot be charged as garnishee for the salary of one of its officials which is fixed by statute, and not due by virtue of any contract, express or implied, with the town. (*Walker v. Cook*, 129 Mass. 577.)

In Kentucky it was held that the City of Louisville could be charged as garnishee with the salary of its marshal (*Rodman v. Musselman*, 12 Bush, 354) and in New Jersey the same rule has been announced. (*Mayor, etc. v. Horton*, 38 N. J. L. 88.)

The code of the State of Iowa provides, in relation to the construction of statutes, that "the word 'person' may be extended to bodies public and corporate," and it was held that the word "person" included corporations, municipal as well as private. (*Wales v. City of Muscatine*, 4 Ia. 302; followed by *Binton v. District Township*, 11 Ia. 166.)

In Rhode Island the city of Providence was held subject to garnishment under a statute providing for service of process upon "any body corporate." (*Wilson v. Lewis*, 10 R. I. 285.)

It has been held in Montana that the word "person" may extend to bodies politic and corporate, and a county may be garnished for debts owed by it to one of its officers, the court holding that such a construction of the statute is not contrary to public policy as tending to impede the exercise of the functions of the county or its officers. (*Waterbury v. Board Com'rs Deer Lodge Co.* [Mont.], 26 P. 1002.)

But according to the greater weight of authority public corporations and their officers are not included in the general terms of the statutes subjecting corporations to garnishment process, however broad they may be, for the reason that such bodies are created for the public benefit, and should not be subject to the interruptions in the prosecution of the public business. To permit the great public duties of a corporation to be imperfectly performed in order that individuals may the better collect their private debts, would be to pervert the object of its creation. It is generally held, upon grounds of public policy, that a municipal corporation cannot, by service of garnishment upon its mayor or its disbursing officers, be charged as garnishee, on account of salary due its officers or employes. (*Hawthorn v. St. Louis*, 11 Mo. 59; *McLellan v. Young*, 54 Ga. 399; *Waldman v. O'Donnell*, 57 How. Pr. [N. Y.], 215; *City of Erie v. Knapp*, 29 Pa. St. 173; *Switzer v. City of Wellington* [Kansas], 19 Kas. Rep. 620; *First National Bank v. City of Ottawa*, 43 Kas. 294.) [Note, the case of *Hawthorn v. St. Louis*, 11 Mo. 59, was affirmed in *Fortune v. St. Louis*, 23 Mo. 289; since this decision a statute has been enacted exempting municipal corporations from garnishment.]

In Georgia, a municipal corporation is not subject to garnishment for sums due a contractor for constructing public buildings. (*Bank of S. W. Georgia v. City of Americus* [Ga.], 17 S. E. 287.)

In Maryland, Vermont and Mississippi it has been held that statutes providing that "any person" may be summoned as garnishee are not to be construed as including municipal corporations (*Mayor, etc. v. Root*, 8 Md. 95; *Bradley v. Town of Richmond*, 6 Vt. 121; *Dollman v. Moore*, 12 So. 23 [Miss]), and in Alabama the decisions go further, and hold that even though the law provides that



the word "person," when used in a statute, shall be construed as applying to corporations, as well as natural persons, municipal corporations are exempt. (Mayor, etc. v. Rowland, 26 Ala. 498; *aff'd* in Clark v. Mobile School Com., 36 Ala. 621, and in Underhill v. Calhoun, 68 Ala. 216.) The rule exempting municipal corporations from garnishment is followed in Illinois and Tennessee (Merwin v. City of Chicago, 45 Ill. 133; City of Memphis v. Luski, 9 Heisk [Tenn.], 511; S. C., 24 Am. Rep. 324), and the same rule has been held to apply with respect to debts due persons not connected with the city government. (Burnham v. City of Fon du Lac, 15 Wis. 193; People v. Mayor, 2 Neb. 166.) Salary due an employee of a city, after being audited or ordered paid, does not become a personal liability of the officer whose duty it is to pay the same so as to subject same to garnishment. Such officer is the mere agent of the municipal corporation. (Smith v. Woolsey, 22 Ill. App. 185; Hawthorn v. St. Louis, 11 Mo. 59; Triebel v. Colburn, 64 Ill. 376.) City funds deposited in a bank by the city marshal to the credit of the city are not subject to garnishment on a personal judgment against such marshal. (Marx v. Parker, 37 P. 675; 9 Wash. 473.)

The rules applied to municipalities as cities and towns are held equally applicable to other public corporations such as counties, townships and school districts. (Dollman v. Moore [Miss.] 12 So. 23; McDougal v. Board of Sup., 4 Minn. 184; Board of Co. Com. v. Bond, 3 Colo. 411; Millison v. Fiske, 43 Ill. 112; Wallace v. Lawyer, 54 Ind. 501; Boone Co. v. Keck, 31 Ark. 387; State v. Eberly, 12 Neb. 616; Smith v. Finlen, 23 Ill. App. 156; Chamberlain v. Waters [Utah], 37 P. 566; Skelly v. Westminister, etc., 103 Cal. 652; [37 P. 643;] Kein v. School District of City of Carthage, 42 Mo. App. 460; Merrill v. Campbell, 49 Wis. 535; Ward v. County of Hartford, 12 Conn. 404; Bivens v. Harper, 59 Ill. 21; Hightower v. Slaton, 54 Ga.; Dotterer v. Bowe (Ga.) 11 S. E. 896; School District v. Gage, 39 Mich. 484; Bulkley v. Eckert, 3 Pa. St. 368; Ross v. Allen, 10 N. H. 96; but *contra* as to county: Bray v. Wallingford, 20 Conn. 416; Adams v. Taylor, 121 Mass. 380.) As to whether a public corporation can waive the exemption from garnishment the rule would seem to be that as the exemption is granted from public necessity and for the public benefit it cannot be waived by either the corporation or the party whose fund is garnished (Porter v. Blair H. Co. v. Perdue, Ala. 16 So. 713; Rindge v. Greene, 52 Vt. 204; Wallace v. Lawyer, 54 Ind. 501; McLellan v. Young, 54 Ga. 399.) A statutory exemption of a municipal corporation from garnishment cannot be waived by the municipality by an ordinance consenting that money in its hands

may be garnished in suits between private parties (Van Cott v. Pratt [Utah], 39 Pac. 827).

In considering the question of reaching debtors' assets in the hands of municipal corporations or their officers by a creditor's bill or supplementary proceedings the two methods of procedure will be joined, inasmuch as supplementary proceedings are statutory and to a great extent substituted for the old equity form of proceedings used in discovering and applying the property of a debtor which cannot otherwise be reached, to the payment of his debt. Statutes of this kind are in force in Arkansas, California, Colorado, Indiana, Iowa, Kentucky, Maine, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, South Carolina and Wisconsin. Upon the theory that funds due and owing to an employee of a municipal corporation and held by it are in the nature of trust funds, they may be reached by creditors' bill or supplementary proceedings when such funds have become payable (Lawrence v. Pease [Supreme Court] 21 N. Y. Supp. 223); and the rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to the examination of a judgment debtor in supplementary proceedings. (Knight v. Nash, 22 Minn. 462.)

It was held by the Appellate Court of Illinois (58 Ill. App. 273) that a creditor's bill does not lie against a municipal corporation having in its possession money due to a contractor for the purpose of subjecting such money to the payment of his debts, but quite recently this decision was reversed by the Supreme Court, and it was held that the word "person," as used in the statute permitting a creditors' bill to be filed, may extend and be applied to bodies politic and corporate as well as individuals. Wilkin J., says: "We think there is a wide difference between the two remedies \* \* \* In a garnishment proceeding the garnishee may be made defendant alone; or its answer may be controverted and it compelled to sustain it by proof \* \* \* and it can readily be seen that no more perplexing and harassing litigation could be imposed upon the officials of a city than garnishment proceedings. We do not, however, so regard a creditor's bill. Here the defendant in the unsatisfied judgment is a necessary party defendant to the bill jointly with his alleged debtor. He must protect his own rights. The city is only required to make discovery as to whether or not it holds money due and owing him. If it denies the alleged fact that it owes him anything, that is the end of the litigation so far as it is concerned. (King v. Clark, 3 Paige C. R. 76; also Ins. Co. v. Central Nat. Bank, 1 Ill. App. 344; Ins. Co. v. Central Nat. Bank, 7 Ill. App. 426; Fifield v. Chapman, 15 Ill. App. 458.) If, on the contrary,

it answers that it is indebted to him, it is only required to pay such indebtedness to the complainant or into the hands of a receiver. We see no reason why, in order to protect an honest creditor, city officials should not be required to forego such light inconvenience. The reasons given by Mr. Dillon in his work on Municipal Corporations (vol. 1, sec. 101) why, to allow writs of garnishment run against municipal corporations is against public policy, do not apply to a creditor's bill or discovery." (Addison Pipe and Steel Co. v. City of Chicago, Chicago Legal News, vol. 28, p. 256, as yet unpublished in reports.)

By a creditor's bill a debt due by a municipal corporation to its creditors may be subjected to the satisfaction of a judgment against the latter (Furlong v. Thomssen, 1 West. Rep. 729; Luthby v. Woods, 1 Mo. App. 167; Beal v. McVickers, 3 Mo. App. 592; Riggan v. Hilliard 20 S. W. 402; 56 Ark. 476; McFadden v. Hilliard, [Ark.] 20 S. W. 404; Pittman v. Same, Id.), and a creditors' bill may be filed against a county. (Lyell v. Sup. of St. Clair, 3 McL. 580.)

It was held in Pennsylvania that since a contractor's claim against a city cannot be attached, equity cannot entertain a bill in the nature of a creditor's bill to restrain the city from issuing warrants to creditors of the contractor holding the city's certificates to him as collateral, and to restrain said creditors from paying any balance over to the contractor, there being no averments that he or they have been guilty of fraud. (Philadelphia Granite, etc. Co. v. Douglass [Pa. Com. Pl.], 14 Pa. Co. Ct. R. 234.) Money in the city treasury belonging to a debtor who has absconded may be reached by a creditor by a bill in equity (Pendleton v. Perkins, 49 Mo. 565), but the salary of a judicial or other public officer while in the hands of the disbursing officer of the general or municipal government in his official capacity, in common with other money to be applied by him towards the payment of judicial and other official salaries, according to law, cannot be reached by supplementary proceedings. (Waldman v. O'Donnell, 57 How. Pr. [N. Y.], 215; N. Y. Marine Court v. Remmey, Id. 217; Wallace v. Lawyer, 54 Ind. 501; 28 Am. Rep. 661; Lowber v. N. Y., 7 Abb. Pr. [N. Y. Sup. Ct.] 252; Chealy v. Brewer, 7 Mass. 259.) On the grounds of public policy money due a public printer by the state cannot be reached by such proceedings. (Swepson v. Turner, 76 N. C. 115.) In the District of Columbia a bill will not lie to subject an unpaid balance in the hands of a municipality to the payment of the claims of subcontractors and material men. (Columbia Brick Co. v. Dist. of Columbia, 1 App. D. C. 851.) In Roeller v. Ames (38 Min. 132), it was held that salaries of officials of a municipal corporation could not be

reached in supplementary proceedings. The court distinguished this case from Knight v. Nash (22 Minn. 452), where it was held that money due a contractor for labor performed for the city might be reached by such proceedings. This distinction seems to be generally followed, and on the grounds of public policy, salaries of officials or employees of a municipal corporation are held exempt, although it must be conceded the distinction is a fine one, and the reasoning in the case of Addison Pipe and Steel Co. v. City of Chicago, heretofore cited, would seem to apply here. If a municipal corporation can be compelled to make discovery of money due a contractor employed by it, why not go further and compel it to discover, through proper proceedings, money due its officials and employees of the city? The distinction between a contractor and an employee seems one without a difference.

In Ohio no such distinction is recognized, and it has been held that salaries of officials due and unpaid might be subjected by judgment creditors of such officers to the payment of their judgments. (Newark v. Funk, 15 Ohio St. 462.)

It may be gathered from the weight of authority that, generally, municipal corporations, together with towns, counties and like corporations, are exempt from garnishment process unless made liable by statute, but that funds in the hands of such corporations or their officials, due to creditors other than the corporations' officers and employees, may be subjected by judgment creditors to the payment of their judgments by supplementary proceedings or creditors' bill.

MORTON JOHN STEVENSON,  
*Of the Chicago Bar.*

#### CAT FIGHT IN COURT.

GYPSEY is a Police Court cat, and owns the Harrison street station. Jumbo is the tortoise-shell mascot of the fire department, and belongs at the engine-house in Pacific avenue. Gypsy can whip any cat from the annex to Twelfth street. Jumbo has ranged north to the river, and never known defeat. To-day Gypsy went mousing around in Justice Richardson's court, where some non-union printers were looking on at the proceedings. Jumbo, who understood this was a hot place, and that people were often fired down stairs, came in as a department attaché might. And the two cats got acquainted.

When they met, Gypsy sent his back up in an arc and said "Pfsist!" scornfully. Jumbo had an enlargement of the tail, and then they clinched.

Justice Richardson was trying a Chinaman and an Italian, questioning them in English, and telling them to walk Spanish to the bridewell, when that

first collision of Gypsy and Jumbo disturbed the serenity of his court. The cats were very much attached to each other. Gypsy had seven claws imbedded in Jumbo's fur, and Jumbo was trying Gypsy's shoulder straps with his teeth. They rolled and bounded about the room like an animated football, each making meowing remarks to the other.

A sporting man, who had come in to "josh" the clerk about jumping a bail bond, offered to bet \$5 on either combatant, and a detective, who had just made money detecting, doubled the wager, picking the fire department for winner. Justice Richardson rose and looked at the conflict judicially, and then granted the janitor's motion to strike out.

Some one held open the back door, and all the lawyers present rushed the feline offenders into the alley, where the fight was suspended.

Gypsy went down to the custodian, who has a lot of furs on hand, and Jumbo ran back to the engine-house in blazing wrath, and was at once put out.

Then the trial went on.—*Chicago Post.*

#### AN \$11,8000 PUZZLE

A FORTUNE of \$118,000 is hanging on the grammatical construction of a single word in the Superior Court of San Francisco. A jury, among whom there is not a school teacher or any one claiming to be an authority on grammar, had, up to a week ago, devoted twelve days to the consideration of the point, and at last accounts the case was still unsettled. The learned judge and some half-dozen high-priced lawyers had been helping to disentangle the intricacies of the problem. The prize depends on the exact meaning of the word "their" as it appears in a clause in a contract. It is plain that the word is a pronoun, standing for an antecedent noun in the sentence, but there are two such nouns, and the point is as to which it refers. This is the \$118,000 sentence:

"And at their option the Adams Company is to have the use of all the machinery and coal hoisting apparatus now in use by the Southern companies."

The Southern companies referred to have the money which is at stake, and if the jury decide that the "their" refers to them they will keep it. If they hold that "their" refers to the Adams Company, then the Adams Company will get it. The sentence occurs in a contract between the Adams Company and the Southern Pacific Railroad Company for five years. The account adds:

"It is said that the Southern Pacific Company's lawyer did not see the possibilities in the queer bit of grammar until long after litigation had been begun. In the sentence under dispute appear the words 'Adams Company is,' and the Southern companies claim that the word company is therefore

written in the singular sense and the word 'their' cannot apply to it. If written in the singular sense and the Adams Company he would have used the word 'its' instead of 'their.' The other side claims that the word 'their' must refer to the Adams Company, because the latter is the nearest noun to the disputed pronoun."

#### LAWYERS QUOTE SCRIPTURE.

ATTORNEYS quoted scripture before Judge Woods in the United States Court of Appeals at Chicago the other day. The suit was an appeal from the Federal Court of Western Wisconsin, where a jury gave a verdict of \$2,000 against the Minneapolis, St. Paul and Sault Ste. Marie Railroad for the burning of property in Lincoln County, the fire, it was alleged, being caused by sparks from a locomotive. Alfred H. Bright, in arguing for the railroad company to have the verdict set aside, asserted that sparks from a locomotive fly upward, and the probability of the fire having been caused by sparks was remote. "The universal effect of air currents on sparks of fire was discerned by the author of Job long prior to the birth of our jurisprudence when he said, 'Man is prone to trouble, as the sparks fly upward.'" William H. Flett, attorney for Emerson Bros., the firm securing the verdict, rejoined: "Counsel has seen fit to cite the Book of Job in support of his theory as to sparks. It is also recorded in holy writ, 'Behold how great a matter a little fire kindleth.'"

The court took the issue under advisement.

#### BEFORE THE FINAL BAR.

MERCER BEASLEY, Chief Justice of the Supreme Court of New Jersey, died February 19, at his home in Trenton, of pneumonia. Chief Justice Beasley was born in Mercer county, N. J., in 1815, the son of Rev. Frederick Beasley, for many years president of the University of Pennsylvania. The future jurist spent a year at Princeton, and afterward studied law under Chancellor Williamson, of Elizabeth. He was admitted in 1833. In 1851 he was a Whig candidate for mayor of Trenton, but was defeated.

At the break-up of the Whig party he became a Democrat. In 1864 Gov. Parker appointed him chief justice of the Supreme Court, and he was reappointed in 1871, 1878, 1885 and 1892. His term would have expired March 8, 1899. He is survived by one son, ex-Judge Chauncey H. Beasley, and two daughters, Mrs. Judge Green and Mrs. Justice Gummere.

David Wright, the oldest member of the Cayuga county, N. Y., bar, died on February 24, at Auburn, aged 91 years. He was father of Mrs. William Lloyd Garrison, of Boston.

### Legal Notes of Pertinence.

An attempt by an attorney to withdraw his answer and appearance in a divorce case, when made in avowed hostility to his client and as an act of retaliation for alleged non-payment of his fees, was held, in *Nickells v. Nickells* (N. D.), 33 L. R. A. 515, to be outside the scope of his authority, and a judgment by default taken after such withdrawal was set aside.

Another Torrens land transfer bill has been prepared for introduction in the Illinois legislature, which is believed to be so framed as to cure the defects in the old law, which the Supreme Court pointed out when it declared that act unconstitutional. Should it be passed, it will have to be submitted to the people at the November election.

Under a new law, legislative lobbying in Tennessee is made a felony, and punished with imprisonment for from two to five years.

In the retirement of Ben S. Dean from the editorship of the *Jamestown* (N. Y.) *News*, that paper loses a thorough journalist, and a forceful writer whose place will not be easily filled. Mr. Dean is not only a good newspaper man, but a learned lawyer, particularly on constitutional subjects, having been a particularly useful member of the New York Constitutional convention of 1894. Mr. Dean has long been a valued contributor to the columns of the ALBANY LAW JOURNAL.

After a temporary suspension, caused by the death of the editor, Dr. Austin Abbott, the publication of the *University Law Review* has been resumed, under the auspices of the law faculty of the New York University. The contents of the first number under the new management, that for February, 1897, are full of interest.

An English custom of not so long ago was to hang smugglers on gibbets arranged along the coasts, and then tar the bodies that they might be preserved a long while, as a warning to other culprits. As late as 1822 three men thus varnished might have been seen hanging before Dover Castle. Sometimes the process was extended to robbers, assassins, incendiaries and other criminals. John Painter, who fired the dockyard at Portsmouth, was first hanged and then tarred in 1776. From time to time he was given a fresh coat of varnish, and thus was made to last nearly fourteen years. The weird custom did not stop smuggling or other crime, but no doubt it worked some influence as a preventive.

A dispatch from Pretoria, South Africa, says the High Court has decided in favor of the American Engineer, R. E. Brown. Brown, sued the government for a declaration of rights in his favor

respecting certain claims, at Witfontein, or, in default, the payment of £1,000,000 (\$5,000,000). The suit arose from the government proclaiming Witfontein open for gold mining on a certain date, whereupon Mr. Brown pegged out large blocks of claims. But the government withdrew the proclamation and afterward proclaimed Witfontein under the lottery law.

From a perusal of City Attorney West's annual report it appears that during the past year 296 suits at law were begun against the city of Chicago in which damages to the amount of \$4,594,500 are claimed. This large increase over previous years is attributed to the increase of population, the bad condition of wooden sidewalks, especially in the outlying districts, and the agencies instituted and abetted by certain lawyers for the purpose of prosecuting all suits of this character on commission of one-half of all money recovered and without any cost or trouble to clients.

The Supreme Judicial Court of Massachusetts has recently decided, that a workman on a building, who fell and was injured as a result of stepping on a joist that had just been sawed nearly through by another workman, who had left it for a moment, could not recover from his employer for the injury "since it would be impracticable to require employers to warn their men of every such transitory risk, when the only thing the men do not know is the precise time when the danger will exist." *McCann v. Kennedy*, 44 N. E. Rep. 1055).

The Supreme Court of Georgia has lately decided a very interesting question, holding that while an entry in a bank-book or "pass-book" purporting to show that the owner of the book has a credit in a bank for a specified balance is not conclusive or binding upon the bank, yet, when a banker issued and delivered such a book containing an entry of this kind which was *ab initio* false, and when, after this was done, a third person, who had seen the book, applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give in terms the information thus sought, did, by concealing the truth, or by other means, induce the inquirer to believe the entry in the book was true and correct, and, in consequence of that belief, to make with the owner of the book a contract by which the inquirer, though exercising due care in the premises, was defrauded and suffered a loss, the banker was, within proper limits, liable in damages to the former on account of that loss, if, under the special circumstances of the case, he was under an obligation to communicate to the inquirer the exact truth of the matter. (*James v. Crosthwaite*, 25 S. E. Rep. 754).

## THE MAGAZINES.

THE opening pages of the *North American Review* for March are devoted to a timely and elaborate paper from the pen of Sir Edwin Arnold on "The Famine in India." The problem of "Prison Labor" is thoughtfully considered by Carroll D. Wright, United States Commissioner of Labor, and in "The History of a Poem," Mr. Edmund Gosse recounts the circumstances connected with the production of the late Coventry Patmore's work, "The Angel in the House." "How to Reform Business Corporations" is discussed by V. H. Lockwood, and M. Georges Clemenceau contributes the second and concluding portion of his paper on "The French Navy." A writer under the signature of "A London Police Magistrate" gives a description of "Drink and Drunkenness in London," dwelling especially on the class known as habitual drunkards. Under the caption of "The Railway Problem" are treated two distinct and vital aspects of this great question, the Hon. Lloyd Bryce considering "The Legislative Solution," and James J. Wait giving a "A Mercantile View." The Hon. Edwin Taylor appeals to the country at large "In Defence of Kansas," and progressive religious thought has its champion in Prof. C. A. Briggs, D. D., who furnishes a brilliant paper on "Works of the Imagination in the Old Testament." Other topics dealt with are: "When Congress Should Convene," by the Hon. J. F. Shafroth; "The Question of Ships," by Winthrop L. Marvin; "Amenities of Philology," by Prof. E. W. Bowen, and "Objections to a Children's Curfew," by Winifred Buck.

The frontispiece of *McClure's Magazine* for March is a fine portrait of Mark Twain, painted by Charles Noël Flagg, and never before reproduced. It introduces an extremely interesting number. There is the opening installment of a new novel by Robert Louis Stevenson, the last novel we shall ever have from that most charming of romancers. There is a brief critical paper, apt and comprehensive in its interpretation and full and cordial in its praise of Rudyard Kipling as a poet, by W. D. Howells. There is a paper of personal impressions on one of the greatest of illustrative artists, Daniel Vierge, by his intimate friend, August Jaccaci, with numerous drawings by Vierge, most of them never before published. And there is a paper from Conan Doyle relating his own personal adventures in the Arctic seas as a young surgeon on board of a Greenland whaler. These are features varied and significant enough, one should think, to attract a crowd of readers to any magazine; but there is still much else worth mentioning in this number of *McClure's*, of which lack of space forbids detailed mention.

Captain A. T. Mahan, U. S. N., contributes to the March number of *Harper's* a very valuable

article entitled "Preparedness for War," in which he both urges the view that our consistent enforcement of the Monroe Doctrine involves greater probability of conflict with European powers, and outlines a scheme for defence by sea. In the second paper of the series, entitled "The Awakening of a Nation," Charles F. Lummis describes the religious, charitable and political institutions of Mexico, which not only were the first, but are among the most highly developed in the American hemisphere. The illustrations portray the magnificent public works of the City of Mexico, and the monuments of art and architecture which make it the handsomest capital in America. "Astronomical Progress of the Century," the second of a series of amply illustrated papers on modern contributions to science, by Dr. Henry Smith Williams, traces the development of the latest theory of the universe, unfolding a scientific actuality more stupendous in its reaches of imagination than the cosmography of the "Divine Comedy" or "Paradise Lost." George du Maurier's "The Martian" is even more autobiographic than usual, many of the events occurring just as they happened to Du Maurier. In "The Last of a Great Black Nation," Poultny Bigelow describes the English rule in Basutoland, and details the arts of opportunism by which Moshesh, the national hero of the Basutos, earned the title of the "Bismarck of South Africa." The paper is splendidly illustrated by R. Caton Woodville. In "The Decadence of the New England Deep-Sea Fisheries," Joseph William Collins records the development of canning and ice-packing in America, and shows how they have affected the most picturesque and adventuresome of our industries. The article is fully illustrated by Carlton T. Chapman.

The leading articles in the *Review of Reviews* for March are a character sketch of Lyman J. Gage, by Moses P. Handy, of Chicago, a Study of the Longest Reign in British history, with rare and valuable pictures of Queen Victoria, her family and her home life, by W. T. Stead, and "Naming the Indians," by Frank Terry, with illustrations. The editor's Progress of the World is unusually full and interesting. The leading articles of the month include, among some forty titles, International Bimetallism, The Philippine Islands, An Estimate of President Cleveland, Condition of Government in Cuba, and John Fiske's Views on the Arbitration Treaty.

## AIDING THE CUBANS.

WHAT citizens of the United States may lawfully do to aid the Cubans in their struggle for freedom is a question of present interest. Activity in furnishing arms, ammunition and men to aid the

rebellion in Cuba has led to a series of prosecutions for violation of the U. S. Rev. Stat. § 5286, which declares: "Every person who within the territory or jurisdiction of the United States begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or State or of any colony, district, or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding \$3,000 and imprisoned not more than three years." It is said by Chief Justice Fuller in *Wiborg v. United States*, 183 U. S. 632,—L. ed.—: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency." He points out that the offence is defined disjunctively as committed by every person who within our territory or jurisdiction "begins, or sets on foot, or provides, or prepares the means for any military expedition or enterprise to be carried on from thence." The Supreme Court of the United States decided in that case that there is a prohibited military expedition or enterprise when men combine and organize in this country and are carried with arms and ammunition under their control by a tug thirty or forty miles out to sea to a steamer on which they embark and drill and by which they are taken to Cuba, where they disembark to effect an armed landing on the coast with intent to make war against the Spanish government.

Other Federal courts have applied the law to somewhat similar circumstances. In *United States v. Pena*, 69 Fed. Rep. 983, it was held that the statute was not violated by shipping arms, ammunition, or military equipments, or leaving the United States as individuals, singly or in unarmed associations, for the purpose of joining in military operations on foreign soil. So in *United States v. Hughes*, 75 Fed. Rep. 267, the court holds that a merchant ship in legitimate commerce may carry passengers to Cuba, and also carry boxes of arms and ammunition as merchandise at the same time; but that there would be a military enterprise within the prohibition of the act of congress if the passengers, after they came aboard the vessel, took the arms from the boxes and organized themselves into a company or organization, or if they drilled and went through the manual of arms under the leadership or direction of one man or more.

To the same effect is *United States v. O'Brien*, 75 Fed. Rep. 900, expressly deciding that it is not a violation of neutrality laws for individuals to leave this country with intent to enlist in the Cuban army, and

that such persons may be lawfully carried as passengers on a vessel, and that they may go separately on a regular line steamer or any other, or charter a vessel, or go separately or in association for the purpose of facilitating transportation, provided they do not form or set on foot any military expedition or enterprise, or procure or prepare the means therefor. The same case holds that secrecy and mystery in the transportation of men and munitions do not render the transaction a violation of the neutrality laws when it is not done in aid of a military expedition or enterprise.

If it is evident that, under the law, as laid down in these cases, the question of combination and organization is an important part of the subject. With the law thus plainly interpreted, there does not seem to be much to prevent Cuban sympathizers from furnishing all the men, munitions and guns that they can procure, providing they can escape the Spanish ships. So far as the United States laws are concerned, the main thing is to avoid combining and organizing their men into a military expedition before they reach Cuba.—*Case and Comment.*

#### IMPEACHMENT OF OWN WITNESSES.

THE binding rule of law, inhibiting the impeachment of one's own witnesses, is sometimes denied in cases where the parties to the litigation are called as witnesses, says the *National Corporation Reporter*. But there is no distinction in the law, as again shown by the approved ruling in *Crespi v. People* (46 Pac. 863.) The action was criminal libel, and a part of the libelous matter was a published charge that the complaining witness, Almagia, himself a newspaper editor or proprietor, was paid by the "camorra" to libel and villify certain people. (By "camorra" is understood to have been meant a clique, ring, cabal, or confederation of Italians in the city, banded together for dishonest and dishonorable purposes.) Defendant undertook to prove the existence of this camorra and Almagia's connection with it. He called Almagia to the stand, as his own witness, and asked him, with specifications of time, place and persons present, if he had not stated that he had instituted the prosecution of defendant at the instance of others. Almagia answered that he had not. Defendant then sought to impeach him by showing that he had made this statement. The court refused to admit the impeaching evidence. This ruling is complained of. It was clearly right. It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him. Indeed, he was apparently questioned for the sole purpose of impeachment. Such practice is not permissible. (*People v. Jacobs*, 49 Cal. 384; *People v. Mitchell*, 94 Cal. 556; 20 Pac. 1106.)

### Notes of Recent American Decisions.

**ATTACHMENT—TRESPASS BY OFFICER.**—An officer attaching a stock of goods subject to mortgage should seize only such as would be sufficient to satisfy the attachment and the mortgage, and is liable in trespass *quare clausum fregit* if he seizes all the goods, and excludes the owner from possession of the store and contents. (*Holland v. Anthony* [R. I.], 36 Atl. Rep. 2.)

**BENEVOLENT SOCIETY—ASSESSMENTS—WAIVER.**—Where assessments have been levied and paid subsequent to those unpaid, and upon which a forfeiture might have been claimed, such subsequent assessments and acceptance of money paid upon them constitute a waiver of such right to avoid a certificate for delay of payment. (*Williams v. Maine State Relief Assn.* [Me.], 36 Atl. Rep. 63.)

**BILLS AND NOTES — PAYMENT.** — Defendant and another made a note payable to a certain bank under an agreement that, if defendant would assign to the bank a certain judgment owned by him, he should be relieved of all liability on the note. On the death of the other maker of the note it was proven as a claim against his estate, and defendant assigned, in accordance with the agreement, the judgment held by him to the bank. A receiver thereafter appointed for the bank sold all the notes and choses in action of the bank: *Held*, that the note had wholly ceased to be an asset of the bank before such sale by the receiver. (*First Nat. Bank of Indianapolis v. New* [Ind], 45 N. E. Rep. 597.)

**CARRIERS OF PASSENGERS—REASONABLENESS OF REGULATIONS.**—Where a passenger takes a dog with him into a passenger car, contrary to the rules of a railroad company, and refuses to remove him when requested, the conductor is justified in removing both from the car in a proper manner, though the passenger has paid his fare. (*Gregory v. Chicago & N. W. Ry. Co.* [Iowa], 69 N. W. Rep. 532.)

**CONTRACT — AGREEMENT TO ARBITRATE.** — An agreement to arbitrate as to a liability which has already been incurred is no defence in an action to enforce the liability. (*Gaither v. Dougherty* [Ky.], 38 S. W. Rep. 2.)

**CORPORATIONS — STOCK SUBSCRIPTIONS.**—A corporation (creditors not being interested) cannot recover on a subscription for stock, where, after it was made, the corporation, with the consent of the subscriber, sold out its entire authorized stock, including that subscribed for by him, and received full pay therefor. (*Level Land Co. No. 3 v. Hayward* [Wis.], 69 N. W. Rep. 567.)

**FRAUDS, STATUTE OF — DEBT OF THIRD PERSON.** — A promise by a vendee that, on a purchase of the

land, he will pay a note of the vendor to a third person, is void, within the statute of frauds. (*Haun v. Burrell* [N. Car.], 26 S. E. Rep. 111.)

**GARNISHMENT — JUDGMENT.**—Where two corporations, under a business name, which they use when acting together, different from the corporate name of either, issue a policy of insurance for a certain amount, reciting that half thereof is insured by each, they may be garnished under that name for their liability, and a single judgment rendered against them in that name. (*Ferry v. Cincinnati Underwriters* [Mich.], 69 N. W. Rep. 483.)

**HUSBAND AND WIFE — AGENCY.**—The mere fact that a wife knew that materials purchased by her husband on credit from plaintiff were used in her house does not amount to a ratification of the husband's act, where it is shown that the wife furnished the husband with money to pay for all purchases made for her house, and had no knowledge that any were made on credit. (*Young v. Swan* [Iowa], 69 N. W. Rep. 566.)

### New Books and New Editions.

**DIGEST OF INSURANCE CASES**, embracing all decisions of the United States Supreme, Appellate and Circuit Courts, and of the Appellate Courts of the various States and foreign countries, in any manner affecting insurance companies, upon whatever plan their business may be conducted. By John A. Finch, of the Indianapolis Bar. The Bowen-Merrill Company, Indianapolis and Kansas City.

This is Volume IX of the Digest of Insurance Cases for the year ending October 31, 1896, and contains 835 cases affecting insurance companies and their contacts. There are in this volume over 300 references to cases in which various parts of insurance policies are subjects of construction, which the author regards as indicating a surprising difference of opinion between the courts and the policy-writers, showing the necessity for greater clearness on the part of the latter, and for a better understanding of the contract on the part of the courts. There are covered in this volume 107 references to cases construing statutes passed by various State legislatures. The original plan of giving the abstract of each case in full under one title has been continued in this volume. An unusually exhaustive index, bringing together all the points passed upon during the year under their proper designations, adds greatly to the value of the work, while a table of cases is given, showing where each case has been reported up to the date of the publication of the current volume. Volume IX is an improvement upon preceding volumes in the number of cases digested, in the fullness of the text, and in the completeness of the index and table of cases.

## The Albany Law Journal.

ALBANY, MARCH 13, 1897.

### Current Topics.

BY the action of the Supreme Court of the United States, in the case of the filibustering steamer "Three Friends," the task of our government in enforcing the neutrality laws with respect to the Cuban insurrection, exceedingly difficult under any circumstances, is rendered somewhat easier. The steamer was seized by a government vessel, in Florida waters, on the charge that it had violated the neutrality laws in assisting the Cuban patriots in their struggle against Spain. Judge Locke, of the Southern District of Florida, dismissed the libel brought by the government, on the ground that the Cuban patriots, not having been acknowledged as belligerents, and Spain refusing to recognize Cuba as in a state of war, as far as its relations to other countries are concerned, the vessel had not, therefore, violated the neutrality laws. The neutrality statutes now in force, based on laws enacted in 1794, 1817 and 1818, prohibit two different acts—one fitting out on our soil a military expedition or enterprise against any power with whom the United States are at peace, and, second, fitting a vessel for use in the service "of any foreign prince or state or of any "colony, district or people" with whom the United States is at peace." It is under the second of these clauses that the "Three Friends" was libeled. The point raised in her defence was that the terms used applied only to an independent nation, or at least to a belligerent power, because with no mere insurrection could the United States be described as being at peace.

The Circuit Court in Florida held this view, and dismissed the libel. Strong ground existed for this finding. Our courts early held that the terms in this act referred only to foreign "powers." This raised the presumption that the act did not apply to a mere rising. In the Plata case, the vessel laden with arms for the Chilean insurrection, Judge Ross, in the lower court, held that it was "to say the least, extremely doubtful" whether the statute could apply to

an unrecognized insurrection. The Supreme Court cleared the Plata on other grounds and did not pass on this issue. In the "Three Friends" it was directly raised. This vessel left Florida with passengers bound for Cuba, a cargo of arms and a mounted gun. When attempting to make a landing the vessel was attacked by the Spanish coast guard vessels, and successfully repelled the attack. She became thereby an armed vessel in the service of the Cuban government. If she was not that, she was nothing but a pirate. In arguing the case before the Supreme Court, Attorney-General Harmon and Mr. Whitney, his assistant, took the ground that the only question was whether the statute was applicable when the belligerency of the Cuban insurrection had not been recognized.

While the court was not unanimous, the majority decided that the statute is applicable, and the "Three Friends" is remanded for trial. Chief Justice Fuller, who wrote the opinion, took the ground that the war in Cuba had been carried to such an extent as to have demanded the recognition of belligerency, and although that recognition had not been given, yet the neutrality laws applied practically the same as if such recognition had been given. The court defined neutrality to mean: "Abstinence from any participation in a public, private or civil war, and impartiality of conduct toward both parties. The maintenance unbroken of peaceful relations between the two powers, when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency."

The court held that, while the act cited was intended to secure neutral action, it was, nevertheless, an act to punish offenses against the United States. He said that the law had originally been drafted at Washington's instigation, and that the words "colony, district or people," on the proper construction of which the case hinged, were inserted in 1818, at the instance of the Spanish minister, who suggested that the South American colonies in revolt and not recognized as independent, might be included in the word "State."

The court held that the words must necessarily be held applicable to a body of insurgents



associated together in a common political enterprise and carrying on hostilities against the parent country in the effort to achieve independence, although recognition of belligerency had not been accorded.

Chief Justice Fuller said that it belonged to the political department to determine when belligerency should be recognized, but there was a sharp distinction between the recognition of belligerency and the recognition of political revolt, as was shown in this case, in which, while there had been no recognition of belligerency, there had still been many proclamations and messages by the president recognizing the Cuban insurrection, and an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of belligerency had not taken place.

Justice Harlan, in his dissenting opinion, said that there was nothing in the case to justify the court in straining the statute, as it must, to suit the conditions. He fully concurred in the opinion of the district judge of the Southern District of Florida, in refusing the libel of the vessel.

It will probably strike the average student of international law that the language used by Justice Harlan pretty clearly expresses the situation. The majority opinion seems to strain the statute to suit the conditions. A fair construction would seem to be that its terms can be applied only to an independent nation, or at least to a belligerent power, formally recognized as such. If the Spanish government insists on its refusal to recognize the belligerency of the Cubans, it is only proper that it should abide by the consequences of such refusal. The decision is more than fair to Spain — it is generous. In view of it, and the additional fact that our government has all along done its full duty in preventing aid to Spain's enemies, from this country, the Madrid authorities ought to be equally just and generous in strictly carrying out each and every treaty obligation. But, according to all accounts that have reached us, the contrary has been the case. American citizens have been systematically abused, reviled and insulted, while one, at least, has died under the bludgeon. These acts, it need hardly be said, are contrary to our treaty rights, and to our claims as a neutral

and friendly power. This latest decision of the Supreme Court ought to place the Madrid authorities under additional obligations to remove speedily all cause of reproach.

A case of far-reaching importance has just been decided by the United States Supreme Court. The question presented was this: Is a judgment of a State court, which takes and appropriates to the use of the public, land owned in fee simple by a railway company, for compensation that is merely nominal, reserving to the company the right to cross the street when opened for general use, a violation of the constitutional provision against taking property without due process of law? The railway companies set up the claim that they were entitled to the same rate of compensation for the land appropriated which the city allowed to individual owners of contiguous property. In one of the cases tried the city paid the individual property owners whose lands were condemned, about \$8,350 — the full market-value — in damages, while for the strip of land belonging to the railway company, embracing 10,798 square feet, it paid only \$1. This discrimination was made under a city ordinance providing that the municipality may at any time open a street through a railroad company's right of way by paying \$1 nominal damages to acquire title. The main question which the Supreme Court was called upon to decide was as to the constitutionality of this ordinance, and the correctness of the ruling by the State court upholding it as sound law. The federal court answers in the affirmative. While conceding that the railroad company holds its lands in fee simple, just as any private owner does, it is regarded as inequitable and against public policy to permit a railway corporation, which originally acquired its right to its land and franchise from the public, to assume an obstructive attitude and prevent needed public improvements. The right of the railroad to cross the new street with its tracks not being impaired in any way, it is bound to part with its title and give way to the interests of the public. This is, we believe, a new and radical departure, somewhat startling at first glance; and while the subject is not entirely free from difficulty, the principle thus clearly enunciated by the highest court in

the land is sound and reasonable. It will be heard with gratification by the people of many States, particularly those residing in the large cities, where the work of extending streets can now go on without fear of being compelled to pay heavy damages for the privilege of crossing the right of way of railroad companies. Justice Brewer dissents from the opinion of the court and holds substantially with the attorneys of the railroads, denying the right of a city to discriminate against them in the matter of compensation for property taken for public purposes. More elaborate reference to and comment upon the decision must be deferred until its full text is at hand.

The end of the "easy divorce" system in North Dakota appears to be in sight, the House of Representatives of that State having passed, by the overwhelming vote of 44 to 5, a bill extending the period of residence required from applicants for divorce from three months to one year. The passage of the bill by the other branch of the legislature ensures its enactment into law, and thus a great scandal, which has brought the State and its people into disrepute, will be done away. Much deserved criticism has been directed against the State for the inducements its lax laws have held out to those seeking legal separation, and if this bill shall become a law, as now seems altogether probable, thanks to the reawakened moral sentiment of the community, some other State must become the Mecca of the loose moralists the United States over. North Dakota has evidently concluded that a good name is more to be prized than the wages of sin and vice, however liberal they may be.

Mrs. Clara Foltz, the New York attorney, recently had an unpleasant experience in a metropolitan restaurant, as a result of which she has just brought suit for \$5,000 damages against the restaurateur. The trouble arose out of the enforcement of a peculiar rule which has been adopted by many of the restaurateurs of the metropolis, that they will not serve female customers who are unaccompanied by male escorts, after 9:30 P. M. The attaches of the particular eating-house referred to not only declined to serve Mrs. Foltz, and her daughter

who accompanied her, but, as is alleged, ordered them out of the place, to the amusement of the assembled male customers. The lady went, but lost no time in serving a complaint in a suit for damages to her feelings and reputation. The arbitrary, and it would seem wholly unnecessary, rule, the enforcement of which caused the scene referred to, which has compelled hundreds of highly respectable women in New York to undergo similar experience, will now be tested in the courts, and the portion of the community at whom the discrimination is aimed will have an earnest, able and powerful champion in Mrs. Foltz. It seems to us that no public reason exists for the establishment or enforcement of any such regulation, and without doubt, the courts will decide the case on its merits. The result will be awaited with much interest.

The prison-labor problem in this State is by no means solved yet. The action of the Prison Labor Commission in resolving to introduce printing and bookbinding in the penal institutions of this State, on a large scale, has stirred up the printers to a degree of activity which indicates how seriously the proposed action would affect them. Why the "art preservative" should have been thus singled out of all others is difficult to understand. The Albany Typothetæ point out the fact that if the plans of the prison commission are carried out, several hundred honest, hard-working members of the craft in Albany will find themselves deprived of a means of livelihood, for it is proposed to do not only the printing and binding required for the use of the penal, reformatory and charitable institutions of the State, but legislative and department printing, reports of municipal and town boards, election ballots, blanks, stationery and other supplies for all county officers, boards of supervisors' reports and proceedings, city printing, etc. In addition to all this, a bill has been introduced to authorize the manufacture of school books by the use of convict labor. With a view of preventing this, Mr. Wieman has introduced in the senate a bill which, in substance, provides that only the printing required by each penal institution shall be done in such institution. The action proposed to be taken by the legislature on the recommenda-

tion of the prison commission would disastrously affect the ancient and honorable art of printing, by bringing it on a level with the lowest grade of work, besides affecting every newspaper in the State. It is not to be wondered at that the printers whose craft is thus attacked are up in arms against such a proposition. The State Constitution can be complied with without so deadly a blow at this honorable trade, and it is fair to presume that the people meant just what they said when they voted for the prison labor proposition, viz.: That convicts should be excluded from competition with honest industry. Particularly would the manufacture of school books by convicts be objectionable, being altogether too close a link between the felon's cell and the school-room, where the flower of youth is nurtured.

The Circuit Court of Hancock county, Ohio, recently handed down an important decision involving the right of a railroad conductor to confiscate a mileage book when it is presented by a person other than the one who purchased it. Arthur J. Morton, a local ticket broker, purchased a mileage book from the Lake Erie & Western Company. When a third party attempted to use it the conductor of the defendant company took it up and collected fare. Suit was brought by Morton to recover the value of the book. The Circuit Court, reversing the decision of the Common Pleas, awarded Morton judgment for the amount of his claim, with interest and costs.

The court held that there was nothing in the contract between Morton and the railroad company whereby the latter acquired a title to the ticket because it was in the hands of a third person. The book was purchased by Morton and the title passed from the railroad company when it was sold. The conductor could only refuse to accept the mileage and collect full fare.

The criminal features of the so-called oleomargarine law have been upheld by the Supreme Court of the United States. Three persons were convicted in the courts of the District of Columbia of selling oleomargarine without having it stamped and marked as required by the regulations issued by the commissioner of internal revenue. They applied

to the Supreme Court of the United States for release on writs of *habeas corpus*, on the ground that it was not competent for congress to delegate to the commissioner of internal revenue or to the secretary of the treasury the judicial functions which they exercised in this case. The court holds that it is a revenue law, and that the issue of stamps for the purpose of stamping the oleomargarine is purely an administrative function. The writs of *habeas corpus* were denied, and the petitioners remanded to custody to serve out their sentences.

The ALBANY LAW JOURNAL acknowledges the receipt of a printed copy of the proceedings of the second annual meeting of the Iowa State Bar Association, held at Davenport, Iowa, July 29 and 30, 1896. It makes a pamphlet of 185 pages, and the contents are unusually interesting and valuable, particularly the address of the president, Judge L. G. Kinne, on the "Procedure and Methods of the Courts of Final Resort of the Republic of Mexico, the United States of America, and of the several States and Territories of the Union." The facts and statistics with which the address is filled were obtained at first hand by Judge Kinne with a view of ascertaining, by comparison, how the system of practice and methods of procedure in Iowa could be best improved and simplified, and are of exceptional value.

The propriety and advisability of mortgage tax laws has been much discussed, *pro* and *con*, in the various States of the Union, and opinions widely differ on the subject. The experience of Michigan in this respect is worth noting. Such a law has been on the statute books of the State for a number of years, and a strong effort is now being made, as an outcome of the general dissatisfaction over the operation of the law, to bring about its repeal. The fact is noted that the city of Detroit is practically the only part of the State where any attempt is made to enforce the statute, and even here but a small proportion of the mortgages are taxed — not more than \$5,000,000 out of \$30,000,000. It is also stated, as an argument against the law, and as a reason why it should be repealed, that very few of the large mortgages fail to escape

the tax, the great bulk of those paying ranging from \$500 to \$1,200. It is a comparatively easy matter for the experienced money-loaner to evade the law. His usual method is to negotiate his loans through the banks, or some non-resident whom the law exempts from this taxation. Another peculiarity of the mortgage law is that in most of the cases where these mortgages are taxed it generally amounts to double taxation, the one being the tax assessed on the mortgage, and the other against the full value of the real estate. It is also asserted that as a natural result of the workings of this law foreign or non-resident capital is placed at a decided premium, while home capital is necessarily driven out. A strong effort is being made in the Michigan legislature to repeal the law, and the movement has the support of many of the most influential citizens and newspapers of that State.

#### HORSE RACING.

#### COURT OF APPEALS.

March 2, 1897.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.  
SAMUEL B. LAWRENCE, Respondent, v. JOHN  
FALLON, Warden of the City Prison, etc., Ap-  
pellant.

*Chapter 8, Penal Code, forbidding lotteries—not  
violated—constitutional provision against gamb-  
ling not infringed.*

The racing of horses for stakes or prizes is not a lottery within the meaning of the provisions of chapter 8 of the Penal Code, prohibiting lotteries and the sale of lottery tickets.

The offering of prizes or purses of a definite sum by a racing association, to be awarded to the successful horses in a race, and to be paid out of the general funds of the association, made up in part of entrance fees paid by the owners of the competing horses, is not a violation of the Constitutional provision against gambling (Const., art. 1, sec. 9).

Appeal from an order of the Appellate Division of the Supreme Court in the First Department affirming a final order of the Court of Oyer and Terminer of the City and County of New York, which sustained writs of *habeas corpus* and *certiorari* issued in behalf of the relator and discharged him from the custody of the appellant.

John D. Lindsay and Benjamin Steinhardt for appellant; Joseph S. Auerbach, John M. Bowers and Ellihu Root for relator-respondent.

MARTIN, J.—The relator was arrested upon three distinct criminal charges. One was for a violation

of chapter eight of the Penal Code, forbidding lotteries and the sale of lottery tickets; another, for violating section three hundred and fifty-one of the Penal Code, which relates to pool-selling, book-making and bets and wagers, and the third for an offense under section three hundred and fifty-two of the same act, relating to racing of animals for stakes. When arraigned before the magistrate he waived an examination and was committed to the City Prison. He subsequently sued out a writ of *habeas corpus*, upon the return of which a *certiorari* was granted, and upon the hearing before the Oyer and Terminer he was discharged.

The facts, so far as material, may be briefly stated. The relator was an officer of the Westchester Racing Association, which was organized under chapter 570 of the Laws of 1895. He, together with other officers of the association, announced and advertised the intention of the association to hold a meeting for races on its grounds; and offered purses or premiums to be competed for at a time named. Owners of horses were permitted to enter them for the races by paying an entrance fee, which became the property of the association, was paid into its general treasury and became a part of its general assets. The premiums or stakes offered by the association were for a definite sum, without regard to the amount of entrance fees received, and were payable out of its general funds. The races were advertised, managed and held under the direction of the association and its officers, conducted in the usual way, and governed by the rules generally adopted by racing associations.

The first contention of the appellant is that the races thus held were in direct violation of chapter 8 of the Penal Code, which forbids lotteries and the sale of lottery tickets. That statute defines a lottery as a scheme for the distribution of property by chance, among persons who pay or agree to pay a valuable consideration for the chance. It is obvious from the language of this statute, and the circumstances existing at the time of its passage, that it was not intended to include within its provisions every transaction which involved any degree of chance or uncertainty, but its plain purpose was to prohibit and punish certain well known offences which had existed and been regarded as crimes before the enactment of that law. The offences thus sought to be suppressed have long been known and understood, and are clearly distinguishable from the racing of animals for stakes or prizes. There is certainly a great difference between a contest as to the speed of animals for prizes or premiums contributed by others and a mere lottery, where the controlling, and practically the only, element is that of mere chance alone. A race or other contest is by no means a lottery simply because its result is uncertain, or because it may be affected by

things unforeseen and accidental. When this statute against lotteries was passed the legislature not only defined the meaning of the term, which cannot be fairly said to include a test of speed or endurance of horses for prizes or premiums, but it at the same time passed a statute relating to the racing of horses, which shows that such a contest was not intended to be included among the offences which should be punishable under the statute against lotteries. What constitutes a lottery was considered in *Reilly v. Gray* (77 Hun, 402). The opinion in that case and the authorities there collected show quite satisfactorily that acts like those performed by the relator do not and were not intended to constitute an offence under the statute relating to that subject. We are of the opinion that the courts below properly held that the relator was guilty of no offence under the statute relating to lotteries.

After a careful examination of the record, brief, argument and authorities cited by the learned counsel for the appellant, we fail to find any facts or to discover any principle of law that would justify us in holding that the relator was guilty of either bookmaking or pool-selling. Nor do we find that there was any evidence even tending to show that he was guilty of either of those crimes.

Another question we are asked to determine is whether the races held by the association, of which the relator and his associates were officers, constituted gambling within the provisions of the Constitution of this State. The appellant contends that they did and, consequently, even if authorized by statute, the statute was violative of the provisions of the Constitution, which forbids lotteries or the sale of lottery tickets, pool-selling, bookmaking and every other kind of gambling, and therefore affords no protection or justification to the relator. Chapter 570 of the Laws of 1895 authorizes associations organized under the provisions of that act to hold and conduct meetings for running or trotting races for purses, premiums, prizes or stakes, to be contributed by the corporation or owners of horses engaged in the races, or others who are not participants therein, but forbade any other person than the owners of contesting horses from having any pecuniary interest in such prizes or premiums contested for, or from being entitled to receive any portion thereof after the race was finished, and further provided that the whole of such prize should be awarded according to the conditions of the race. The validity of that statute is challenged and the appellant insists that it is void for the reason that it authorized a species of gambling which was in terms forbidden by the Constitution of the State. As it was conceded in this case that the moneys contributed by the horse owners participating in the races were paid into the general treasury of the association and became, for the time being, a part

of its general assets, subject only to the obligation of the association to pay out of its funds the amount of thirty-five hundred dollars to the owners of the first, second and third horses in the races, the inquiry arises whether the offering or paying of premiums or prizes contributed in that manner constitutes gambling, within the meaning of the constitutional provision referred to. There is a plain and obvious distinction between a race for a prize or premium contributed in that manner, and a race where the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created.

The latter is a race for a mere bet or wager, while the former is for a prize offered by one not a party to the contest. In *Harris v. White* (81 N. Y. 632), Judge Folger fully discussed and quite clearly pointed out the distinction between a race for a prize or premium and a bet or wager. The conclusion reached in that case was that a race for a prize or premium offered by such an association, under circumstances similar to those existing in this case, was not within the condemnation of the law relating to gambling, or illegal gaming. If the doctrine contended for by the appellant is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or State fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them. The decision of this court in *Harris v. White* renders any further discussion of the question unnecessary. We are of the opinion that the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling within the spirit and intent of the constitutional provision under consideration.

Nor can it be held that the relator was guilty of a crime under the provisions of section three hundred and fifty-two of the Penal Code. That section prohibits racing for a stake, bet or reward, except as allowed by special law. That chapter

five hundred and seventy is a special law, within the meaning of that section, we have no doubt. It is manifest that such racing was not intended to be entirely prohibited by this statute, as it plainly indicates that the legislature contemplated the existence or passage of special laws pertaining to races for stakes or reward.

We think the determination of the courts below was correct, and that the judgment of the Appellate Division should be affirmed.

All concur.

### THE CUBAN QUESTION.

#### THE CONFLICT OF AUTHORITY BETWEEN CONGRESS AND THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT.

THIS is the first instance, it seems, where a serious conflict has arisen between two branches of the Federal government in regard to the settlement of a question of foreign affairs. It is also the first instance where the executive department of the government has announced, in advance of definite action, an intention to disregard, or to refuse to execute, a solemn act of the legislative department. Never before in the history of our government has the executive attempted to arrogate to himself power to disannul an act of congress, except on constitutional grounds. Hitherto the power of nullifying an act of congress has been claimed, and exercised exclusively, by the judiciary department of the government.

Having refused for nearly a year to execute or carry into practical effect the will of congress — expressed, it appears by a two-thirds majority — it is not unnatural, perhaps, that the executive department should attempt to justify its action in the matter, and to announce, in advance of further legislation by congress, the line of policy it purposes to adhere to in dealing with this matter in the future.

The question of paramount authority in dealing with the Cuban question is one of grave importance to the country at large, and, perhaps, to other nations, and a favorable opportunity to settle it definitely, and in a peaceful manner, should be welcomed by all parties to the controversy, as well as by the people in general.

Our system of government is known as a representative democracy; the will of the people is the supreme law. The will of the people is greater than the Constitution or the laws. They can make or unmake a constitution or laws at pleasure. It is the constant, permissive consent of the people which gives the Constitution an effective force and preserves its vitality. Just as soon as the people withdraw their consent to its further existence, the Con-

stitution becomes, *eo facto*, a nullity and of no binding force. So with the delegation of powers to representatives — just as soon as the people decide to withdraw such powers, the authority of the representatives cease.

The source of all power, and the animus to execute such power, vests in the people of this country. The people may demand the enactment of a law, and yet negative it before it is executed, or, they may nullify, limit the effect of, or suspend its further operation. The people may require the performance of some act that has not been defined or embraced within the scope of the Constitution, or of jurisprudence, and where no provision has been expressly or impliedly made for the execution of the act in question. That is a high prerogative of a sovereign people, not yet called into active existence. It is an inherent, embryonic attribute of sovereignty not yet ripened into mature form, or invested with a potential existence. It is a sacred and inalienable privilege of a free and independent people to call into existence or evolve a right at their pleasure, and to give effective force to that right in such a manner, and with such reservations and restrictions, as they may deem proper. Such a right may be a mere creature of the mind, intangible and indefinite; it may exist in an embryonic state for a day, a month, or a year, but when the forces of the mind bring it to maturity and give it an effective vitality, it ripens into potential existence and is capable of exerting an influence in the administration of human affairs.

The people of the United States are invested with plenary governmental powers. They have delegated a certain measure of that power to representatives to be selected by them, with a right to revoke the authority of the representatives at pleasure. Such powers as have been delegated to representatives, have been codified in the shape of a Constitution, and laws necessary to give that instrument practical effect — with a reservation in the people of a right to amend, modify, or abrogate the Constitution and laws at pleasure. But such powers as have not been by the people delegated, either expressly or impliedly, to representatives to be chosen by them, are retained by the people as residuary or reserved powers, which may be exercised by the people at their will, or called into definite existence to meet new exigencies that from time to time arise.

Now the people of this country, by virtue of their sovereignty, exercise, or claim to exercise, the right of supremacy over the North American continent. With the process of time and the progress of events in Cuba, the people of this country have decided that the present condition of affairs on that island should cease, and that the inhabitants of the island are entitled to be recognized as belligerents,

or as free and independent. Our people have decided that Cuba should be independent of Spain, and their will in the matter is absolute and admits of no alternative but to obey it. In the exercise of their sovereign powers the people have called into existence a certain right or law, and they have called upon their representatives in congress to reduce that right to a definite form and put it into active, potential existence, in accordance with the usual mode of procedure in such cases. It is not the duty of congress to question the justice or wisdom of the people's wishes in this matter, but to carry such wishes into effect, leaving the responsibility with the people. The power of the people being supreme, it follows that the power of their representatives is paramount to that of any other authority. The executive department of the government is required not to originate measures or to interpret them, but to execute them, subject to constitutional limitations.

The remedy which the people demand in respect to the Cuban question requires the exercise of solemn legislative powers, which congress alone has authority to exercise. This is not a question of procedure, or one requiring the exercise of the discretionary powers of an executive, but one requiring the exercise of the original jurisdiction of the law-making power of the land. Congress alone can originate laws. In this respect the executive is impotent and can exercise but a supervisory right. The recognition of belligerent rights or of independence, acts fraught with grave consequences to this country, require as an essential prerequisite the enactment of specific legislation by congress, and of such further and supplemental legislation as may be necessary to give such recognition practical effect and to provide for exigencies which the recognition of belligerent rights or of independence may occasion. Hence, it is obvious that congress alone is empowered to take the initiative in this matter and to exert its constitutional functions in a decisive and effective manner. The people demand such legislation as will settle the Cuban question, and congress alone can give full and effective expression of the popular will.

The Cuban question is one of an extra-territorial character, for the settlement of which our Constitution or laws have made no adequate provision. To a certain extent the principles of international law become co-ordinate with our laws in prescribing the mode of settlement. But neither the public laws of this country nor the law of nations define with any degree of exactness a rule of action fully applicable to this case. Hence, an exigency arises, an extraordinary case which requires the exercise of legislative powers. Congress must originate laws to meet this exigency and laws that will

conform to both the spirit of our Constitution and the law of nations. The executive alone could not perform so grave and important a duty; indeed, it would be a supreme folly to permit him to attempt it. It is a case requiring for its proper solution the combined wisdom of many minds.

Our course of duty in this Cuban matter is made the plainer by studying the letter and spirit of the Constitution, and the mode of procedure in analogous cases. The Constitution is remarkable for the powers it does not, rather than the powers it does, confer. Among the powers expressly conferred on congress by this instrument are: Power to define and punish piracies; to declare war; to make treaties; to raise troops; to provide a navy; to regulate land and naval forces. Article 1, section 8, subdivision 18, authorizes congress: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

A fair construction of the provisions of the Constitution just referred to shows that in all matters arising extra-territorially, especially, it was the intention of the framers that congress should be vested with full powers to act decisively. Under the section quoted above, it seems very clear that congress has exclusive power to determine the proper mode of settlement of all questions like that raised by the Cuban insurrection. This section confers upon congress full power to act decisively in all cases where no provision has been made for the settlement of any particular question. It is the delegation of reserved powers, or of all powers not defined, or called into existence to meet new cases or important exigencies. Congress is the custodian of that body of reserved powers which appertain to the people as an inseparable attribute of sovereignty.

The power conferred by the Constitution upon congress implies power to act effectively; otherwise congress would be a mere advisory council to the executive, and could exercise only ministerial, rather than creative or mandatory, functions. In dealing with foreign affairs, it is obvious from the powers expressly or impliedly conferred upon congress by the Constitution, that the jurisdiction of congress in all cases must be original and exclusive. This is shown by the fact that congress alone has power to effect a complete settlement of a question like the one at issue. The recognition of Cuban independence without the authority of congress would not be a valid public act, nor binding on this country, nor would such an act confer upon the Cubans a right to enjoy the privileges accorded by this country to other nations. The executive is not authorized to grant belligerent rights, or to

recognize independence, in any case, without the consent of congress. Congress must take the initiative in all such matters. The rule which requires it to act before belligerent rights or independence can be recognized, shows that congress is invested with original and exclusive jurisdiction in such matters. If the jurisdiction of the executive is exclusive of that of congress, why is congress called upon to act at all in the matter? Why, then, is congress required to exercise its powers of making treaties, confirming envoys, or of raising troops, or equipping vessels? If the executive has power to prevent congress from recognizing the independence of Cuba, where is that power derived from? It would be utterly absurd to assert that the executive has exclusive power to perform an act which congress alone could render effective by appropriate legislation. But such is not the case. It stands to reason that, if congress alone can render an act effective, it should have authority to determine the wisdom of the act *ad limine*. It would be a stupendous piece of folly to permit the executive to perform an act which might bring on a war, when congress alone has power to declare war, or to carry it on. The provision which invests congress with the power to declare war, or to furnish the means to prosecute a war, proves conclusively that congress has paramount authority to act finally and decisively in all cases at home or abroad. It is the essence of good policy that the department of the government which is charged with the duty of declaring and conducting a war, should be able to exercise its powers and judgment to prevent a war. To give the executive the sole power to grant belligerent rights, or to recognize independence, might, in effect, confer upon the executive the power to declare war, or, what might amount to the same thing, power to act in such a manner as to precipitate a war. The recognition of Cuban independence by this country might bring on a declaration of war by Spain. Hence, if the executive alone could recognize the independence of Cuba, he might thus be able, by a circuitous method, to declare war with Spain.

In the absence of well-defined and authoritative principles governing the Cuban question, why should it not be controlled by the same rules which regulate the administration of domestic affairs? It is a great public question of vital importance to this country, and good policy demands that, in case of doubt as to the proper remedy to be applied, we should look for guidance to the organic law of the land, the Constitution. Now, what is there in this grave question which prevents its proper settlement by the well-defined principles that govern domestic questions of a public character? Why should congress be deprived of jurisdiction in this matter?

Why should we dispense with the wisdom of congress in dealing with so important a problem, and leave its solution entirely to the discretion of the executive?

If we look to the Constitution we shall find the only safe and conservative mode of procedure in dealing with the Cuban question. A fair interpretation of that instrument renders our duty very clear and explicit. The best index of the intention of the framers of the Constitution, and of the people who accepted it, is to be found in the practical effect given it from its adoption, and in operation for a century. Under the Constitution congress may pass a bill over the executive veto, and such an act will thus acquire the force of law, and the executive must abide it unless the same is nullified by the judiciary. That the authority of congress is paramount is illustrated by this constitutional provision which gives to congress the right to oust the executive of all jurisdiction over certain matters. When a measure is enacted by congress the executive must either approve or veto it. To that extent his jurisdiction of the subject-matter is concurrent with that of congress. If he approves the measure, it becomes a law; if he vetoes it, then it is negatived. But when the executive approves or vetoes a measure, his power over the matter is exhausted. Then, if congress passes the bill over a veto, the jurisdiction of the executive over the matter is destroyed, and, unless the judiciary department nullifies the act, the executive must enforce it. This distribution of constitutional powers shows, beyond a shadow of doubt, that the power of congress is paramount, and there can be no valid distinction between the powers granted to either department in respect to the regulation of foreign or domestic affairs.

In regulating domestic affairs the Constitution is plain and specific, but in dealing with foreign affairs the question of authority, or of the mode of executing it, is often doubtful. Yet it is difficult to see why a different rule should prevail in the regulation of foreign than in domestic matters. The Constitution, Art 1, sec. 7, subd. 3, enacts: "Every order, resolution or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill." Now, suppose congress passes a joint resolution recognizing the independence of Cuba, over the executive veto. Could the executive, in such an event, nullify the action of congress? Could he do in respect to a foreign question what he is



powerless to do in regard to a domestic matter? Because the question is of a foreign character, it is difficult to see how the executive can nullify or set at naught the authority of congress. If he could do so, where is the line of demarcation between the jurisdiction of the executive and congress in respect to the regulation of foreign affairs? Has the executive the powers of an absolute monarch the moment he is called upon to decide a question of foreign affairs?

But the weight of authority fully sustains our contention that the authority of congress is paramount to that of the executive in the administration of affairs, both domestic and foreign. No stronger proof of this could be adduced than the constitutional provision giving to congress power to enact a measure over the executive veto. Such authority being conferred upon congress in the regulation of domestic affairs, it follows, *a fortiori*, that congress possesses such authority in dealing with questions beyond the territorial limits of this country, where dangers to the republic are more likely to occur, and there is a corresponding need of greater caution. The paramount authority of congress, over foreign or domestic affairs, is, in so far as this country is concerned, paramount in all parts of the earth where the flag of this country is respected.

It is obvious from the distribution of powers to the respective branches of the government, that the authority of congress must be paramount to that of the executive. The express limitations upon the powers of the executive clearly shows this. Suppose, for instance, that the executive should recognize the independence of Cuba. His act would be of no binding force, simply because he has no authority to give it practical effect. A recognition of Cuban independence by this government, under authority of congress, would give to that island the status of a sovereign state, and entitle it, at least in so far as this country is concerned, to exercise all the rights and powers of an independent state, and to demand a recognition of its acts by our government. But the executive alone could not give full effect to Cuban independence. He could not, without the consent of congress, make a treaty with the new state, nor send to it a duly accredited minister or counsel; he could not obtain means to raise troops or equip vessels to aid in protecting the rights of the new state, or the rights of our own citizens, against the aggressions of foreign foes. In fact, the recognition of Cuban independence by the executive alone, would be a mere useless form, utterly lacking the solemn ratification and effective force which the law-making power of this country only could give, or the essential rights and mutual obligations which such

ratification could confer. A recognition of Cuban independence, to be of service to struggling patriots, should be made effective — and that effect congress alone has plenary power to give.

Another feature of the Constitution shows that Congress has paramount authority. Congress may elect, impeach or otherwise disqualify an executive. It formally determines the election of the executive, and, in doubtful cases, adjudicates the question of a disputed election, as in the case of the Electoral Commission in 1876. Likewise, congress might act in case of an interregnum. Conversely, the executive can perform no such acts, or exercise any such powers, in respect to congress.

In considering this question of the paramount authority of congress or the executive, it is instructive to note that Rome, the greatest republic of antiquity, acquired the mastery of the world during the period when the power of the senate was paramount; and that as the power of the senate became weakened, the republic became undermined, and finally the empire supplanted the republic, and the same causes which undermined the republic eventually destroyed the nation itself.

In this country by a custom, recognized, perhaps, from its immemorial usage as a right, the power of granting belligerent rights to insurgents, or of recognizing independence, has been exercised by the executive after proper proceedings by congress. But this is a mere precedent, and it acquires no binding force as against the will of the people, expressed through their representatives in congress. The will of the people is the supreme law; that is an essential and inseparable attribute of sovereignty. General power that is undefined, or not formulated as law, remains in the people as a part of the residuary legacy acquired by independence. New elements of power, defined or formulated to meet the exigencies of particular cases, spring into existence at the will of the people. Where laws are silent in regard to a given subject, the will of the people must be accepted as law. The will of the people is that the independence of Cuba should be declared, and their will, being the supreme law of the land, must be decisive of all questions. Subtlety in devising schemes, or of discovering precedents, to defeat the popular will, can avail nothing. Congress must heed the commands of the people, leaving the latter to assume the responsibility for the acts of the former. The will of the people cannot be ignored.

The claim that the executive is empowered to act in respect to the Cuban question solely in his discretion, and without the consent of congress, is monstrous, and displays an utter lack of conception of the true spirit of our free institutions. It is utterly repugnant to the vital principles of civil

government, a menace to the Constitution, and indicates a dangerous tendency toward absolutism.

If the executive could recognize independence, he might also declare a war to compel other nations to respect his act. He might also raise troops, or equip ships, to protect our interests in Cuba or in the adjacent waters. But the Constitution expressly delegates the exercise of such powers to congress. If the executive alone can recognize Cuban independence, his act might involve us in a war which he would be powerless to cope with alone. He should be permitted to perform no act which he is unable to render effective, or to shield us from the consequences. Congress holds both the sword and the purse. And in order to prevent the rash use of these powerful agents, and to curb the power of the executive, the Constitution has wisely provided that all revenue bills shall originate in the lower house of congress, which is in closer touch with, and more readily swayed by, the popular will.

Conceding, for the sake of argument, that the Constitution is silent regarding the mode of settling the Cuban question, what is there in that case which justifies us in departing from the safe and conservative course—venerated by a century of successful operation—usually pursued in administering domestic affairs? This Cuban question is one of long standing; it is a deep seated, and insidious ulcer that has been kept in a violent state of eruption for half a century. This question is one of vital importance to this country because it involves the greater and more serious question of our supremacy on the American continent.

Our Constitution has wisely ordained a mode of procedure for the regulation of domestic affairs, and provided appropriate checks and balances in the distribution of the functions of government. The safe course of procedure adopted for the regulation of domestic affairs should be adhered to in the broader domain of foreign affairs, where the welfare of the State is concerned, where most important public interests are at stake, where the greatest caution is necessary to prevent serious complications, where even the slightest error might precipitate a terrible war with all its horrors, where the cleverest tact is required to maintain peace and comity between nations, every reason of public policy, every principle of justice and equity imperatively requires that the executive should, in the exercise of his functions, be restrained by the nature, wisdom and moderation of congress. Where powers are not defined to meet grave exigencies, the more urgent is the necessity of congressional action. The greater the danger to the State, the greater the need of wisdom, moderation, and right action, the best safeguards of the nation.

"In the multitude of counselors there is safety."

GEORGE A. BENHAM,  
of the Chicago Bar.

#### RESULTS OF MINORITY VOTING IN ILLINOIS.

IN a recent number of the LAW JOURNAL there appeared a report by the Honorable John F. Dillon as to the constitutionality of a system providing for minority voting. The author quotes the provision in the Constitution of Illinois (1870) which I reproduce. It reads:

"The house of representatives shall consist of three times the number of the members of the senate. Three representatives shall be elected in each senatorial district. In all elections of representatives aforesaid each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same or equal parts thereof, among the candidates as he shall see fit; and the candidate highest in votes shall be declared elected."

I have not read the opinions of correspondents collected by Mr. Forney in his work on Political Reform, referred to in the report, but assume they are favorable in general, as stated. I should not set up my opinion against that of any one. But upon this subject I cannot remain silent, and I do not hesitate to express my convictions for the reasons are given, and any one interested can make up his mind as to their soundness. The report in question but incidentally touches upon the question of the *desirability* of such a provision, but I wish to do what I can to correct any impression that this provision of our Illinois Constitution is worthy of adoption elsewhere.

The provision is generally credited to Mr. Medill, of the Chicago *Tribune*, out of respect for whom some attacks upon it have been withheld. It has been in force in Illinois for twenty-five years, and under it, I believe, thirteen legislatures have been elected. It has been in force then in the aggregate in 663 instances and I am credibly informed that in but four or five instances, all three representatives elected from any district have been of the same political faith; so that as far as securing minority representation is concerned, the law has been almost a complete success. Here the benefit of the law ends in my opinion.

Illinois is divided into fifty-one senatorial districts. Each of these districts elects one senator and three representatives in the legislature. In voting for the latter, the voter may cast three votes for one candidate; one and one-half votes for each of two candidates; or one vote for each of three candidates. The three candidates polling the largest vote are elected.

Frequently the minority party in the district nominates one candidate and the majority party two. In such case an election is wholly unnecessary unless there be a fourth candidate. This is one of the objections to the system. When a political party can name officers instead of candidates, the

people suffer. In this way seats have been secured in our legislature by those who never could have been elected to any office by a majority election of their constituents. And in such an event the people have little redress, because if they nominate an independent candidate as a protest to an objectionable party nomination it will be likely to happen (and has happened), that the independent candidate defeats some *worthy* opponent, for the reason that the better element cast their votes for the independent candidate while the rank and file of the party vote for the candidate who is attacked, and thus the unoffending and unobjectionable regular party candidate is defeated; moreover, in large communities, where the "machine" is so powerful, and a legislative nomination is not much sought, some venal but active party worker is often "paid off" with such a nomination, and when such a candidate is attacked the party machinery earnestly supports him to preserve its prestige or punish its enemies. In this way the worse of the two party candidates is, of course, elected, no matter which of the other candidates may succeed.

Generally, however, each party nominates two candidates. It is plain that one of the four must be defeated. As a rule, it is equally plain at the opening of the canvass that the unsuccessful candidate will be one of the minority party. We are thus confronted with the spectacle of these two candidates of the minority party, nominated by the same convention, and each bound in honor to take no more than his proportion of his party support, *i. e.*, one and one-half votes, tempted by the instinct of self-preservation to break his implied pledge and secure, as far as possible, his own election by the slaughter of his colleague. The temptation may not be strong at first, but (when the most mischief is done), in the last days of the canvass, at the time when rumors of treachery are rife, when the fear of defeat becomes great, when some attack upon the character is made or some sudden political emergency arises, there are very few men so honorable that they will not, at least tacitly, consent to substitute success for honor. In this situation it is easily seen that there is a premium upon dishonesty and usually the more venal of the two minority candidates is elected. If the greatest prayer is: "Lead me not into temptation," then this law must be classed with the greatest legislative evils. But this is not all. It happens not infrequently that one of the candidates of the majority party becomes frightened and protects himself at the expense of his colleague. In every session of the legislature we find a member with two thousand votes to spare, enjoying full privileges, while his co-nominee, lacking less than a hundred votes, remains at home. Such an instance gave

Illinois a Democratic United States senator when the State was largely Republican.

The nomination of three candidates by one political party is not uncommon, and, as already stated, in but a few instances, resulted in the election of all three, owing, of course, to the ability of the candidates to withstand the immense temptations to which they were subjected.

Another objection to the system is that it results at times, not in minor *representation* but minority *control*, which is an anomaly in a republic, and it often makes the legislature so "close" as to render it difficult to transact the business of the State.

The main objections to the system are:

1. It tends to place in the hands of political parties the naming of candidates elected without a contest before the people.

2. It promotes treachery between candidates who are bound by the highest principles to be true to each other.

3. It results in defeating the more worthy candidate.

4. It makes it difficult for the people to defeat an objectionable candidate.

5. It sometimes results in minority control.

6. By multiplying by three the area of the representative district, it to that extent removes the representative from the people.

7. The example which it affords lowers the tone of morals in political life.

I trust New York will not follow our bad example. If we ever have another constitutional convention, I feel certain the people will rid themselves of the system.

ROBERT McMURDY.

CHICAGO, Ill., March 8, 1897.

#### ANTICIPATION OR ALIENATION.

WHAT is the difference (if any) between restraining a married woman from alienating her separate property and restraining her from anticipating it? Vice-Chancellor Bacon once said that he saw none; and Lord Justice Kay said that he agreed with him. It has been argued that the doctrine only applies to a life interest in settled personality or a life estate in the rents of real property. But its object was to give to married women the enjoyment of property independently of their husbands; and, it being obvious that the only way of doing this is to restrain them during coverture from disposing of the property, the doctrine applies as much to a fee as to a life estate. That has been the settled law ever since *Tullett v. Armstrong* was decided. In *Baggett v. Meux*, a few years afterwards, it was held that, where there was an absolute gift of a house to a married woman, and a subsequent

direction in the will that she should not sell, mortgage, or encumber the property, but should have the same for her separate use, she took the house absolutely, but could not anticipate the income during coverture. Subsequent cases give rise to the contention that where a fund given absolutely to a married woman was not an income bearing fund the Court would order it to be paid to her, although she was expressly restrained from anticipation; but that it was otherwise where the fund produced income, or where the restriction was expressed to be not merely a restraint on anticipation, but on alienation. The point remained a doubtful one till 1884, when the case of *In re Bown* came before the Court of Appeal. There it was held that it was quite immaterial whether the fund was represented by cash or by investments; and that the question really depended upon the intention of the testator as declared by his will, whether the money should be paid to the married woman, or whether she should only receive the income from time to time. In the recent case of *In re Fearon*, before Mr. Justice Kekewich a testatrix bequeathed property upon trust for her brother for life, and after his death for her niece, with a direction that it should be paid to the separate use of the niece free from the control of any present or future husband without power of anticipation. The brother being dead, the niece was held entitled to immediate payment of the *corpus*. The words restraining anticipation could be construed as applicable only to the interval between the death of the testatrix and that of the tenant-for-life. In other words, the legatee could not assign or charge the property as long as her interest remained reversionary; but there was nothing in the will to prevent her receiving it when it fell into possession.—*London Law Journal*.

### Legal Notes of Pertinence.

More than fifty bills to restrict the powers of corporations are pending in the Indiana legislature.

Patent office reports are, as a rule, not very interesting, but that for 1895, which has just been issued, contains some matter which is really instructive. It shows, for instance, that American inventive genius is again enjoying a period of great activity after a long interval of depression. The number of patents granted during the year was 22,057, or more than those granted in any year since 1890, when the record touched high-water mark at 26,292. From this latter year there was a steady decline every year until 1894, when the number was only 20,867. Since then the upward movement has been constant. Of the patents granted last year only fifty were to women. The greatest patentee

on the American record is Edison, with 711 inventions to his credit, and next to him is Elihu Thomson, with 394, the appliances of both inventors being almost entirely electrical in character.

A Georgia judge, emulating the example of Chicago Divorce Courts, concluded a murder trial in less than an hour recently. A jury was impaneled within twenty minutes, the evidence closed in fifteen, verdict of guilty at once returned and the judge pronounced sentence of death upon the accused, all of which occupied fifty-five minutes. While the law's delays are notorious and oppressive, and oftentimes work the denial of justice, yet such unseemly despatch as marked the proceedings in the Georgia court can but serve to perpetrate the rankest injustice.

An interesting and what will probably be a popular measure has been introduced in the Minnesota Legislature bearing the title "An act to prevent the fostering of crime and morbid sentimentality." It provides that any person who shall give or offer to give or send flowers or any other token of sympathy or admiration to a person under arrest charged with a crime amounting to a felony, or under or awaiting sentence for a crime amounting to a felony, shall, unless such person stands in the relation of husband, wife, child, parent, brother or sister to such criminal accused, or is an ordained minister of the gospel, be guilty of a misdemeanor, and on conviction thereof be punished by imprisonment in the county jail for a term of not less than fifteen nor more than ninety days, or by a fine of not less than \$25 nor more than \$100.

An Indiana barber, who is a member of the Legislature of that State, has prepared a bill levying a tax of \$10 per year on every man wearing whiskers. It also provides a tax on goatees. Mustaches are freed from all taxation. Well, why not? If it is the function of business by levying discriminating taxes why shouldn't the tonsorial artists be permitted to share in the alleged benefits of the scheme? Give the barbers a chance!—*Boston Herald*.

The sheriff of a county in another state recently created a sensation by establishing the rule that the prisoners in the jail, about 200 in number, should not be allowed to read the daily newspapers. He explained his position as follows: The prisoners will be allowed magazines, papers and periodicals that do not contain the news of the day. I wish prisoners who leave here never to return, and also wish them to realize that they have been in jail, not in a seminary or Sunday school. They can have all of the reading that they desire outside of the newspapers. The institution is filled with books and magazines, and no prisoner who can read has any excuse for not having enough to employ his mind at all times.

Angello S. Cello, sued as the administrator of the estate of Henry Maitak; the latter who was five years old, died on January 20, 1893, from the result of morphine administered unintentionally. Dr. Bell prescribed quinine; the prescription was filled at the drug store of A. W. Brewerton, 492 Fullerton avenue, and morphine was substituted for quinine, by mistake of the prescription clerk. A jury in Judge Goggin's court rendered a verdict for \$5,000 against Brewerton, and Monteil, the prescription clerk, who put up the prescription.—*Chicago Legal News*.

In May, 1895, Phebe Steenberg, then over eighty years old, having a few days previously been severely injured, called for her bankbook from her sister's custody and gave it to an old friend, saying it was "Amelia's property," Amelia being a stepdaughter and also a niece. Shortly thereafter she sent for the book and said to her friend: "I want you as a witness to show that this bankbook belongs to Amelia, and I give it to her." Then she took up the bankbook and handed it to Amelia, and said: "Let Mrs. Filkins take it back with her until called for by Amelia." Then the old lady said she was confident she would not be here very long. Mrs. Steenberg had made a will about a year previously, in which she gave the money represented by the bankbook to her sister. In a suit by Amelia S. Callanan, the stepdaughter, against Margaret C. Clement, the sister, to recover the amount, Justice McLoughlin, in the Saratoga Special Term of the Supreme Court, gave judgment for the plaintiff, holding that what took place was a good delivery to Amelia, and that there was a valid gift *causa mortis*. "Every element," he says, "necessary to establish such a gift is here present—contemplation of death, a clearly expressed intent to give *in presenti*, delivery of the subject matter, and death of donor without revocation of the gift."

### Humors of the Law.

Magistrate—What is your nationality?

Witness—Well, sir, my father was Irish, my mother was an American, and I was born in a Dutch brig sailing under French colors in Spanish waters.

Magistrate—That'll do, my man; you can stand down.

A witty answer.—Judge B—fell down a flight of stairs, recording his passage in a bump on every stair, until he reached the bottom.

A bailiff ran to his assistance, and, raising him up, said:

"I hope your honor is not hurt?"

"No," said the judge, sternly, "my honor is not hurt, but my head is."

### Notes of Recent American Decisions.

INSURANCE — VALUED POLICY LAW. — Revised Statutes, 1879, article 2971, which provides that a fire insurance policy, in case of a total loss, shall be held to be a liquidated demand against the company for the full amount of such policy, "provided that the provisions of this article shall not apply to personal property," applies to a house, erected by the owner on leased land. (*Orient Ins. Co. v. Parlin & Orendorff Co.* [Tex.], 38 S. W. Rep. 60.)

LANDLORD AND TENANT — CONSTRUCTION OF LEASE.—Under a lease of a building at a certain rent, and providing that until the lessor should cause the building to be heated with steam the rent should be another smaller sum, the lessor is not bound to furnish steam heat except as a condition precedent to his right to the higher rent. (*Gatch v. Garretson* [Iowa], 69 N. W. Rep. 550.)

MALICIOUS PROSECUTION — PROBABLE CAUSE.—An honest, though mistaken, belief in the truth of the charge made in a criminal complaint, is evidence of probable cause. (*Goldstein v. Foulkes* [R. I.], 36 Atl. Rep. 9.)

MORTGAGES — EXTENSION OF PAYMENT.—An extension of time, for a consideration, to pay one of two notes secured by a mortgage, does not preclude the right to foreclose for the non-payment of interest, where the mortgage provides that interest should be paid on each note annually, and that the whole debt should become due on default in the payment of any installment of interest. (*Germond v. Hermosa Ice Co.* [S. Dak.], 69 N. W. Rep. 578.)

PRINCIPAL AND AGENT — CONTRACT.—An agent for the sale of goods of a manufacturing company, under a written contract by which he agreed to indorse all notes taken from customers, is not bound to indorse a note taken for goods sold by a general agent of the company over his protest, and after his statement that he would not indorse the note, although, after the sale was made, he delivered the goods sold, and took the note therefor, the same as other customer's notes, but refused to indorse it. (*Springfield Fertilizer Co. v. Tompkins* [Ind.], 45 N. E. Rep. 615.)

REAL ESTATE AGENT — COMMISSIONS.—Plaintiff, a real estate broker, knowing defendant had property for sale, said to him that he had a "customer," and asked the price. At a second interview he took defendant to the house of the proposed purchaser and introduced him to defendant, saying, "This is my customer." No sale was then made. Defendant afterwards effected a sale to such person without the knowledge of plaintiff: Held, there was no implied contract by defendant to pay any commission to plaintiff. (*Weinhouse v. Cronin* [Conn.], 36 Atl. Rep. 45.)

**Notes of Recent English Cases.**

**BILL OF EXCHANGE — CHECKS PAYABLE TO "FICTITIOUS OR NON-EXISTING PERSONS" — FORGED INDORSEMENT — FRAUD — NEGLIGENCE — DUTY TO HOLDER.** — By a system of fraud extending over eight years the appellants' clerk obtained checks drawn by the appellants to the order of a non-existing person for work never executed and for goods never supplied. These checks he stole, and indorsed in the name of a non-existing payee, and paid them to the respondents, pawnbrokers, who gave value for them, partly in money, partly in goods, at intervals during the whole period of eight years. All the checks were honored by the appellants' bankers. The appellants sought to recover the proceeds of these checks from the respondents as money paid under a mistake of fact. *Held*, that the appellants were not entitled to recover.

Their Lordships (Lord Halsbury, L.C., Lord Macnaghten, Lord Shand, and Lord Davey) affirmed the decision of the Court of Appeals (64 Law J. Rep. Q. B. 627; L. R. [1895] 2 Q. B. 707), and dismissed the appeal with costs. (Cluttons, appellants, v. Attenborough & Sons, respondents, 31 L. J.)

**LIBEL — PRIVILEGED COMMUNICATION.** — The agent of an insurance company resigned, and the secretary then sent out a circular to customers who had insured through that agent saying, "the west end office of this company has been opened at A. street under B., and the agency of N. at C. street has been closed by the directors." N. sued for libel. *Held*, that the circular was not a libel, for the ordinary and natural meaning of the words in it did not impute anything discreditable to N.; and that, assuming the circular to be defamatory, it was a privileged communication, and would not be actionable without actual malice. (Nevill v. Fine Arts and General Ins. Co., Limited, W. N. 171; 103 L. T. 131; House of Lords, affirming, 72 L. T. Rep. 525.)

**WRITTEN AGREEMENT — PAROL EVIDENCE OF CONDITION PRECEDENT.** — Parol evidence can always be given to show that a signed document, which appears to be a concluded contract, is not so in fact, by reason of a condition precedent which has never been complied with. (See *Pym v. Campbell* in *Anson's Contracts* (8th edition), at 260, 261.)

H. employed a house-agent to find a tenant for his house. The agent wrote H. that there was a *bona fide* offer. H. arranged that the offeror should call on his solicitor. P. did so call, and was told he must satisfy H. as to his responsibility, and signed an agreement. The solicitor sent the agreement on to H., who also signed it. Then H. and P.'s brother met, and H. stipulated that A. and B. should become guarantors for the rent, and handed the agreement to his solicitor with instructions not

to complete until A. and B. signed as security. A. and B. did not sign. P. sued for specific performance. Action dismissed. (*Pattle v. Hornbrook* 102 L. T. Rep.)

**Communications.**

AS TO THE REGISTRATION OF LAWYERS.

To the Editor of the Albany Law Journal:

Referring to the pending bill in the New York assembly for the registration of lawyers, No. 293, I beg leave to say that while I am fully in accord with some such action, I respectfully submit that some changes in phraseology and substance should be made in the bill before its final passage.

The title should be "An act for the registration of all persons now or hereafter duly licensed or admitted to practice law or act as attorneys and counselors at law in any of the courts of this State, or otherwise," so that it should be made to apply to all courts and persons claiming, pretending or holding themselves out as lawyers.

The question is one of importance to all the good people of the entire State, and something of the kind would be of benefit to all suitors and a protection to the general public, and ought to commend itself to the judiciary and the profession generally.

There is no apparent or valid reason why such a law in its action outside of New York and Kings counties should only apply to courts of record, and in those counties to all courts. If the proposed act in its present shape should be adopted, a grave question might arise as to whether it would not contravene the Constitution as special legislation, or at least be obnoxious as class legislation. To make the law effective and carry out the object and purpose for which it is designed, all complications should be avoided; it should be general and apply to all judicial tribunals and quasi lawyers, as well as *bona fide* lawyers and courts of record throughout the State.

Section 2 should be in substance as follows, to wit:

"Every person who has heretofore been, or hereafter may be, duly licensed and admitted as provided by law and the rules of court, as an attorney, or attorney and counselor at law, in this State, or who shall hold himself out or act as such, shall subscribe, take and file the oath, affirmation or affidavit as provided in section 1 of this act, together with a certified copy of the order of admission, and the date of the license attached, before he begins or shall be entitled to act, advise, practice or hold himself out as an attorney, or attorney and counselor at law, or appear in any court in this State as such in any action, matter or proceeding therein, or before any referee, either personally or in connection with others. And any person who

shall neglect or fail to comply with such provision shall be guilty of a misdemeanor. And any person who shall make or take any false or fraudulent statement in connection with such oath, affirmation, affidavit or certificate, or in the procuring, making or filing of the same or any part thereof, directly or indirectly, shall be deemed guilty of perjury and punished accordingly."

Section 1 should be so changed as to eliminate from the oath, affirmation or affidavit provided for, the words, "natural born," and, "if naturalized, state when and where." So that it will read: "I am a citizen of the United States, and now reside at . . ." There should also, before final adoption, be added a section, or form a part of some existing section, in substance, as follows, to wit:

Sec. 3. "*Every person* not duly admitted and licensed as an attorney or attorney and counselor at law in this State, as provided by law and the rules of court, who has neglected or failed to subscribe, take and file the oath, affirmation and affidavit, with the certificate attached as aforesaid, who shall attempt to practice, or hold himself out as an attorney or attorney and counselor at law, or appear, or offer to appear, as such for another in any action, suit or proceeding in any court in this State, or before any referee, or who shall accept, receive, or offer to accept or receive, any fee, compensation or reward, directly or indirectly, for advice or services as an attorney or attorney and counselor at law for another, shall be deemed guilty of a misdemeanor.

"*Provided*, that nothing in this act shall be intended or so construed as to prevent any court of record from granting an order for a regularly admitted and licensed non-resident attorney as a professional courtesy to appear and act as associate attorney or counsel in any action or proceeding pending or on trial or argued in any of the courts of this State or before any referee, in which he is professionally engaged. And,

"*Provided* further, that nothing in this act contained shall be so construed as to prohibit or prevent any regularly and duly admitted and licensed attorney in this State who has complied with the requirements of this act from deputing and having any of his regularly employed clerks from appearing, managing or attending to any of his business, actions, suits or proceedings pending in any of said courts or before any referee on his behalf."

This article is not intended or designed for the purpose of criticism. No doubt some such legislative action is demanded and would be approved by an intelligent and enlightened public sentiment, but there should be left no complications or room for abstruse construction. Some simple changes of expression or phraseology in the pending act would make it effective to reach existing evils. There is

no good purpose to be subserved as to citizenship as specified in the oath or affidavit referred to in section 1, and it should be omitted. The word "any" before the word "attorney" in the third line of section 2, is evidently an error and intended for, "an;" other changes will suggest themselves upon careful inspection. By the addition of some such provisions as presented in the proposed section 3, herewith submitted, unnecessary complications would be avoided and obviate a question of construction, for instance, what is, or is meant by "*practice*?"

Respectfully submitted,

SAMUEL ASHTON.

529 Temple Court, N. Y. City.

### New Books and New Editions.

HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS, by Wm. L. Clark, Jr., instructor of law in the Catholic University of America, and author of Hornbooks on "Criminal Law," "Criminal Procedure," and "Contracts." St. Paul, Minn. West Publishing Co., 1897.

The present volume, one of the well-known Hornbook series, treats of a subject in which many difficulties and great conflict in decisions are to be met with. The unsettled points have received special and careful attention. The entire work has been written from the cases themselves, the authorities have been selected with care, and none have been cited without personal examination. In order to keep within the limits of a one-volume handbook, the author has been compelled to confine himself to the elucidation of the rules and principles of law applicable to corporations generally, and has not been able to deal with corporation law in its application to particular corporations. In design, arrangement, definitions, citations and other features this treatise is excellent, adding still further to the reputation of the accomplished author. An interesting monograph on "The Logical Conceptions of a Corporation," by Mr. Benjamin Trapnell, which forms an appendix, gives additional value to the work.

AMERICAN STATE REPORTS, containing the cases of general value and authority subsequent to those contained in the American Decisions and the American Reports, decided in the Courts of Last Resort of the several States, selected, reported and annotated by A. C. Freeman and the associate editors of the American Decisions. San Francisco, Bancroft-Whitney Company, 1897.

This is volume 52 of the American State Reports, and contains cases selected and re-reported from the State Reports of California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Montana, New York, Oregon, Pennsylvania, Washington and West Virginia. In this volume of 1035 pages 149 cases are reported in full, all of first importance, and covering a wide range of subjects. The citations at the end of each reported case are particularly valuable.

## The Albany Law Journal.

ALBANY, MARCH 20, 1897.

### Current Topics.

OUR English cousins, it seems, never cease to marvel over the peculiarities of American jurisprudence. What appears to particularly excite their curiosity and wonder is the dissimilarity of laws and penalties in the various States of the Union. One of the most recent instances is that of Francis Blessing, an English barrister, who not long ago spent some three months in this country in the search for a man whose signature was necessary in the partition of an estate which has been in litigation in London for a dozen years. Having traveled as far west as Colorado in his quest, and being of an inquiring turn of mind, Mr. Blessing made a study, of necessity somewhat hasty and superficial, of State laws in the several States he visited. He found himself totally unable to understand why a regulation in one State should not be a regulation in all; why an offence against morals should be punished by imprisonment in Pennsylvania and should not be mentioned in the statute books of New York. But what seemed to strike the English barrister most forcibly was the different penalties prescribed for the crime of murder. It seemed most odd to this observer of American institutions that one State should imprison a murderer for life, another hang him, and still another put him to death by means of electricity. If murder calls for capital punishment, Mr. Blessing inquires, why is it not inflicted by the same method in all the States. The State sovereignty idea, in other words, puzzles this foreign gentleman beyond measure. Some of his observations make very interesting reading. To a newspaper reporter Mr. Blessing said:

"I had occasion to go to St. Louis about three weeks ago, and I was surprised to learn that the death penalty is inflicted there for perjury — that is to say, it is still a law in Missouri, but is never enforced. In other States imprisonment for from three to seven years is the maximum penalty. In Delaware you hang a man for arson or burglary. In New York, I see by the newspapers, that a man has been

convicted of firing a tenement house in which hundreds of persons lived and were in peril, and received a sentence of ten years in jail. Is human life less valuable here than in your Southern States?

"But there's another peculiarity of your laws that upsets me completely. In the State of New York I am informed that if a man and wife are legally separated by the courts the party against whom the decision is given is not permitted to remarry within the State; that he or she may cross over a river and legally contract marriage in another State, and return to this State without fear of interference. That certainly seems to me a legal paradox. In the State of New Jersey I am told that a writ of *ne exeat regnum* may be obtained by statutory mandate — one of the oldest and most oppressive processes known in English law, and which was responsible for the creation of that famous character, 'the father of the Marshalsea.' A brother lawyer tells me that there are but five other States in which this is a statutory writ. It can be exercised, as you are doubtless aware, to deprive a person of his or her freedom for an indefinite period. The hardship of it is when a debtor is restrained from leaving the jurisdiction, and is so prevented from earning the means to liquidate his indebtedness. I am unable to understand why thirty-eight or thirty-nine States refuse to recognize the justice of this restraint and five or six others should maintain it.

"The election laws are equally perplexing. As I understand the subject, the general government says that a man must be twenty-one years of age and a native born or naturalized citizen before he can exercise the right of franchise. It so happened that the man I have been looking for has removed from one State to another in pursuit of employment. In tracing I found that he has been within the last seventeen years a citizen of the States of Maine, Rhode Island, Missouri and Colorado.

"In the State of Maine it was necessary for him to have been a resident for but three months to have the right to vote, but that when he removed to Rhode Island he had to stay there two years to qualify himself as a voter. When he went out to Missouri, he was obliged to live in the State a year, but in Colorado a



residence of but six months was required. In looking up the qualifications for citizenship in these States I find that in Rhode Island and Maine paupers or lunatics were debarred from voting, but that in Colorado the election laws make no mention of either of these classes, forbidding only the right of franchise to persons who had been convicted of bribery in public office.

"In several of the Southern States I discovered, on making further inquiry, that dueling, or aiding or abetting a duel, is sufficient cause to prohibit a citizen otherwise qualified from taking part in an election, but it is no bar in the Northern States.

"Now, don't imagine that I am going to write any impressions of America when I get home, because I shall do nothing of the sort. As a lawyer I am interested in these apparent clashes and conflicts of law, and I have devoted what time I could spare to studying them. So far as politics is concerned, I am quite at sea, except in a general way. It seems to me that you are turning people out of office and putting others in their places continuously. In one State the local parliament meets biennially, and in another annually. Certain offices are appointive in one section of the country and elective in another."

Mr. Blessing also freely expressed his wonder and surprise at the knowledge of political affairs displayed by young Americans in all parts of the country, being far ahead of their English cousins in this respect. This gentleman's perplexity over the variance of the laws in the several States is quite natural, and even to those who have always been accustomed to it the subject often excites comment. State sovereignty doctrines have led not only to legal refinements in times past, but were also a potent factor in bringing on the terrible war which put the supreme test upon our national perpetuity. The system which excites this visitor's wonder is, indeed, complex, and it is not without its serious disadvantages; but on the whole it works well. Time and experience will undoubtedly bring us nearer and nearer to that uniformity which is, from many points of view, highly desirable, but in the meantime, the country seems to be doing quite well and making satisfactory strides in civilization as well as in the arts and sciences, and in that material

progress which has long been the wonder of the world. The desired uniformity of laws will come, if it come at all, gradually, as a survival of the fittest. In that happy day the lawyer will find himself emancipated from a practical servitude which, under present conditions, renders his task of keeping abreast with the multitudinous and often conflicting decisions in the various States too much like that of the ancient and fabled Sisyphus.

The rights of individual labor and of labor organizations are clearly defined in a recent decision of the New York Court of Appeals. The case was that of *Charles Curren v. Louis Galen*, chief of the Rochester Assembly of Knights of Labor. Curren, it appears, was employed by a Rochester Brewing Company, which belonged to the Ale Brewing Association. This association had an agreement with the Brewery Workingmen's Local Assembly, 1796, Knights of Labor, under which the former bound itself not to employ for a period exceeding four weeks men not members of the latter. Curren refused to join the assembly after the period named above had expired, whereupon representatives of the assembly called upon the brewing company, notified them of his refusal and procured his discharge from employment.

This question in due course of proceedings went up to the Court of Appeals, which holds that the agreement referred to above operated as a threat to keep persons from working at a particular trade, and to procure their dismissal from employment; that it is clearly unlawful and militates against the spirit of our government and the nature of our institutions. "If," says the opinion, "organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of the members. If it militates against the general public interest, if its powers are directed toward the repression of individual freedom, upon what principal shall it be justified?"

This opinion, it will be seen, denies the legality of all agreements or measures the effect of which will be to deprive a citizen of the right to pursue his business calling as an individual, independent of membership in or connection with labor, trade or business organizations. It is an assertion of the legal and con-

stitutional individual rights of citizens, and contravenes the assumption that any order or body of men has the right to forbid or prevent a citizen from working because of failure to become a member of such an order.

Miss Beatty, the English nurse who recently unsuccessfully sued a prominent London surgeon for heavy damages for performing the double operation of ovariectomy when he was told beforehand that if both ovaries were found to be diseased he must not operate at all, has decided to carry her appeal to the House of Lords, which is the court of last resort. The legal expenses of this appeal which, it is understood, will be in the neighborhood of \$100,000, are said to have been subscribed by a number of wealthy ladies whose sympathies are with Miss Beatty, and who believe that the matter is one of such great importance to the sex that it should be definitely determined for all time by the court of last resort. Opinions as to the justness of the decision that the surgeon was justified in disregarding the patient's express orders for the reason that she would not have lived ten years without the double operation, widely differ. It is argued, with some force, that Miss Beatty, who was engaged to marry, and who, by reason of the double operation referred to was rendered barren and thus forced by conscientious scruples to forego marriage, had a perfect right to prefer to live for only ten years, and to be for that time a wife, and possibly a mother, rather than to live the ordinary length of time unmarried, or be a barren wife. The question how far a surgeon may go in disregarding specific instructions is an exceedingly important one, the final adjudication of which is of the highest importance.

Apropos of the decision of the Supreme Court of Rhode Island, that discharging a jury during the progress of a criminal trial upon information by telephone that one of the jurors is sick, and without further proof of the fact, constitutes a bar to a second trial under the rule of jeopardy, it is interesting to note that in Pennsylvania, some years ago, a somewhat similar ruling was made. The jury to try a murder case was completed late in the afternoon, and the court allowed its members to

separate for the night, announcing that the taking of testimony would not begin until the following morning. On the following morning the court, fearing that a mistake had been made, discharged the first jury and impaneled a new one. The defendant was convicted and sentenced to death, but the Supreme Court of the State set him free on the ground that he was placed in peril by the swearing in of the first jury, and that his life could not be placed in jeopardy twice for the same offence.

Not long ago a Baltimore, Md., man claimed that his arm had been broken by a railroad car and demanded \$3,500 damages from the company. He was offered \$100 and refused it. The company bethought itself of the X-rays and had a picture of the man's arm taken, which showed that no fracture had been sustained. Then the man offered to take \$25, but the company refused to pay a cent. Thus one of the latest of scientific discoveries was utilized in a way to prevent the consummation of fraud. The X-rays promise great usefulness even outside the domain of surgery.

Recurring once more to the matter of biennial legislative sessions, the popular demand for which, as the only practicable method of checking vicious or "fool" legislation, is unmistakable, it is worthy of note that while conceding the desirability of the reform, some of our contemporaries are in despair as to its accomplishment because neither of the great political parties, which find the present system convenient as well as valuable, will permit the preliminary steps toward constitutional amendment to be taken. The New York *Mail and Express*, for example, though strongly favoring fewer legislative sessions, remarks that New York legislators are not given to voting themselves out of a job; that they will not pass the necessary resolutions voluntarily, and that no State machine would ever dream of demanding it. Therefore, it concludes the present discussion merely represents a waste of time. We do not at all agree with this narrow view. The same thing, in substance, might have been said and probably was said with reference to other reforms which have been agitated and accomplished in times past. Political machines have been forced against their will to do many things

in the interest of the public, for when the popular demand for a proposed reform becomes very great, either one party machine or the other is pretty certain to take it up as a means of self-preservation. This has been past experience, and it is just as true as it ever was. We are not, therefore, disposed to adopt the pessimistic view of our New York contemporary and give up the fight in advance as hopeless. Constant hammering will reduce to splinters the most menacing rock in the pathway of progress.

"Is it negligence, *per se*, for one to go upon a public crossing over a railroad without waiting for a dense cloud of smoke thrown out by one of two passing trains to clear away?" is a question which was recently passed upon by the Illinois Supreme Court. The case was that of the Chicago & Northwestern Railroad Company, appellant, v. Elida Hansen, on appeal from the Superior Court, a verdict of \$8,000 for personal injuries having been rendered in favor of the plaintiff and appellee. Plaintiff, a girl eighteen years old, going north on the east side of W. 48th avenue, Chicago, went upon the crossing over defendant's double track road about 8 P. M., and was instantly struck by a west-bound passenger train running on the south track, nearest her, her view of which was obstructed by dense clouds of smoke thrown out by an east-bound freight train which had just passed on the north, or far, track; the gates were up, and no watchman on duty; the crossing was used by 3,500 people daily. Counsel for the appellant argued that where it appeared clearly from the evidence that the plaintiff would have seen the approaching train had her vision not been obscured by a temporary cloud of smoke, caused by a train passing on the track furthest from her, it was her duty to pause until the smoke had cleared away, and if she ventured upon the track before this temporary obstacle to her vision had disappeared, she was guilty of a lack of ordinary care, and could not recover. A number of authorities in behalf of this contention were cited. The court held that whether the methods adopted by the appellant were negligent in allowing the crossing gates to remain up, and in having no flagman stationed at the crossing, and whether the appellee

exercised that degree of care which an ordinarily careful and prudent person would exercise, under the circumstances, were questions of fact for the jury. The court further held that the refusal of the trial court to direct a verdict for the defendant, on the ground of contributory negligence on the part of the plaintiff, was not error. The fact that when appellee entered, and was upon this crossing, the gates were up, was the principal fact entitling her to recover, for when a railroad puts the crossing gates up, it is an implied statement by it that an opportunity is then afforded for people to cross. That it did not operate the gates at night was held to be no excuse, for the city ordinance declares that "said gates shall be operated day and night."

Upon a petition for a writ of *habeas corpus* in behalf of William Grice, who was "restrained of his liberty" by virtue of a *capias* issued upon an indictment charging that he, with others, "did unlawfully agree, combine, conspire, confederate, and engage with William B. Hawkins and divers other persons in McLennan county, Texas, in a conspiracy against trade, Charles Swain, J., in the United States Circuit Court for the Northern District of Texas, at Dallas, delivered an opinion on the 16th inst., declaring the law under which the indictment was found null and void. The law in question, which was passed by the legislature, March 3, 1889, is entitled, "An act to define trades and proper penalties and punishment of corporations, firms and associations of persons connected with them, and to promote free competition in the State of Texas." The opinion of the court consisted of about 11,000 words. It discussed the law with great thoroughness and quoted numerous authorities in support of the decision. The court finds that while ostensibly intended to prevent "conspiracies against trade," and "trusts," the act has no such limitations, but, on the contrary, would prohibit the partnership of two persons. It is also held to be class legislation, favoring some individuals of a certain class, and denouncing other individuals of the same class. It is also in the opinion of the court clearly intended to favor the agricultural class, as against the merchant and the mechanic. The court can find no better language in this connection — almost

prophetic in some respects — than that used by Judge Catron of Tennessee in two early cases, viz., *Wally v. Kennedy*, 2 Yerger, 555, and *Van Zandt v. Waddell*, same volume, 270 :

"The rights of every citizen must stand or fall by the same rule of law that governs every other member of the body politic, or land under similar circumstances ; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the most of the community, and those who made the law, by another ; whereas a like and general law affecting the whole community equally could not have been passed.

"The idea of people through their representatives making laws whereby are swept away the life, liberty, and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charter in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constitution."

This law that deprives the citizen of all of his rights of contract and that seeks to divide citizens, not exactly by the calling they follow, but by the source of the property they hold, and exempts eighty per cent of them from the penalties it visits upon the remainder, is not sustained by any good reason or excuse, is not just, is utterly without support in law and can have no just purpose, is vicious class legislation, depriving the citizen of his constitutional right of life, liberty, and property, without due process of law, contrary to the law of the land, and is therefore declared to be null and void.

Following close upon the introduction of a bill in the New York legislature to prevent newspapers from publishing portraits or cartoons of individuals, comes the announcement that a measure is to be presented, providing

for the appointment of a press-censor, whose duty it shall be to oversee and officially pass upon all matter before it is printed. According to the provisions of this most extraordinary measure, within twenty days of the passage of the act "placing under the supervision of State officials all the newspapers published in the State," the governor shall appoint, in all counties having a population of 10,000 or more, suitable persons to act as censors. It shall be the duty of each censor to examine and read all articles intended to be published, and prescribe and eliminate all libelous matter, as well as all matter deemed inimical to the interests of the State or of any official thereof. The censors shall hold office during the pleasure of the governor, who shall have power to remove and transfer them at will. Any person printing an article not passed upon by the censor shall be guilty of a felony, and the penalty for conviction thereof shall be a term in State's prison not to exceed five years, or a fine from \$1,000 to \$5,000, or both." One might well imagine this to be a huge joke, if the announcement were not made that the bill is to be seriously pressed. There is very little need, however, of wasting broadsides upon such a measure, the chances of whose passage and enactment into law are exceedingly remote. A press censorship such as this bill proposes to set up in the Empire State would be more rigorous and absolute than any in the European countries. Even in the monarchies where public sentiment permits the king, through his subordinates, to exercise censorship over matter printed by the newspaper and periodical press, it is well known that the government officials merely watch the columns of the publications for matter deemed objectionable, and that no radical action is taken until a third "warning" has gone unheeded. The proposed plan in this State, however, would be some steps in advance of any yet invented. Without going any further into the subject, it may be put down as a fact beyond dispute that while this bill could never pass either house, it may be regarded as another "warning" to the so-called "new," otherwise known as "yellow" journalism, which now finds itself opposing a strong counter-current of public sentiment, the reaction of a marvelously patient and long-suffering public against riotous license, "fake" methods and utter unreliability,

combined with a mercenary pandering to the lowest instincts of humanity. Probably the best sort of press censorship for this free and enlightened country is the individual exercise of the right to exclude the objectionable sheets from the home and the counting-room.

Some important principles with reference to the functions and duties of judges presiding at trials, were laid down by Judge Colt, in Boston, recently. It was in the Bram murder case, in which, it will be remembered, the defendant was found guilty of murder in the first degree, by a Federal jury, after a most sensational trial. The convicted man's attorneys, in asking for a new trial, pointed out what they regarded as several errors committed by the trial court. Judge Colt laid down the principle that it is not sufficient to show that errors were committed during the trial; it must be further shown that the verdict has been actually affected by such errors, and not merely that it might possibly have been affected. The rule is doubtless a correct one, if the court's language be construed to mean that counsel must establish a reasonable probability of the verdict having been so influenced. Absolute proof on this point is, of course, out of the question. A further complaint of counsel, that the judge, in summing up, expressed his personal opinion upon the issues of fact, is answered by referring to the unsoundness of the theory that a judge has no other duty than to keep order in court, and hold counsel within legal limits. The court goes on to deny that judges are bound to tolerate carelessness, forgetfulness or inexperience, on the part of the prosecution or jury, even if they threaten to defeat the ends of justice. The rule on this point is stated by the court in the following language :

It has been repeatedly held by the Supreme Court of the United States that in the national courts the judge may express to the jury his opinion in regard to the issue, provided he properly instructs them that the whole matter is one for their determination.

If he may so express an opinion upon an issue he may manifest his opinion regarding any particular upon which the determination of the issue may in some degree depend, always on the same conditions of instructing the jury of their rights, and leaving to their independent action the determination of the matter.

This, as a contemporary points out, is not

the rule in New York. Here the highest court has held that mere reminders to the jury of its right to disregard the opinions of the judge do not outweigh the effects of positive and impressive expressions on the part of the judge—a practice which is much safer than that laid down by Judge Colt.

An interesting decision as to the construction of a life and accident insurance policy was rendered recently by the Hamilton County (Ohio) Common Pleas Court. It was in the case of *W. A. Gentry v. Standard Life and Accident Insurance Co.*, in which the plaintiff sued for recovery for the loss of one hand. The hearing was on demurrer to the petition. The policy provided for an indemnity of \$3,000 for the loss of "one entire hand and one entire foot, or two entire hands or two entire feet." The claim of the plaintiff was that the word *and* should read *or*. Judge Buchwalter held that the policy showed a distinct purpose to stipulate for two and not for one limb *or part of* two limbs to be severed before the loss creating \$3,000 liability should accrue. It might not be morally creditable to so write the policy without a corresponding fixed total loss for a single hand or foot or eye, but the legal right existed as to this contract. The court, therefore, held that the plaintiff could not recover \$3,000 for the loss of one hand, and remitted the plaintiff to the cause of action founded upon the *weekly* indemnity. The decision is probably technically correct. The case constitutes another warning to insured to carefully examine policies and their exact provisions before entering into contracts, too many of which contain convenient loopholes of escape for the insurers.

The New York Court of Appeals has just rendered a very important decision holding that the act abolishing the office of police justice in the city and county of New York, chap. 601, Laws of 1895, is constitutional. It was in the case of *Joseph Koch, appellant, against the Mayor, Aldermen and Commonalty of the city of New York, respondents*.

The plaintiff alleged in his complaint that on the 4th of January, 1893, he was duly appointed a police justice of the city of New York by the mayor of that city for the term of ten years at an annual salary of \$8,000, pay-

able quarterly; that he duly qualified and entered upon the discharge of the duties of said office, and has always been ready and willing to perform the duties thereof as required by law; that on May 10, 1895, an act was passed by the legislature of the State of New York, entitled "An act in relation to the inferior courts of criminal jurisdiction of the city and county of New York," which is referred to as a part of the complaint, and that under such act the mayor of said city assumed to appoint nine city magistrates in the city and county of New York and five justices of the Court of Special Sessions of said city and county. Notwithstanding the passage of this act, as the plaintiff further alleged, under and pursuant to sections 17 and 22 of article 6 of the Constitution of this State, he is entitled to hold office until the expiration of his term on the 3rd of January, 1903, and that on the 1st of October, 1895, there was due and payable to him, under and by virtue of the said appointment as police justice, the sum of \$2,000, which had been duly demanded and a claim therefor presented to the comptroller of said city for adjustment, but the same had neither been paid nor adjusted, although more than thirty days had elapsed since the presentation of such claim.

The defendant demurred to the complaint upon the ground that the facts set forth do not constitute a cause of action.

By the usual course of procedure the demurrer was sustained, the complaint dismissed and a final judgment entered accordingly, which upon appeal to the Appellate Division was duly affirmed. From the judgment of affirmance the plaintiff appealed to the Court of Appeals.

The court held:

Subject only to the restrictions of the Constitution, the legislature may do what it thinks best with a public office or a public officer, by abolishing the office, shortening or lengthening the term thereof, and increasing or diminishing the salary. The act (chapter 601 of the Laws of 1895) which abolished the office of police justice in the city and county of New York is not in conflict with section 22 of article 6 of the Constitution, which provides that "justices of the peace and other local judicial officers, provided for in sections 17 and 18, in office when this article takes effect, shall hold their offices until the expiration of their respec-

tive terms." The office having been abolished by the act in question, the terms of the incumbents did not survive the office. Whether the legislature could, under the above Constitution provision, have removed the incumbents before the expiration of their respective terms, without abolishing the office, *quære*.

The Indiana Supreme Court recently handed down a decision overruling the long-asserted claim that women have the right of suffrage under the present Constitution of that State.

Insurance journals are discussing the necessity of specifying "bicycles" in the general household furniture form of policy. The contention that by "general usage the bicycle has become part of the household effects," and is, therefore, covered by the usual furniture form, is hardly tenable. A much safer rule would be to see that they are specifically mentioned in the policy, in each case. The courts having repeatedly decided that a bicycle is a vehicle, and as vehicles are not in use as household furniture (with the possible exception of baby carriages), they would probably not be covered by general policy; and although the agent may have intended to cover the wheel in his form, the fact that it was not mentioned is sufficient reason for the adjuster to reject the claim.

#### A BUSINESS BY ITSELF.

THE prosecution of personal injury suits has grown to be a business by itself. Those engaged in it rarely have any other occupation. There are several corporations and many law firms and brokers in the city of Chicago, as in other cities, doing a speculative business in these claims. They employ "runners" as a commercial house employs traveling salesmen. These runners have business relations with saloon keepers near manufacturing works or railway crossings, and surgeons and police officers may be found in many parts of the city having their connection with this business. Sooner or later the runners succeed in obtaining admission to every public hospital in the county. It rarely happens that an accident is mentioned in the newspapers, but the unfortunate person who may be injured, or his family in case of his death, is at once overrun with applicants desiring to procure an assignment of the claim. It will be remembered that under a recent decision of the Illinois Supreme Court—a decision which happily the court has again taken under advisement—a personal injury claim is property, capable of being put on the market and trans-

ferred from hand to hand, like stock in a corporation. In most cases, the runner who has succeeded in procuring an assignment of the claim, has it transferred to some person as trustee. This trustee represents the runner, the saloon keeper, the hospital nurse or other person through whom he may have procured the claim, the attorney, surgeons and other witnesses who may be called upon to testify, and who will, therefore, have a right to share in the proceeds, and, incidentally, the injured person.—*North American Review.*

### LEARNED WOMEN.

THE successful defence by a lady barrister of a man tried for manslaughter at the Sessions Court at Poona, India, has called forth the following interesting remarks from a leading English daily:

"At the bottom of the male objection to female lawyers is the idea that such competition is essentially unfair. Our judges, the lawyers argue, need to be guarded against themselves. They are, as a general rule, a highly susceptible body of men, who would find much difficulty in resisting their natural and chivalrous impulse to give judgment in favor of the side which employed the most engaging advocate. Even now, say those lawyers who have no fear of the penalties of contempt of court before their eyes, a pretty witness or a lady litigant with a winning manner can twist any judge on the bench around her thumb. What would it be if the judges had a row of lady advocates in front of them? According to this opinion, the corollary of lady barristers must be female judges. Only persons of their own sex will be hard-hearted enough to decide fairly where ladies supply the arguments. Then, of course, in a court so constituted, the male barristers would be an absurdity, and so would the male juryman. We have not yet got very near the moment when the ramparts of the Temple and Lincoln's inn will have to be manned to keep the feminine invaders out; and counsel will certainly expect the Inns of Court to protect them from the danger when it does become menacing. Nor will their expectations be disappointed. A desperate resistance may be anticipated in this country, whatever may be the case at Poona; at the bare suggestion of women wig-wearers the benchers may be counted on to tumble over each other on their way to line the last ditch—perhaps the one in Lincoln's inn-gardens. The average legal mind shudders at the notion of a grave queen's counsel referring to 'my learned junior, Miss Fogg,' or of a judge reversing the decision of a 'learned sister.' Incidentally it may be noticed that the most successful lady barristers would certainly have to remain unmarried; the married female pleader, like the wedded curate,

would be shorn of half the usual attractions. Then a new and becoming headgear would have to be devised in place of the hideous horse-hair wig; some bewitching structure of dainty curls, of the particular shade of gold fashionable at the moment. One advantage, if the Poona infection spreads, would undoubtedly solve the jury question; instead of a reluctance to serve, susceptible gentlemen would compete with each other for a chance of getting into the jury-box and being appealed to by all the arts of feminine advocacy. For the same reason the arrival of the lady barrister might increase the volume of litigation; and, if so, the prejudices of the men now in possession of the courts might in course of time disappear."

### HOW A LAWYER GOT INTO HEAVEN.

THIS thus at times they quiz the law:  
 Once on a time th' attorney, Flaw,  
 A man, to tell you as the fact is,  
 Of vast chicane, of course of practice;  
 (But what profession can we trace  
 Where some will not the corps disgrace?  
 Seduced, perhaps, by roguish client,  
 Who tempts him to become more pliant)  
 A notice had to quit the world,  
 And from his desk at length was hurled.  
 Observe, I pray, the plain narration:  
 'Twas in a hot and long vacation,  
 When time he had, but no assistance,  
 Tho' great from courts of law the distance  
 To reach the court of truth and justice  
 (Where I confess my only trust is).  
 But we have left our little man,  
 And wandered from our purposed plan.  
 'Tis said without ill-natured leaven:  
 "If ever lawyers get to heaven  
 It surely is by slow degrees."  
 (Perhaps 'tis slow they take their fees)—  
 The case then now I'll fairly state.  
 Flaw reached at last to heaven's high gate.  
 Quite spent, he rapped, none did it neater,  
 The gate was opened by Saint Peter,  
 Who looked astonished when he saw,  
 All black, the little man of law;  
 But Charity was Peter's guide,  
 For, having once himself denied  
 His Master, he would not o'erpass  
 The penitent of any class;  
 Yet never having heard there entered  
 A lawyer, nay, nor one that ventured  
 Within the realms of peace and love,  
 He told him, mildly, to remove,  
 And would have closed the gate of day  
 Had not old Flaw in suppliant way,  
 Demurring to so hard a fate,  
 Begged but a look, tho' through the gate.  
 Saint Peter, rather off his guard,  
 Unwilling to be thought too hard,

Opens the gate to let him peep in;  
 What did the lawyer? Did he creep in?  
 Or dash at once to take possession?  
 Oh, no; he knew his own profession.  
 He took his hat off with respect,  
 And would no gentle means neglect;  
 But finding it was all in vain  
 For him admittance to obtain,  
 Thought it were best, let come what will,  
 To gain an entry by his skill;  
 So while Saint Peter stood aside,  
 To let the door be opened wide,  
 He skimmed his hat with all his strength,  
 Within the gates to no small length;  
 Saint Peter stared; the lawyer asked him  
 Only to fetch his hat, and passed him;  
 But when he reached the jack he'd thrown,  
 Oh, then was all the lawyer shown.  
 He clapped it on, and, arms akimbo,  
 (As if he'd been the gallant Bembo)  
 Cried out: "What think you of my plan?  
 Eject me, Peter, if you can!"

—From an old English pamphlet in black letter,  
 about 1620.

#### OLDEST WILLS ON RECORD.

UNTIL recently the oldest will supposed to have been made was when Jacob said to Joseph, "I have given thee one portion above thy brother." *Genesis*, xlviii., 22.

The next oldest account until recently has been the custom, said to have been introduced by Solon, of willing personal property in Athens, which custom existed in Rome and in Germany at an early date, and there is no account of a time when it did not exist in England. (I Redfern, *Wills*, 1 and 2.)

But we are told in 24 *Irish Law Times* for April 26, 1890, and also in other law periodicals, that a unique document was unearthed at Kahun, or, as the town was formerly known, Illahun, in Egypt, in which the testator settled all his property on his brother, a priest of Osiris, 2,550 years before Christ. Also a second document, bearing date 2,548 B. C., in form nothing more or less than a will, by which the testator settled on his wife, Teta, all the property given him by his brother, but forbids her pulling down the houses built by his brother, though empowering her to give it to her children as she pleased. The instrument was witnessed by two scribes, with an attesting clause similar to that in present use.

Prior to June 24, 1877, by the common law of England, which included the statutes up to that time, a will of personal property might be either verbal or written, and if written, yet it was unnecessary in order to be valid. The abuses which arose in the attempt to set aside written wills by proving verbal or nuncupative wills finally culminated in *Coles v. Mordaunt*, tried in the Court of Probate, where the will was rejected, and then

taken on appeal to the delegates, where Mrs. Coles offered to go to trial at law on a feigned issue, and it was so tried at the Bar of the King's Bench, on such issue, where it appeared that most of the nine witnesses to such will were perjured, and that Mrs. Coles, the widow, was guilty of subornation of perjury.

After that she applied for a commission of review, which was refused. It was on the occasion of this shocking and foul conspiracy to attempt by perjury to defeat a written will, made three years previously, giving £3,000 for charitable purposes, that Lord Chancellor Nottingham said he hoped to see one day a law that no written will should ever be revoked but by writing. This great man, Heneage Finch, was the father of equity, a consummate lawyer, remarkable for zeal at lectures, and case putting at moots, and who laid to heart a maxim of his uncle, Sir Henry Finch, that "a law student ought to read all the morning and talk all the afternoon."

#### NO ALIMONY FOR HUSBANDS.

HENRICH GROTH, of Chicago, brought suit for divorce against Emile Groth, his wife, and the case was tried before Judge Gibbons. Groth asked for alimony, and was awarded \$20 a month. Mrs. Groth appealed, and Justice Gary, of the Illinois Appellate Court, has just rendered a decision reversing the decree of the Circuit Court. The fact that a husband was granted alimony in a suit for divorce attracted much attention to the case. Here is the text of Justice Gary's decision:

"The appellant filed a bill to obtain a divorce from appellee. The Court ordered that she should pay him \$20 per month temporary alimony and \$25 solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessities, but there was no reciprocal duty. The statute gives her—not him—alimony. To give it to him is not to administer existing law, but to make new law. *Summers v. Summers*, 39 Kan. 132; *Green v. Green*, 66 N. W. Rep. 947. The order is reversed."

#### "TRESPASSERS WILL BE PROSECUTED."

TWO volunteers walked across a grass field in August on their way to their rifle-range. In so doing they were trespassers, and trod the grass down to some extent, but did not damage the soil nor its verdure, except by their footprints. But they were summoned before justices and convicted under section 52 of the Malicious Damage Act, 1861, of wilfully and maliciously committing dam-



age, injury or spoil to or upon real property in a case not provided for by other sections of the act. This conviction was quashed on January 24 by Mr. Justice Wright and Mr. Justice Bruce, on the ground that the damage proved must be to the "land," and not to the plants growing thereon, to fall within the section. The law is a little puzzling.

When people pick uncultivated mushrooms they do not commit larceny, because the mushrooms are part of the land; whence the precaution of the modern farmer to scatter spawn on his fields and turn his mushrooms into cultivated plants. But when the same things are damaged they do not savor enough of the realty to fall within section 52. The result of the decision is to confine the owners of land merely walked over to actions for civil trespass, and to make the customary notices even more *brutum fulmen* than they were supposed to be. It is said that once a learned judge had some experience on this subject, and that some years ago he had notices put up on his property, "Trespassers will not be prosecuted," with the result that he had to go to a County Court to get an injunction against persons who read his notice as an invitation.—*London Law Journal*.

#### "W. AND A. MCKINLEY."

ON the door of an office on the second floor of a building near the main street in Canton, Ohio, is a worn and battered sign, "W. & A. McKinley, Lawyers." This law firm was organized in the early seventies, then "W. McKinley" was public prosecutor for Stark county and "A. McKinley," the younger brother, had just been admitted to the Bar. By the time the senior partner had been elected to Congress, in 1876, the firm had built up what was in those days a lucrative practice. The firm was practically broken up twenty years ago, but the desks, the library and the sign still remain. The senior partner became the leader of his party in the House of Representatives, the Governor of his native State and the President of the United States. The younger brother was Abner McKinley, who, after William's departure from Canton, gradually drifted away from his profession into commercial pursuits, and has made considerable money in various enterprises with which he has been from time to time connected. Now, however, says the *New York Mail and Express*, Mr. McKinley apparently intends to settle down again to practice law. He has established an office at No. 15 Wall street, and on Tuesday he was formally admitted to practice at the Bar of New York State, on the motion of Col. John J. McCook. It so happened that two other Ohio lawyers were admitted at the same time as Mr. McKinley, whereupon Chief Justice Van Brunt smilingly remarked: "It is evident that under the new administration the Ohio men are migrating."

#### THE LEGISLATURE OF NEW YORK.

##### BILLS INTRODUCED WHICH ARE OF INTEREST TO THE LEGAL PROFESSION.

THE following are among bills recently introduced in the Legislature of New York:

By Mr. Sanger, providing that no person shall furnish entertainment to electors with a view to promote his election to office.

By Mr. Mazet, prohibiting presidents, general managers or cashiers of national banking associations doing a banking business in the State, from serving as an official of any savings institution except as trustee.

By Mr. Forrester, providing that no labor-saving machinery propelled by other than hand power shall be used in any penal institution of the State.

By Mr. Dudley, providing for a graduated income tax system so that where a personal estate is subject to a transfer tax of five per cent., and exceeds \$500,000 in value, an additional tax shall be imposed at the accumulating rate of one per cent. for each additional \$250,000, except in cases where estates exceed \$3,000,000 the aggregate tax rate shall only be fifteen per cent.

By Mr. Goodsell, abolishing coroners' juries and providing that all coroner's inquests shall be conducted by a coroner without a jury.

By Mr. Roche, amending the Penal Code relating to the definition of conspiracy, so that the peaceable assembling and extending of aid to persons engaged in a movement to increase wages or better their condition shall not be forbidden.

By Mr. Bates, providing that after January 1, 1898, a tax shall be annually levied upon the gross profits and income received the previous calendar year by every citizen of the State, whether received from property rents, interests, dividends, salaries or any source whatever. Such tax is to be one-half per cent. per annum on an income over \$1,000 and less than \$5,000; one per cent. on sums over \$5,000 and less than \$10,000; one and one-half per cent. on sums over \$10,000 and less than \$20,000; two per cent. on sums over \$20,000 and less than \$30,000; two and one-half per cent. on over \$30,000 and less than \$40,000, and one-half per cent. tax added to every additional \$10,000 taxed up to \$100,000.

By Mr. Roehr, providing that in the counties of New York, Kings and Albany the trial justices of the Supreme Court may at any time order that a new and general calendar of causes may be made up, and may prescribe a fee not exceeding one dollar to be paid to the county clerk upon filing a note of issue for the making of such calendar.

By Senator Wray, providing for payment of the expenses of justices of the second judicial district while holding court in a county other than that in which he resides, the amount not to exceed \$1,500 per year.

By Senator G. A. Davis, providing for the payment by the county of reasonable fees and expenses to witnesses in criminal proceedings upon the order of the court.

By Senator Lamy, amending the Penal Code by repealing the clause which provides fine and imprisonment for selling pools on the trotting tracks. The only penalty provided is that the loser of a pool may sue for its recovery. The racing code is also amended so as not to make it illegal to exact money from professional gamblers for the privilege of selling pools. The bill gives fifteen days to the trotting tracks, five days to steeplechase associations and forty days to each running track duly licensed by the Jockey Club.

By Mr. L. E. Brown, providing that the recorder, city judge and judges of the Court of General Sessions shall receive for their services the same salary paid to each of the surrogates in the city and county of New York, to be paid in monthly installments.

By Mr. Leonard, providing that in the procuring of money or purchase of property on credit, nothing relating to the purchasers' means or ability to pay shall be considered false pretence, unless when made to a mercantile or commercial agency.

By Mr. Austin, authorizing New York city to issue \$10,000,000 in bonds for the erection of new and the repair of old school-houses.

By Senator Cantor, requiring claims for dower to be made within three years, instead of twenty years, and limiting dower interest in property held at the time of death. The husband is given power to mortgage property without the wife's consent.

By Mr. Saunders, providing that all county clerks and registers in whose office affidavit foreclosures are filed shall be authorized to deliver certified copies to purchasers.

#### MIXED METAPHORS.

FROM the collection of famous mixed metaphors made by a German writer, the following choice specimens are taken. It was Justice Minister Hye, who, in 1848, in a speech to the Vienna students, impressively declared: "The chariot of the revolution is rolling along and gnashing its teeth as it rolls." A pan-Germanist mayor of a Rhineland corporation rose still higher in an address to the Emperor. He said: "No Austria, no Prussia, one only Germany—such were the words the mouth of your imperial majesty has always had in its eye." Professor Johannes Scherr, in a criticism on Lenau's lyrics, writes: "Out of the dark regions of philosophical problems the poet suddenly lets swarms of songs dive up, carrying far-flashing pearls of thought in their beaks." The German parliamentary oratory of the present day affords many examples of metaphor mixture, but one may suffice. Count Frankenberg is the author of it. A few years ago he pointed out to his coun-

trymen the necessity of "seizing the stream of time by the forelock." But none of these pearls of thought and expressions surpasses the speech of the immortal Joseph Proudhomme on being presented with a sword of honor by the company he commanded in the national guard of France. "Gentlemen," said he, "this sword is the brightest day of my life."

#### AN OLD BACHELOR'S WILL.

WE are accustomed to curious wills, but quite a new form of eccentric bequest seems to have been discovered by a recently deceased wealthy bachelor. To the astonishment and dismay of his relations, he left a considerable sum of money to provide pensions for a limited number of single ladies over sixty. These single ladies must show evidence, in order to sustain their eligibility, that they have rejected one or more advantageous offers of marriage. Apropos of this, it seems that a little time ago the will of an old gentleman was proved, leaving legacies to three ladies, "because," as he wrote, "they refused to marry me, and so to them I owe my earthly happiness."—*London Mail*.

#### HOTELS AND SUMMER BOARDING HOUSES.

##### INFORMATION FOR WEST SHORE LIST.

THE West Shore Railroad list of hotels and summer boarding houses for the season of 1897 is now in course of preparation. This list will embrace all the hotels and summer boarding houses on the lines of the West Shore, Wallkill Valley, Ulster and Delaware, Stony Clove and Catskill Mountain, Kaaterskill, Catskill Mountain and Cairo and Delaware and Hudson Railroads.

In order that the list may be made as complete as possible, and that correct information may be given to those seeking summer homes, hotels, summer boarding and farm houses desiring summer boarders are requested to address C. E. Lambert, General Passenger Agent, West Shore Railroad, 5 Vanderbilt avenue, New York, for blank form on which to give the desired information. No charge is made for representation in this list.

The West Shore's book for 1897, entitled "Summer Homes and Tours," will be the handsomest ever issued. The size of the book has been increased, and elegant new half-tone cuts are now being engraved. It will be entirely renewed throughout.

If you have not already purchased "The Mastery of Memorizing," advertised elsewhere, at least send for the memory booklet mailed to all applicants. It will prove interesting reading, and should be read by every student. Write for it.

## OUR LAW MAKERS.

IGNORANT legislators have the courage of their notions. Having declared war on the department stores, they are prepared to carry out the logic of their absurd position, says a writer in the *Chicago Post*. In New York a bill has been introduced to abolish "bargain days" and bargain sales, while in Kansas they are consistent enough to advocate a law prohibiting the use of typesetting machines in that State. The Kansas measure, of course, seeks to protect the printers threatened by the inroads of the machines, while the New York bill assumes that consumers are so imbecile that the mere magic word "bargain" prompts them to part with their money without examination or consideration of the claims of advertisers. Our lawmakers might as well abolish at one stroke all advertising and all labor-saving devices. Let us have neither industrial freedom nor capital. Let us return to the simple ways of the savages. But, alas! that would also involve the abolition of our modern Legislatures.

## ANDREW D. WHITE ON THE JUDICIARY.

IN an able address upon *Evolution v. Revolution in Politics*, delivered by Andrew D. White, before the Wisconsin State Historical Society recently, the judiciary is thus spoken of: "The Supreme Court of this nation is indeed its greatest jewel. It seems to have been created by our fathers in a moment of divine inspiration. Its subordinate courts are also excellent. Our State courts are, most of them, good, but, after all, there is nothing more necessary in order to keep our judiciary, and, above all, our elective judiciary, where it ought to be, than an evolution in the people of a higher sense of the judicial function.

"More and more we should assist the evolution, in the popular mind, of the truth that a cheap judiciary is the most costly luxury which a people can indulge in; that it is folly for the people at large to pay starvation stipends to judges who protect our highest interests, while millionaires and corporations employ lawyers who have proved their right to demand fees equal to a king's ransom."

## EMPLOYER'S LIABILITY.

THE Supreme Court of Minnesota held, in the recent case of *Carlson v. Northwestern Telephone Exchange Company*, that the decisive tests as to whether, in any given case, an employe is to be regarded as a vice-principal or a fellow-servant is not his title or his rank, but the nature of the service which he performs; that if he is authorized to perform duties which are the absolute duties of the master, he is, to the extent of a discharge of

those duties, a vice-principal, and that whenever the nature and magnitude of the master's work, whether it be that of construction or otherwise, are such that it is necessary that orders be given regulating the conduct of his employes and directing them where to work, it is not only right but the absolute duty of the master to give such orders, and in obeying such orders the employes have a right to assume that the master, in giving the orders, has exercised due care for their safety. In the case before the court it appeared that the defendant in excavating a ditch placed the work and the men employed thereon, of whom the plaintiff was one, in charge of a foreman, who had general oversight of the work. The men were subject to his orders; he had authority to employ and discharge them and direct them what to do and where to work, and was the supreme authority then present. The foreman negligently ordered the plaintiff from the place where he had been working, into the ditch at a point where he had not previously worked, which was a place of unusual danger by reason of a crack in the earth on the side of the ditch, and defects in the curbing, which danger and defects were not obvious or known to the plaintiff, who obeyed the order and was injured by the caving in of the ditch. The court held that in giving the order the foreman was a vice-principal, and the defendant liable for his negligence.—*Bradstreet's*.

## THE ASSIGNABILITY OF BILLS OF LADING.

AS civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevailed while society was in its earlier and simpler stages. A modern, but not recent, invention of this character, for the transfer, without the cumbersome and often impossible operations of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading. Instruments of this kind are of peculiar character. From long use and trade custom they have come to have, among commercial men, a well understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein described as would a bill of sale.

A bill of lading is a symbol of property, and, when properly indorsed, operates as a delivery of the property itself, investing the indorsee with a constructive custody which serves all the purposes of actual possession, and so continues until there is a valid, complete delivery under and in pursuance of the bill of lading to the person entitled to receive the property. In the hands of the holder, a

bill of lading is evidence of ownership, special and general, of the property mentioned in it, and of the right to receive the property at the place of delivery. The transfer of the bill of lading to a *bona fide* purchaser for value, or as security to one who makes advances on the goods described in the bill, entitles the assignee or pledgee to the possession of the goods, subject only to the lien of the carrier for freight, or the claims of a consignee into whose possession the property may have come before the transfer of the bill of lading. And a common carrier by railroad who delivers goods intrusted to him for carriage without production of the bill of lading describing the goods, is liable for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at their destination.

The United States courts have said: For the convenience of commercial transactions, bills of lading have been allowed to become negotiable instruments, and upon the faith of them it is usual and customary for commission merchants to make advances. By such indorsement of the bill of lading the holder of it becomes, as against the world, the owner of the goods. The bill of lading transfers the property to the consignee, and it seems to be conceded that the assignment of it by the consignee by way of sale or mortgage will pass the property, though no actual delivery of the goods be made, provided the goods are then *en route*. When issued, the parties issuing them have the knowledge that they may, and probably will, be used with commission merchants, or at some bank, to obtain advances of money, and in most instances this result is almost, in certain lines of trade, certain to follow. It is, therefore, no defence to the claim of the consignee, or his assignee, that the goods have been attached or seized by virtue of any judicial process. The contract of the carrier is that he will deliver the property in good order and condition to the shipper or his assignee (certain dangers of transportation excepted). He thus guarantees to protect the possession of the shipper and his assigns.—*Business, New York.*

#### THE STANDARD OF A TRUE LAWYER.

CHIEF JUSTICE ANDREWS of the Supreme Court of Errors of Connecticut, in a case instituted by the Fairfield county bar, to debar one Taylor for unprofessional conduct, concluded his judgment as follows:

"It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he prac-

tices. If he so conducts himself in his profession that he does not deserve that confidence, he is no longer an aid to the court, nor a guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the ingenuity of man has been turned that may not become the subject of his inquiries. Then, of course, he must be especially skilled in books and the rules of his own profession. He must have prudence and tact to use his learning, and foresight and industry and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these faculties, if once the practice becomes to him a mere 'brawl for hire,' or a system of legal plunder where craft and not conscience is the rule, and where falsehood and truth are the means by which to gain his ends, then he forfeits all right to be an officer in any court of justice, or to be numbered among the members of an honorable profession."

#### SCHEME FOR CODIFYING ENGLISH LAW.

MR. BLAKE ODGERS, Q. C., writes on the prevailing ignorance of the law of England. Says he: "The law of England, when once we can find out what it is, is the best and the noblest system this world has ever seen. Talk of the Roman law! Our law is infinitely more just and infinitely more sensible." The only advantage which the Roman law possesses over ours is — Justinian. Mr. Odgers argues for a similar arrangement now. He proposes, therefore, that the process of consolidating various portions of the law should be carried further and crowned by a complete code:

"The responsibility must be thrown upon one man, who must be answerable for the whole. \* \* \* His first duty would be to settle the proper order in which the various topics should be arranged in the code. \* \* \* He would select his assistants, who would work under him and on his method, each taking some special branch of the law with which they were already familiar. It would be the duty of the codifier to fit the work of each assistant into its proper place in the general arrangement. \* \* \* He would revise and mold the whole code, which, when it left his hands, should be printed and laid upon the table of the house of lords, and subjected to the fiercest criticisms of the bench and the bar, of solicitors and merchants, and of the public generally, before it passed into law. This is a work well worth doing. It would take, no doubt, ten or twelve years to complete it. And it would cost the nation not one-tenth part of the price of a single ironclad?"

### Legal Notes of Pertinence.

The power of an express company to establish limits beyond which it will not collect or deliver packages carried or to be carried by it is sustained, in *Bullard v. American Express Co.* ([Mich.], 83 L. R. A. 66), as against a person who has knowledge of such limits; and it is held immaterial that the limits extend farther from the office in one direction than in another. A note to the case reviews the authorities on the duty of an express company as to the delivery and collection of packages.

It is announced from Albany that Judge Robert Earl of Herkimer is to act as counsel in the case of the former police justices here who were replaced by the new city magistrates, and that he will submit a brief to the Court of Appeals, although he does not expect to make any oral arguments. Judge Earl is now receiving \$12,000 a year from the State as a retired member of the Court of Appeals. Under the new Constitution, he could be assigned to perform duty as a justice of the Supreme Court at his own request, but as the Governor has not assigned him to such duty, it is to be presumed that he prefers to practice law. There are three Supreme Court justices retired under similar circumstances by reason of age, the only important difference being that they receive a smaller salary than Judge Earl. They are all at work, however, in the judicial service of the State: Judge Joseph F. Barnard of Poughkeepsie, in Dutchess county and in this city; Judge Jackson O. Dykman of White Plains, in Westchester county, and Judge George B. Bradley of Corning, in the Appellate Division of the Supreme Court in Brooklyn.—*N. Y. Sun.*

For eavesdropping in the court consultation room of the court house at Frankfort, Ky., Frank M. Robbins, a reporter of the Cincinnati (O.) *Times-Star*, was arraigned for contempt of court, and was fined and sentenced to thirty days in jail. It was shown that Robbins in this manner heard the decision of the court in a murder case, and by means of flag signals to his associates, succeeded in conveying the decision to his paper an hour in advance of its announcement by the court.

While in Washington, in February, 1861, and waiting to be inaugurated president, a friend who entertained a bitter contempt for President Buchanan, says a writer in the *Atlanta Constitution*, asked Mr. Lincoln if he intended on inauguration day to ride to the Capitol in company with the retiring president or whether he would go alone. "That reminds me," answered Mr. Lincoln, "of a man in Illinois, who had been summoned as a witness in a lawsuit. Having the appearance of a Quaker, he was asked when he arose to take the

oath if he would swear or affirm. "I don't care a d—n which," was the reply.

A statute requiring a chattel mortgage to be "forthwith" filed in order to make it valid as against creditors and subsequent purchasers or lien holders is held, in *Baker v. Smelser* ([Tex.] 83 L. R. 168,) to have been complied with when the mortgage was filed as soon as possible, and it is then held to take effect from delivery as against an intermediate attachment. With the case is a note on the retroactive effect of filing chattel mortgages for record as against liens acquired after the execution of the mortgage.

Under the instructions of Judge Finletter, in Court No. 2, a verdict of not guilty was taken in the case of Harry T. Paulhamus, charged with the embezzlement as broker, larceny as bailee and the rehypothecation of forty shares of the capital stock of the Integrity Title Insurance Trust and Safe Deposit Company, of Philadelphia, the property of Charles I. Fireing. Mr. Fireing testified that Paulhamus acted as his broker in the purchasing of stocks on margins, and that he gave him the shares of stock as collateral security for any losses that Paulhamus might sustain. On cross-examination he said that when he gave Paulhamus the stock, he signed a blank power of attorney empowering him, if necessary, to sell or in any other way dispose of the stock in order to raise money. Judge Finletter instructed the jury that, inasmuch as the prosecutor had signed a power of attorney, his act exempted the defendant from all criminal liability, and he directed that the jury render a verdict of not guilty.—*Philadelphia Ledger.*

Judge Jenkins has ratified the recent sale for \$8,000,000 of the Chicago and Northern Pacific Railroad.

Professor Grant Newell in talking to his students in the Kent College of Law the other evening said: "When you are trying a case and are strong on the legal side stick to the judge, but when you are strong on the facts stick to your jury. In illustrating what a demurrer was he told of the young fellow, who was being examined by three Supreme Court judges, and they knowing he was a deserving and hard-working young fellow, were anxious to see him pass. When they asked him what a demurrer was he was puzzled.

"Why, you know what a demurrer is," they said. "Yes," he said, "I know what it is, but I cannot give the legal definition." So the judges urged him to try, and finally he stammered out: "Why, a demurrer just means—'suppose it's all true, what of it.'"

Which the judges decided was a very good answer, even if it did not, come quite up to the mark in legal phraseology.

### **Humors of the Law.**

When Abraham Lincoln used to be drifting around the country, practicing law in Fulton and Menard counties, Illinois, an old fellow met him going to Lewistown, riding a horse, which, while it was a serviceable enough animal, was not of the kind to be truthfully called a fine saddler. It was a weather-beaten nag, patient and plodding, and it toiled along with Lincoln—and his books, tucked away in saddle-bags, lay heavy on the horse's flanks.

"Hello, Uncle Tommy," said Mr. Lincoln.

"Hello, Abe," responded Uncle Tommy, "I'm powerful glad to see ye, Abe, fer I'm gwyne to have sumthin' fer ye at Lewiston coté, I reckon."

"How's that, Uncle Tommy?"

"Well, Jim Adams, his land runs long o' mine, he's pesterin' me aheap, an' I got to git the law on Jim, I reckon."

"Uncle Tommy, you haven't had any fight with Jim, have you?"

"No."

"He's a fair to middling neighbor, isn't he?"

"Only tollable, Abe."

"He's been a neighbor of yours for a long time, hasn't he?"

"Nigh on to fifteen year."

"Part of the time you get along all right, don't you?"

"I reckon we do, Abe."

"Well, now, Uncle Tommy, you see this horse of mine? He isn't as good a horse as I could straddle, and I sometimes get out of patience with him, but I know his faults. He does fairly well as horses go, and it might take me a long time to get used to some other horse's faults. For all horses have faults. You and Uncle Jimmy must put up with each other, as I and my horse do with one another."

"I reckon, Abe," said Uncle Tommy, as he bit off about four ounces of Missouri plug, "I reckon you're about right."

And "Abe" Lincoln, with a smile on his gaunt face, rode on toward Lewistown.

### **Notes of Recent American Decisions.**

**ATTORNEYS — LIEN FOR SERVICES.**—An attorney-at-law, who successfully defends an action for the recovery of property, real or personal, recovers the same, within the meaning of section 1989 of the Code, and by virtue of such recovery is entitled, to the extent of his fees, to a lien upon the property so recovered. His claim of lien arises upon his employment, and is perfected by the ultimate recovery of a judgment for his client, and record of his lien, and binds the property so re-

covered as against the owner and all others, save only *bona fide* purchasers without notice. (Lovett v. Moore [Ga.], 26 S. E. Rep. 498.)

**BILLS AND NOTES — ANTECEDENT DEBT — INNOCENT PURCHASERS.**—A note assigned before maturity merely as collateral security for a pre-existing debt, without any agreement for extension of time for payment of such debt, is subject to all equities existing between the original parties. (Loewen v. Forsee [Mo.], 38 S. W. Rep. 712.)

**CONTRACT — RESCISSION — ILLEGAL CONSIDERATION.**—A court of equity will not lend its aid to one seeking the rescission of an executed contract, when it affirmatively appears, from the evidence introduced by the plaintiff in making out his case, that one of the purposes which he and the defendant both had in view in making the contract necessarily involved the violation of a criminal statute, and a mutual intention on their part to defraud and deprive a city of the revenue to which it was entitled as a license fee for conducting a retail liquor business, the sale of which constituted in part the consideration of the contract in question. (Garrison v. Burns [Ga.], 26 S. E. Rep. 471.)

**COVENANTS IN LEASE — INSURANCE MONEY.**—Lessees who have covenanted to keep the buildings insured for two-thirds their value, the insurance money to be used in rebuilding, executed a trust deed of the premises containing a like covenant, the trustee having notice of the lease. The buildings were insured for their full value, the lessor having no opportunity to select or approve the companies, and no part of the insurance being made payable to him. Of a subsequent loss, only about five-sixths was collected: *Held* that, as it was the intention of all parties that the insurance money should be used in rebuilding, the lessor was entitled to the whole amount collected. (Northern Trust Co. v. Snyder [U. S. C. C. of App., Seventh Circuit], 77 Fed. Rep. 818.)

**CRIMINAL LAW — BURGLARY — POSSESSION.**—The failure of a person charged with a burglary which had been committed to satisfactorily account for personal property recently thereafter found in his possession is not a circumstance from which his guilt of this offense can be inferred, unless it appears that the goods in question had actually been taken from the house which had been broken and entered. (King v. State [Ga.], 26 S. E. Rep. 480.)

**CRIMINAL LAW—FORGERY—ORDER FOR GOODS.**—An indictment charging a defendant with having falsely, and with intent to defraud, made a writing requesting one person to deliver merchandise to another, to be charged to a third, with intent to thereby write an order from such third person for the goods, is a good indictment for forgery. (Agee v. State [Ala.], 21 South. Rep. 207.)

**CRIMINAL LAW — HOMICIDE — SELF-DEFENSE.**— One who, when going to the house of another man for the purpose of having illicit intercourse with the wife of such man, arms himself with a deadly weapon, with the intent to take the life of the husband if detected, and if necessary to save his own, and who does so use it, and kills the husband, is guilty of murder in the first degree. (*Dabney v. State* [Ala.], 21 South. Rep. 211.)

**DEED—CONDITIONS — CONSTRUCTION.**—A meeting-house cannot be used for daily morning prayers by the grantor, an academy, which conveyed it to a religious body on condition that the grantor might use it for "public exhibitions and other purposes." (*Trustees of Phillips Exeter Academy v. New Parish in Exeter* [N. H.], 36 Atl. Rep. 548.)

### **Notes of Recent English Cases. I**

**ACCIDENT INSURANCE — POLICY — BLOOD POISONING — DIRECT PROOF — FORFEITURE.**— A policy of insurance against, *inter alia*, accidental blood poisoning was issued to a medical man. In an action on the policy by the insured, it appeared that while he was performing an operation on the uterus of a woman he cut his finger. About a fortnight thereafter he developed a sore upon the finger, the nature of which was disputed, and at the same time showed secondary syphilitic symptoms. The pursuer averred that he had been inoculated through the cut in his finger by this patient, but produced no evidence to show that he was suffering from syphilis. Medical evidence was produced by the company to show that it was contrary to experience that secondary symptoms should develop within fourteen days of inoculation. The pursuer refused to give the name of the patient, on the ground of professional etiquette. The policy also provided injuries for which claims should be made must be "capable of proof." Held, that insured failed to prove, within the meaning of the policy, that the blood poisoning had been accidentally contracted in the course of his professional duty. Lord Young, dissenting, on the ground that the parties must be held to have contracted in view of the known rule of professional etiquette, and that on this footing the pursuer had sufficiently proved his case. Judgment for company below. Here affirmed in favor of company. (*Gray v. Northern Accident Insurance Company* [Scot. Ct. of Sess.], 34 Scottish Law Reporter [Jan. 27, 1897], 201; 4 Scot. Law Times [Jan. 9, 1897], 213.)

### **New Books and New Editions.**

**THE HISTORICAL DEVELOPMENT OF CODE-PLEADING IN AMERICA AND ENGLAND**, with special reference to the codes of New York, Missouri, California, Kentucky, Iowa, Minnesota, Indiana,

Ohio, Oregon, Washington, Nebraska, Wisconsin, Nevada, Kansas, North Dakota, South Dakota, Idaho, Montana, Arizona, North Carolina, South Carolina, Arkansas, Wyoming, Utah, Colorado, Connecticut and Oklahoma. By Charles M. Hepburn, of the Cincinnati Bar. Cincinnati: W. H. Anderson & Co., 1897.

The aim of the author of this work, to define and illustrate the essentials of code-pleading from the side of its historical development in America and England, has been conscientiously kept in view, and such examination as we have been able to give to the volume shows that the work has been thoroughly done. The field is a broad one, and, for the most part, unworked. The author has carefully examined all original authorities, and, in consequence, presents important facts, which do not appear in any other text book on the subject. Code-pleading, as the author truly observes, is essentially a science of historical development, and after fifty years it is still from the historical side of his code that the practitioner can obtain the readiest access to the true nature and successful application of those principles and rules with which he has to do in the actual business of pleading. The book defines clearly and succinctly the place now occupied by code-pleading in general, and by each of the codes in particular, thus putting the practitioner in touch with his code, as part of a great statutory system of pleading. It explains with admirable clearness the nature of code-pleading; classifies the States of the Union according to the character of their systems of pleading; discusses the causes which led to the overthrow of common law pleading; narrates briefly the historical movement in England and America for statutory reform of the pleading; indicates the cardinal points of agreement and contract between our codes; examines the relation of the codes to the New York code of 1848, and its amendments; points out the history of the codes with respect to their stability; considers the proposed New York revision of 1896; defines the place of the codes of civil procedure in the movement for codification in general; gives the history of the partial adoption of code-pleading in the Federal Courts; points out the leading facts in the recent rise of code-pleading in England, with its suggestive relations to code-pleading in America; examines the cardinal matters of agreement between the two systems, and narrates briefly the recent progress of code-pleading in the British colonies. All this has been done within the limits of a small book—318 pages. The work cannot fail to be of real assistance to the practitioner in any one of the code States. It presents valuable facts not found in any other text book, and fills a want, long felt by lawyers, for full and authoritative information as to the development of code-pleading in the English-speaking world. Care and scholarly research are shown upon every page.

## The Albany Law Journal.

ALBANY, MARCH 27, 1897.

### Current Topics.

A SOMEWHAT interesting controversy has arisen between Charles F. Beach, Jr., the well-known author of legal text-books, and his American publishers, Messrs. Baker, Voorhis & Co., of New York. It appears that this firm is about to publish a second edition of one of Mr. Beach's best-known works, and that the editing of the same is not to be done by the author of the original work, because of a dispute as to compensation. Mr. Beach alleges that, after he had, in pursuance of contracts made with him by Baker, Voorhis & Co., collected a mass of matter for the second edition, and had done much other serious work upon the revision, the publishers refused to proceed with the work, "under what turned out to be an entirely mistaken notion that, by the operation, a few dollars might be saved." He therefore feels called upon to notify intending or possible purchasers that the forthcoming new edition is no work of his, and that if it is advertised and brought out as a fair and honest equivalent for a genuine second edition of his original work, it will be a palpable fraud upon the public. Mr. Beach regards the action of the New York publishers as "penny-wise-and-pound-foolish," in view not only of the fact that they deprived themselves of the experience of and materials collected by the original author for the second edition, but were, in addition, compelled to pay more than \$600 in settlement of his claims for damages for breach of contract with him. Of course, this feature of the matter possesses very little interest for the general public; but there is a nice ethical question involved. We refer to the right of a publisher to continue to attach to subsequent editions the name of the author of the original work, after he has, as in this case, denounced it as spurious and bastard. Aside from Mr. Beach's peppery references to the legal gentleman who is editing this second edition,

VOL. 55 — No. 13.

and the alleged fact that he is doing the work for a mere pittance (which is his own, and not Mr. Beach's, business), the latter makes the statement much more important, on information and belief, that the hard-working, though poorly-paid, editor has seen fit to incorporate and interpolate throughout the text "a quantity of agrarian and communistic nonsense in reference to corporations and combinations of capital for which I (he) would on no account consent to be held responsible," and which he thinks is little short of libelous to put out as his (Beach's) work.

The village of Clinton, N. Y., furnishes a cat case which is likely to become a *cause celebre*. While no fun for the feline, lawyers and laymen are actually holding their sides over the developments, and as yet no end of the merriment is in sight. By a singular concatenation of circumstances Miss Anna Q. Moore, a spinster, residing on College Hill, in the aforesaid village, who appears as the plaintiff in the case, found herself minus a "harmless, necessary cat," particularly valuable to her because it had seven toes and a lovable disposition. Suddenly puss disappeared as completely as though it had been swallowed up by the Catacombs of Rome. After giving way to the cataract of tears which such a catastrophe naturally produced in one of such tender susceptibilities, Miss Moore proceeded to catechize her friends and neighbors, with the result that she discovered that her next-door neighbor, Dr. Albro D. Morrill, of the chair of biology in Hamilton College, and Joseph Searle, of the same institution, were responsible for the cataclysm which punctuated the career of poor puss, having, in fact, sacrificed the cat, as they claimed, in the interest of science. Miss Moore thereupon categorically demanded pecuniary compensation for the death of her pet, and failing to receive it, brought suit for \$75 damages, the complaint reading as follows:

Anna Q. Moore against Albro D. Morrill and Joseph Searle.

This plaintiff was the owner of and in possession of a valuable family cat, being of



great value on account of being of the seven-toed variety, and particularly valuable to this plaintiff on account of its domestic disposition and its great usefulness in ridding the house, barn and premises, where plaintiff resides with her mother, of rats, mice and other pests, the value of the same being \$75.

That on or about the — day of March, 1897, at the residence of plaintiff, on College Hill, the above defendant unlawfully and wickedly and wilfully took aforesaid cat from the premises of this plaintiff and carried away and killed the same, to this plaintiff's damage in the sum of \$75.

ANNA Q. MOORE, Plaintiff.

L. M. MARTIN, Counsel for Plaintiff.

This unique answer to the complaint was filed by D. F. Searle, of Rome, the defendant's attorney:

For answer to complaint herein

Defendant most respectfully

Denies the same, disputes the claim,

And utterly, rejectfully.

This maiden plaintiff's Thomas cat

Was filled with bad propensity

To prowl and fight, and scratch and bite,

And howl with great intensity.

The feline *fera natura*

Would go with great velocity,

Not after rats, but neighbors' cats,

And claw them with ferocity.

He was a mangy, flea-bit thing,

And mingled with bad company;

No high-born cat, aristocrat,

But nasty, vile, and vicious he.

His sire was mean and mean his dam,

And damned thro'out eternity

By neighbors sad and neighbors mad,

Whose dams meant not maternity.

Felis damage-feasant was,

*Sic scripsit magna curia;*

To stop his breath and cause his death

*Damnum absque injuria.*

We tried to rid us of this pest,

"The cat came back" and squalled defiance;

Not knowing that 'twas plaintiff's cat

We thought we'd offer him to science.

His fur and carcass plaintiff took,

And when from life that body parted

She should be glad, for then she had

A better cat than when she started.

And now we ask this learned court

For judgment in this cause unholy;

In Justice's name dismiss the claim

With costs and soothe our melancholy.

The case will be tried before Judge E. S. Williams and a jury. It promises to be fought with Kilkenny stubbornness.

The legislatures of various States are wrestling with the difficult problem of enacting just and equitable libel laws. The views and opinions of leading jurists and lawyers differ quite radically as to what the provisions of such a law should be, particularly on the subject of punitive damages. The Illinois legislature has recently refused to pass a bill repealing the new libel law of that State and go back to the practice of 1895 and previously, under which the legal presumption was that the publisher of an incorrect statement was actuated by malice. Under the old law, sought to be re-enacted, the publisher was obliged to disprove the presumption of malice in order to avoid punitive damages, and did not always escape when he proved the negative, as required by law. The law which the legislature refuses to repeal gives publishers, like all other accused persons, the presumption of innocence until proved guilty, and without depriving suitors of their rights, prevents publishers from being unrighteously oppressed because of accidents or errors, of which they themselves are the victims. If a published error is retracted conspicuously, fully and promptly, the publisher must pay all damages actually caused by the erroneous publication, but nothing more. This would appear to be sound, wise and just, protecting publishers acting in good faith from being oppressed because of innocent error, and keeping open the way for full compensation for all loss or actual injury caused by the erroneous publication. The Court of Appeals of New York, however, in the case of Juliette C. Smith, appellant, v. George E. Matthews and Charles E. Austin, respondents, just decided, holds that under the laws of this State, in actions for libel, punitive damages may be awarded by the jury for the reckless and careless publication of libelous matter, as well where the publication is shown to have been induced by malice. The defendants, who are publishers of the Buffalo Morning Express,

issued daily, and the Buffalo Illustrated Express, issued weekly, on or about June 14, 1890, published in their newspapers an article received by them through the United Press Association, charging that the plaintiff, the wife of a Toronto merchant, had eloped with one Rutherford, a young bachelor of thirty. It was admitted by defendants at the trial that there was no elopement, and the plaintiff proved that she was escorted to New York by Rutherford at the suggestion and request of her husband, who met her at the Grand Central Station on their arrival in that city. No "individual malice" on the part of either of the defendants toward plaintiff was shown or claimed, but the case rested on carelessness and negligence, and the wanton publication of a falsehood. The defendants admitted that no attempt was made, prior to the publication, to ascertain the truth or falsity of the communication; but it was also shown that it was not the custom, on receiving articles of news, to verify them before publication — in fact, that it would be impossible, practically, to do so. After the action had been begun, the defendants at once published a full retraction of the libel. The plaintiff secured a verdict for \$4,000, which the General Term of the Superior Court of Buffalo set aside. The Court of Appeals holds that, in order to recover punitive damages, it is not necessary to show that actual malice or wicked intent to injure exists, but that a libel recklessly or carelessly published will support such an award. While conceding that a smaller verdict would perhaps have answered the purposes of justice under all the circumstances, the court finds that the publication referred to was grossly negligent, attacking without shadow of justification the good name of an innocent wife and mother. The court concludes: "All this came about, not because the defendants were impelled by a wicked intent to injure this plaintiff, but for the reason that, as one of them admitted on the witness stand, it was not their custom, on receiving articles of news, to ascertain their truth or falsity before publication. The publishers who adopt this reckless rule in the conduct of their business must abide the conse-

quences." Without at all presuming to criticise this ruling, it may be proper to point out that it will bear heavily upon publishers, who will have to make a radical change of methods in order to avoid the danger of being heavily mulcted in damages for entirely innocent errors. It is manifestly impossible for publishers to verify all the news they receive, before its publication, and in the case under consideration the editors had no special reason for instituting an investigation, or doubting the accuracy of the information, which came to them through regular and supposedly reliable channels. They followed the usual custom of newspapers throughout the country.

Recent cases under the libel laws of other States are of interest in this connection. In a suit against the Philadelphia Ledger for a false publication, it appeared that the libel was due to a mistake in the confounding of names; that there had been a prompt correction of the mistake, and a fair explanation of the accident. Judge Gordon charged the jury that for a libel not malicious, but accidental, the verdict should not represent more as compensation than the facts proven justify. The jury fixed the damages at \$75, and the judge pronounced the verdict exactly right. In a suit against the Post, of the same city, tried before another judge, the charge was that any libelous publication is presumed to be malicious, and no evidence proving or disproving malice need be given. A verdict of \$7,000 was rendered, although the offense of the Post consisted merely in the publication, as ordinary news, of an account of a president of a certain corporation in regard to his dismissal of an employe. This seems clearly a gross injustice, and is matched by a case in Wisconsin, where, recently, a newspaper was compelled to pay heavy damages for publishing an accurate report of a speech made at a meeting of a city council. The speech contained libelous charges and reflections upon a public man, and the newspaper, which simply published the speech, without editorially endorsing the libel, was held to be guilty of the same offense as the author. These cases go further against publishers than the law as inter-

preted by the highest court in this State, but it would seem to be wise to draw a clear distinction between malicious and inadvertent or unintentional libel, making publishers, in the latter case, liable only for the damages actually shown to have been caused by the erroneous publication.

The recent remarkable feat of Isaac Dement, a Chicago stenographer, in taking testimony at the almost incredible rate of 402 words per minute, during a test recently made in that city, serves to direct public attention to the development of shorthand writing since its inventor, Isaac Pitman, who died in England a few weeks ago, at an advanced age, first gave his system of brief writing to the world, in the year 1837. It is a curious fact that the principal object for which the system was originally invented — the reporting of debates in parliament — has been greatly dwarfed by the uses to which stenography has been put in the courts of law of the world, and its incalculable influence upon and facilitation of trials. In order to obtain some realization of this, one has but to recall the procedure in vogue a half century ago, and compare it with these *fin de siècle* methods. Trials that would formerly occupy a week or more are now often concluded in a day, or less. The judge who presided at the trial, and counsel on each side, wrote out in longhand full notes of the evidence, and even the cross-examining counsel took notes as he went along. In addition to this, any one could require a witness to pause until he caught up with him in writing down his evidence. As Mr. Henry L. Clinton shows in his interesting reminiscences of New York courts and lawyers fifty years ago, the very object of cross-examination was not infrequently defeated by this method, as a witness was given the opportunity to change his evidence before it was written down. There would be frequent discussions as to what a witness said, and from such discussions the witness would be able to perceive which version of his evidence would best subserve the side on which he testified. When the discussions ended, it would be left to the witness to state what he

actually said. All this the taking of evidence in shorthand has prevented, besides enormously lightening the labors of bench and bar, and rendering the entire machinery of justice more certain. Thus shorthand, together with that other remarkable modern invention, the typewriting machine, has to a large extent emancipated the judges and lawyers, and there has grown up a remarkably clever class of hard-working male and female experts, who are able to take with more than phonographic accuracy, because brains and wise discrimination are behind them, every word that is spoken by even the most rapid and garrulous witness. The marvelous dexterity of the shorthand writer who is able to take 400 words per minute may be partially comprehended by reflecting that this feat involves the writing of between six and seven words in each second, a most remarkable feat even if kept up for only one minute. Shorthand and the typewriter have thus inconceivably reduced the burdens of modern life, making it possible for the business man to dispose of correspondence, the care of which, under old methods, would have been a practical impossibility, even with every minute of the business day devoted to it.

Governor-Mayor Pingree, of Michigan and Detroit, has met defeat in his extraordinary attempt to hold both offices at the same time. The Supreme Court of the State decides unanimously that, having accepted and entered upon the duties of the office of governor, he vacated, *ipso facto*, the office of mayor of the city of Detroit. The court orders the common council of that city to call a special election for the purpose of choosing a new mayor. If, as has been generally understood, it was the intention of Mr. Pingree, if forced to choose between the two offices, to relinquish the higher and more exalted position in favor of the mayoralty, that plan, too, has been defeated by the court, for resignation of the gubernatorial office would, under the court's decision, mean retirement from the State office, without any claim upon the city office. The decision is to the effect that under the Consti-

tution the governor of Michigan cannot hold any other office "under the State," and that the mayoralty, being an office created by State laws, and a considerable part of its duties being performed for the State, the inhibition clearly applies to the mayoralty. An even more convincing consideration adduced by the court is that the governor is clothed with the power to remove the mayor of any city in the State, under certain circumstances, and it may well be asked whether any court could rationally hold that the two offices are compatible, in the light of this fact. The decision is unquestionably sound.

The New York State Library has just issued its seventh annual comparative summary and index of State legislation, covering the laws passed in 1896. Each act is briefly described or summarized, and classified under its proper subject-head, with a full alphabetical index to the entries. Perhaps the most important legislation of the year was that enacted by the people directly through their votes upon the numerous constitutional amendments submitted to them. The bulletin records the amendments defeated as well as those adopted, a special table arranged by States being inserted for convenient reference. It is of interest to note that of 57 separate constitutional amendments voted on, only 24 were adopted.

There is steadily growing appreciation of this bulletin by all persons interested in improving State legislation. It is already widely used, and helps materially in raising standards and promoting uniformity in the laws of the different States. It is proposed that the eighth bulletin shall consolidate into a single series with the legislation of 1897 the summaries for the preceding seven years. This material will be closely classified, and so presented as to give a clear view of the general progress of legislation for the eight years ending in 1897.

The Supreme Court of Missouri has judicially declared the right and power of a Merchants' Exchange to suspend a member who insists upon smoking during 'change hours

in violation of its rules. The decision grew out of the suit of Albers against the St. Louis Merchants' Exchange for \$50,000 damages claimed to have been suffered through Albers' suspension from the privileges of the floor because he refused to obey the rule prohibiting smoking. It appears from the record that he had been warned to desist, under threat of suspension, before the order of suspension was made. He denied the authority of the Board of Directors to make or enforce such a rule, and continued to smoke. When suspended, he brought suit for damages. The Supreme Court not only declares the power of the board to make such a rule, but the justices hint at admiration of the good taste of such a restriction. The decision, in large measure, defines the powers of Merchants' Exchange directors not only to make, but to enforce, rules for the government of the conduct of members during 'change hours. Any one who has seen the endless variety of horse-play so often indulged in by practical jokers will concede that it was high time to invoke the aid of the courts in defense of the amenities. At all events, the sign, "No smoking during business hours," will mean what it says in St. Louis hereafter.

The ALBANY LAW JOURNAL makes room in this issue for a synopsis of the very important decision of the Supreme Court of the United States, in which the so-called Sherman Anti-Trust law is sustained, and its application to all pooling arrangements by railroads for the purpose of maintaining rates expressly declared. All such agreements are held to be in restraint of trade, and therefore contrary to public policy. Justice Peckham writes the opinion, in which Chief Justice Fuller and Associate Justices Brewer, Harlan and Brown concur. While the decision was given in the case of the United States against the Trans-Missouri Freight Association, embracing all the great railway lines of the west, there is practically no doubt of its applicability to the Joint Traffic Association, embracing the Vanderbilt, Pennsylvania, Wabash, and other great eastern systems, with headquarters in New York city. All of

the decisions of the lower courts had been favorable to traffic associations, and they were confident the court of last resort would sustain them.

It is already predicted that within a week, as a result of the decision, not one of the organizations having jurisdiction over passenger and freight rates will be in existence in this country. The legal advisers of the great railroad corporations, after hasty consultations, have informed the officials that the only safe course to pursue is to sever connections with all associations, and in consequence many lines have already determined to withdraw. This means the certain and speedy disruption of the following, among other associations and committees: Western Freight Association, Trans-Continental Passenger Association, Western Passenger Association, Southwestern Traffic Association, Trans-Missouri Freight Association, Southwestern Passenger Committee, Mississippi Valley Freight Committee, St. Paul and Minneapolis Rate Association, Colorado Freight Association, the Local Passenger Associations of St. Louis, Colorado Springs, Pueblo, Denver and Chicago, St. Louis General Passenger Agents, Chicago and St. Louis Traffic Association, Western Classification Committee and Indianapolis Terminal Freight Association. The life of these organizations is dependent on the unity of action of all members, and the withdrawal of one line may be followed by the making of lower rates, which would immediately result in all the other competing lines quitting the associations. The consensus of opinion is that a period of widespread and disastrous rate disturbance is at hand, because each road can now do as it pleases, and cut rates openly and secretly, regardless of the Interstate Commerce law.

Chauncey M. Depew, who is chairman of the Board of Control of the Joint Traffic Association, is quoted as saying that the decision is of serious moment. While he had not seen the full text of the opinion, from what he had heard he was inclined to the belief that the decision did not cover the Joint Traffic Association, or, if it did, that it opened up a new course of action, and that

each individual association would have to have a separate hearing. Mr. Depew said the articles of the Joint Traffic Association were drawn up with the most minute care; they were prepared by the ablest lawyers in the country, and were passed upon by the foremost railroad men. Even the precaution of a test case was resorted to. It is as yet too early to predict what action will be taken, in view of the decision by the Joint Traffic Association. The decision just handed down is conceded to be of far-reaching importance, dealing, as it does, a heavy blow at monopoly and unlawful combination.

What proved to be one of the most remarkable criminal trials on record in this State was recently concluded at Auburn, N. Y., with a verdict of conviction, the defendant being Frank Sheldon, who was indicted for the crime of wife-murder. From the opening of the case to the finding of a verdict by the jury, no less than forty-seven days elapsed. Not only in the length of time consumed in the taking of evidence, but also in the conduct of the jury, was the case noteworthy. The twelve men seemed to have shared the differences of opinion manifested on the trial. Many times after they retired for deliberation did they appear before the court, either for instructions or to announce their inability to agree, and as many times were they sent back by the presiding judge, with the injunction that they must find a verdict; and it was not until they had been out eighty-four hours that they came into court and announced their agreement. The anxiety of the court that all the labor and expense involved in the trial should not go for naught was proper and natural, and it is conceded that, but for the firmness of the judge, a disagreement would have certainly resulted. At the same time, this remarkable trial again brings up the question as to how long it is proper for the court to keep a jury in confinement after one or more of its members have declared their inability to agree with the others. The right of individual judgment is, of course, the sacred prerogative of a juror. When he has determined, under his oath and con-

science, that he is unable to agree with the majority, it is his right to maintain that attitude to the end. It is possible he may be right and the majority of his fellow-jurors wrong; at all events, he is presumed to be honest in his conviction, and is answerable to his conscience only for an honest and fearless discharge of his sacred duty. But it is difficult, if not impossible, to fix any limit to the time a jury should be kept in confinement under such circumstances. The court is properly the judge in such cases. The question whether or not there was error in this case is likely to be passed upon by the Court of Appeals, and it is to be hoped it will be.

The attempt made in the State of New Jersey to break up the so-called Tobacco Trust has failed with the decision by Vice-Chancellor Reed, recently filed with the clerk of the Court of Chancery, dismissing the suit brought against the American Tobacco Company to restrain it from doing business in New Jersey in a manner prejudicial to the complainants. The bill was filed by Attorney General Stockton, in the relation of John R. and Frank W. Miller, jobbers in paper cigarettes, with whom the American Tobacco Company refused to deal, according to the allegation of the Millers, because they also persisted in handling a cigarette manufactured by a rival corporation. In his decision Vice-Chancellor Reed holds, in effect:

1. A court of equity does not possess the power to restrain a corporation organized under the form of law from performing acts within its corporate power, merely because some of the steps taken in organizing the corporation may have been irregular, or because the purpose of the incorporators may have been to establish a monopoly.

2. Under these conditions *quo warranto* is the appropriate proceeding to challenge the right of the corporation to exercise its franchise.

3. A trading or manufacturing corporation, until its charter is annulled by such proceedings at law, has the same authority as an individual trader or manufacturer to sell or consign its goods, to select its selling agents, and to impose conditions as to

whom it shall sell and the terms upon which it will sell.

4. A decree restraining the officers and agents of a corporation from executing its corporate powers is the same as a decree enjoining the corporation itself.

A decision of particular interest and importance to firemen and residents of cities has just been handed down by the New York Court of Appeals in the Farley case. It was a test as to the liability of a municipality for damages to firemen from street incumbrances while going to fires. Farley, a New York fireman, in November, 1892, was responding with his company to an alarm in Broome street, when the hose carriage upon which he was riding collided with a wagon, and he was seriously injured. He sued for damages against the city, and \$7,500 was awarded to him; but on appeal this judgment was reversed, on the ground that it was a misdemeanor, under city ordinance, for any person to drive faster than at the rate of five miles an hour, and that as Farley himself was going at a faster rate than the ordinance permitted, even though on public business of imperative urgency, he was barred from recovery. The Appellate Division of the Supreme Court affirmed the judgment of dismissal; but as the case involves numerous like suits of other firemen, the counsel of Farley appealed to the Court of Appeals. This tribunal sustains the claim of counsel of the fireman, reversing the judgment of the Appellate Division, and establishing the principle that the ordinance regulating the speed of vehicles does not apply to the fire department. It would be clearly contrary to public policy, as it seems to us, to limit the fire department to a speed of five miles an hour for engines and hose carriages in responding to fire alarms.

A contract to give all one's property at death to a niece in consideration of her living with and taking care of the promisor, is denied specific performance in *Owens v. McNally* [Cal.], 33 L. R. A. 369, where the promisor had subsequently married and left a wife surviving him who did not know of the contract when she married him.

**RAILROAD POOLING UNLAWFUL.**

THE SHERMAN ANTI-TRUST LAW UPHELD BY THE UNITED STATES SUPREME COURT.

THE United States Supreme Court, in a decision handed down on the 22d inst., sustains the so-called Sherman anti-trust law, and holds that it, in effect, forbids all pooling arrangements by railroad corporations. The court was divided — 5 to 4 — and Justice Peckham, of New York, wrote the majority opinion. The cause came up on an appeal from the decision of the United States Circuit Court of the district of Kansas. That court decided in favor of the railroads. The government appealed to the United States Circuit Court of Appeals for the Eighth district. Here the railroads were again successful. Then the government appealed to the United States Supreme Court. The case has been pending for many months, an eminent array of counsel appearing in behalf of the railroads. The government was represented during the argument by Attorney-General Harmon, who prepared the briefs and conducted the argument unassisted.

The decision says the two important questions which demand examination are whether the trust act applies to and covers common carriers by railroad, and, if so, does the agreement set forth in the bill violate any provision of that act?

As to the first question the court says: "The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several States or with foreign nations.

"Unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce, we see no escape from the conclusion that the agreement is condemned by this act.

"It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it.

"We have held that the Trust act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of the United States v. E. C. Knight Company, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon.

"The Interstate Commerce act does not, in our opinion, authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring, either directly or by implication, any authority to make it. If the agreement be legal, it does not owe its validity to any provision of the Commerce act, and if illegal, it is not made so by that act.

"The general nature of a contract like the one before us is not mentioned in or provided for by the act.

"One of the contentions was that congress, in the passage of the Anti-Trust act, had intended to direct against combination and conspiracy such as the Beef Trust, the Standard Oil Trust, the Steel Trust, the Sugar Trust, the Whiskey Trust, etc., and these trusts, it was stated, had assumed an importance and had acquired a power which was dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity.

"It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably thought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them.

"But a further investigation of 'the history of the times' shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations between the different roads.

"A reference to this history of the times does not, as we think, furnish us with any strong reasons for believing that it was only trusts that were in the minds of the members of congress, and that railroads and their manner of doing business were wholly excluded therefrom.

"The very fact of the public character of the railroad would itself seem to call for special care by the legislature in regard to this conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible.

"It is true the results of trusts or combinations of that nature may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest.

"In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured

by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under these circumstances may nevertheless be badly restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.

" Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business, it seems to be an inevitable necessity that distress, and perhaps ruin, shall be its accompaniment in regard to some of those who were engaged in the old methods.

" A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purposes leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes.

" It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment by reason of such changes as we have spoken of may find opportunities for labor in other departments than those to which they have become accustomed. It is a misfortune, but in such cases it seems to be the inevitable accompaniment of change and improvement.

" It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article.

" In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small, but independent, dealers, who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein.

" Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transforming an important business man, the head of his establishment, small though it may be, into a mere servant or agent of a corporation for selling

the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

" Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of the combination of capital.

" Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common.

" It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business, but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both.

" We think, after a careful examination, that the statute covers and was intended to cover common carriers by railroad."

In discussing the second question, as to what is the true construction of the statute, assuming that it applies to common carriers, Judge Peckham entered into a lengthy argument in contravention of the position that the common-law meaning of the term, "contract in restraint of trade," includes only such contracts as are in unreasonable restraint of trade.

He says the term is not of such limited significance, and no exception nor limitation can be added without placing in the act that which has been omitted by congress. He discusses the difficulty of judging what is a reasonable rate and argues that to say that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

" We recognize," says the opinion, "the argument upon the part of the defendants, that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation, and prevents the deadly competition so liable to result in the ruin of the roads, and to



thereby impair their usefulness to the public, and in that way to prejudice the public interest.

"But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public, and by those who assume to defend its interests both in and out of congress.

"Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

"Considering the public character of such corporations (railroads), the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

"It is true that as to a majority of those living along its lines each railroad is a monopoly.

"According to the argument of counsel, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving perhaps one to raise rates indefinitely when its rivals have been driven away.

"It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. These agreements have never been found really effectual for any extended period.

"Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

In conclusion, Judge Peckham's opinion says: "The question is one of law in regard to the meaning and effect of the agreement itself, namely, does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does.

"The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.'

"To that end the association is formed, and a body created, which is to adopt rates which, when agreed to, are to be the governing rates of all the companies, and a violation of which subjects the defaulting company to the payment of a penalty;

and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet, while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce, as described in the act.

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restricting trade or commerce or for maintaining rates above what was reasonable."

### **LIBEL.**

#### **ACTUAL MALICE—WHEN MALICE IMPLIED—FAILURE TO INVESTIGATE CHARGE BEFORE PUBLICATION.**

If the truthfulness or untruthfulness of the charge made could have been found out, and the publisher failed to make any investigation, the jury are entitled to find implied malice and award vindictive damages.

The rule is well established that it may often occur in a charge to the jury that particular words or expression used, when taken by themselves, will be objectionable or seem to be erroneous, but they should not be considered independent of the context.

### **COURT OF APPEALS.**

**JULIETTE C. SMITH, Appellant, v. GEORGE E. MATTHEWS and CHARLES E. AUSTIN, Respondents.**

Decided March 2, 1897.

Appeal from an order of the General Term of the Superior Court of Buffalo reversing a judgment in favor of the plaintiff, entered upon the verdict of a jury for \$4,000 in an action for libel.

B. Frank Dake for Appellant.

Charles B. Wheeler for Respondents.

**BARTLETT, J.**—This is an action to recover damages for an alleged libelous publication in two newspapers of the defendants, and a jury rendered a verdict in favor of the plaintiff for \$4,000.

The General Term of the late Superior Court of Buffalo reversed the judgment entered upon the verdict and ordered a new trial. A single question is presented on this appeal. The learned trial judge, after a very full and fair charge to the jury, was requested by counsel for defendants to charge:

"That, unless defendants were moved by actual malice, the jury should not award the plaintiff damages by way of punishment."

The court replied: "Yes, I charge you they must be moved by actual malice; but you may find actual malice if you find they failed to make an investigation as to the truthfulness of the charge."

To this charge the defendants excepted.

Taken as abstract propositions, both the request

of defendants' counsel and the response of the court involved legal error. If by "actual malice" the defendants' counsel referred to actual spite or wicked intention on the part of defendants, then his legal proposition is unsound, as damages, by way of punishment, are not limited to actual malice as thus defined. If the trial judge meant to state to the jury that a failure on the part of the defendants to investigate the truthfulness of the charge before publication entitled them to find "actual malice" in the sense that it showed the defendants were moved by spite and wicked intention against the plaintiff, it is clearly erroneous as a legal proposition. The reversal of the General Term rests upon this alleged error in the charge, for the reason that prejudice may have resulted to the defendants therefrom, as the jury might have based their verdict upon actual as distinguished from implied malice, or malice in law.

It is necessary, in order to properly decide the question thus presented, to examine the entire charge to the jury in the light of the facts and the proceedings at the trial.

The defendants published the alleged libel in two newspapers owned by them—the *Buffalo Morning Express*, issued daily, and the *Buffalo Illustrated Express*, issued weekly.

The plaintiff, at the time of the publication, was a young married woman, living with her husband and children in Toronto, Province of Ontario, moving in high social circles, and possessed of a good reputation.

On or about June 14th, 1890, the defendants published in their newspapers an article received by them through the United Press Association, charging that the plaintiff, the wife of a Toronto merchant, had eloped with one Rutherford, a young bachelor of thirty; that the incident had created a great stir in Toronto, and her husband would investigate, etc., etc.

It was admitted by defendants at the trial that there was no elopement, and the plaintiff proved that she was escorted to New York by Rutherford at the suggestion and request of her husband, who met her at the Grand Central Station on their arrival in that city. For the purposes of this appeal, it can be taken as admitted that the article complained of was a gross libel, charging the plaintiff, a reputable married woman, with the gravest offense that can be committed by a wife and mother; that it was published in the two newspapers of defendants, both of which were circulated to some extent in the city of Toronto, which is distant seventy miles from Buffalo.

At the trial plaintiff's counsel stated, while the case was with defendant, that it was not claimed there was "individual malice" on the part of either of the defendants towards plaintiff, but that the case rested on carelessness and negligence, and the wanton publication of a falsehood.

This was the theory upon which the case was

tried, and the jury were so informed repeatedly by court and counsel.

This action was begun about a year after the publication, and the defendants immediately published a retraction of the libel.

It was admitted by the defendants on the trial that it would have been an easy thing on receiving the original article from the United Press Association for the manager of their newspapers to have telegraphed their special correspondent at Toronto to ascertain the truth or falsity of the communication: that he had full authority to do so if he deemed it necessary, and that he made no attempt to verify or investigate the truth of the statements received.

It was proved by one of the defendants on cross-examination that it was not the custom on receiving articles of news to ascertain their truth or falsity before publication.

It was, therefore, for the jury to determine the damages suffered by plaintiff on account of his publication, it being admitted that defendants were not impelled by spite, or ill-will, or wicked intention, that is, actual malice, provided they were found guilty of gross carelessness and negligence in printing the libel.

So we come to the question whether, considering the whole charge of the trial judge, this case was properly submitted to the jury as to the facts and the rule of damages, notwithstanding the incident at the close of the charge to which we have already referred.

We will quote a few sentences from the charge:

Speaking of the defendants, the court said: "They disclaim any intent to injure the plaintiff, either in her good name, in her reputation, or otherwise, and these facts are undisputed. It is expressly stated by the counsel for the plaintiff that he makes no claim that they were actuated in the publication of this article by express malice, so you see that you cannot draw from these circumstances express malice." Further on the charge continues: "And that strikes out from this case, so far as the defendants are concerned, actual malice and intent." The trial judge then correctly explained to the jury the legal effect of publishing a libelous article without investigation and with reckless indifference to the rights of the individual, and stated it amounted to a wanton publication, and that while there was no actual intent to do an injury, yet the law would impute malice and an undue disregard for the rights of others.

At the close of the main charge the defendants' counsel said: "I except to that portion of your honor's charge in which you instruct the jury that they may give damages by way of punishment, it being conceded that there was no actual malice either upon the part of the defendants or their agent."

By the court: "You will not misunderstand the court upon that proposition. They have dis-

claimed any actual malice, and the court has told you that must be accepted by you as true; that they did not at the time actually intend to inflict injury; consequently from that statement you would not be justified in awarding damages by way of punishment. But if you find that they could have found out the truthfulness or untruthfulness of this charge that they made, and they failed to make any investigation, you would be able to find such action upon their part, or upon the part of their agent, was a wanton act of negligence from which the law would imply malice, and you would be authorized to award vindictive damages, if you so find."

It was at this point, and after the court had again placed correctly before the jury the precise issue and the rule of damages, that the erroneous charge was made upon which the General Term reversed and to which we have adverted.

We are unable to agree with the learned General Term that it cannot be said with reasonable certainty that the defendants were not prejudiced by this lapse of the trial judge in telling them they could find actual malice if they found the defendants had failed to make an investigation as to the truthfulness of the charge.

The entire charge discloses repeated statements to the jury that there was no actual malice on the part of the defendants, and that if they were to be held liable it was by reason of implied malice for a reckless and negligent publication of the libel, and we are satisfied that the jury were not misled.

This error of the trial judge was harmless under the well-established rule that it may often occur in a charge to the jury that particular words or expressions used, when taken by themselves, will be objectionable or seem to be erroneous, but they should not be considered independently of the context. (*Chellis v. Chapman*, 125 N. Y. 214, 223; *Sperry v. Miller*, 16 N. Y. 407, 413; *Losee v. Buchanan*, 51 N. Y. 492; *Northern Pacific Railroad v. Babcock*, 154 U. S. 201.)

This case was submitted to the jury in a matter most favorable to the defendants. It is undisputed upon the evidence that this publication was reckless and negligent, nevertheless the trial judge submitted that question to the jury, and told them they could award nominal, actual or punitive damages.

The learned counsel for the defendants insists that punitive damages are only recoverable in case of actual malice, when the wicked intent to injure exists. The rule is otherwise, and it has been repeatedly held in this State that a libel, recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages. (*Warner v. Press Publishing Co.*, 132 N. Y. 181, 185; *Holmes v. Jones*, 121 N. Y. 461, 467, and cases cited; *Holmes v. Jones*, 147 N. Y. 59, 67.)

The defendants have been cast in heavy judgment, and it may be that a smaller verdict would

have answered the purposes of justice under the circumstances, but this publication was grossly negligent, and attacked, without the shadow of justification, the good name of an innocent wife and mother, charging her, in effect, with unfaithfulness to her marriage vows, and the abandonment of her children.

All this came about, not because the defendants were impelled by a wicked intent to injure this plaintiff, but for the reason that, as one of them admitted upon the witness stand, it was not their custom, on receiving articles of news, to ascertain their truth or falsity before publication.

The publishers who adopt this reckless rule in the conduct of their business must abide the consequences.

The order appealed from should be reversed and the judgment entered upon the verdict, and the order denying a new trial affirmed, with costs.

All concur.

Ordered accordingly.

#### THE CHIEF JUDGESHIP OF THE COURT OF APPEALS.

IN view of the fact that the voters of the State of New York will be called upon, next fall, to elect a chief judge of the Court of Appeals, in place of Judge Charles Andrews, who retires under the constitutional age limitation, the following article from the Albany Argus will be read with interest:

There will be but one State officer elected this fall — a chief judge of the Court of Appeals in the place of Charles Andrews, of Syracuse, Republican, who was elected to that high office in 1892, and whom the age limit will now retire, full of years and honors, after serving upon the Appellate bench for nearly thirty years. Neither of the great parties will hold a State convention for the nomination of this single State officer, the Republican and the Democratic State Committees having each been authorized last year by the State conventions which severally created them to make nominations for chief judge of the Court of Appeals without the convocation of a party convention.

The fact that this judicial nomination will, therefore, be the only one upon which the voters of the State at large will have an opportunity to pass, should impel the Democratic State Committee to select a democratic jurist of the highest character and attainments, and not only so by reason of the character of the office itself, but also because of the strength contributed to assembly and local democratic candidates by a strong and popular name at the head of the ticket — a potent factor always to be considered by nominating bodies, but especially so at this time and under the present ballot-law, under which "the tail goes

with the hide" to an extent heretofore undreamed of.

The chief judge of the Court of Appeals to be elected this fall will be the sixth incumbent of that distinguished office as created by the constitutional amendment of 1869 to the Constitution of 1846. The first was the late Sanford E. Church, of Albion, who served ten years, until his death, in May, 1880. Governor Cornell, on May 20, 1880, promoted Charles J. Folger (then associate judge) to the vacant chief judgeship, and Folger was elected by the people at the November election following for the full term of fourteen years. He served, however, only until November, 1881, when he resigned to become secretary of the treasury by appointment of President Arthur. Folger's subsequent disastrous candidacy for governor, and his death—caused, as many believed, by chagrin at his overwhelming defeat—are among the most dramatic chapters of the more recent political history of the State.

Governor Cornell appointed the present chief judge, Charles Andrews (then associate judge) to the vacancy in the chief judgeship caused by the resignation of Mr. Folger; but Judge Andrews's first candidacy before the people was in that disastrous year for Republicans, 1882, and the successful candidate was William C. Ruger, Democrat, also a Syracusan—Judge Andrews resuming his place as associate judge. Judge Ruger served about nine years, and upon his death Governor Flower designated Associate Judge Robert Earl, of Herkimer, to the vacant place. Judge Earl's approaching three-score years and ten made his candidacy for the chief judgeship seem at that time unadvisable, though his party would gladly have honored him; and for that and other reasons it came about that in the democratic year of 1892 Judge Andrews, by the endorsement of both parties, again won the chief judgeship—this time by the popular vote of which he had failed in the election of ten years before.

The first bench of the present Court of Appeals, as constituted in 1870, consisted of five Democrats—Chief Judge Church, Judges William F. Allen, Martin Grover, Rufus W. Peckham and Charles A. Rapallo—and two Republicans—Judges Charles J. Folger and Charles Andrews. The present court consists of five Republicans and two Democrats—Chief Judge Andrews, Judges Bartlett, Haight, Martin and Vann, Republicans; Judges Gray and O'Brien, Democrats. The other associate judges since 1870 have been Alexander S. Johnson, of Utica, appointed December 29, 1873, in the place of the senior Rufus W. Peckham, who was lost at sea; the late Theodore Miller, of Hudson, who was elected at the polls November 3, 1874, for the full term vacancy created by Judge Peckham's death; Robert Earl, of Herkimer, appointed in 1875 in the place of Grover, deceased, elected in 1876 and re-elected in

1890; Samuel Hand, of Albany, appointed by the Governor June 10, 1878, vice Allen, deceased, and served until the following January; George F. Danforth, of Rochester, elected November 5, 1878; Francis M. Finch, of Ithaca, who came to the bench by appointment, vice Folger, chosen chief judge, was elected by the people in November, 1881, for a full term, and has just recently retired; Gen. Benjamin F. Tracy, who served a little over a year (from December 8, 1881, to January, 1883), during the interval of Judge Andrews's designation by Governor Cornell as chief judge; the younger Rufus W. Peckham, who was elected November 2, 1886, and resigned in 1895 to become a justice of the United States Supreme Court; and the late Isaac H. Maynard, of Stamford, who served two years, 1892 and 1893, the first year by designation in the place of Robert Earl, acting chief judge, and the second to fill the vacancy caused by the election of Judge Andrews as chief judge. During almost all its history, until 1895, the Court of Appeals had a democratic majority, but it is at present decidedly Republican in its make-up.

In view of their present preponderance in the court; in view of the general concurrence of the best opinion that judicial offices should not be awarded upon strict partisan lines; in view, also, of the democratic free gift of the chief judgeship to the present Republican incumbent in 1892, the Republican State Committee might well consider the propriety of endorsing the democratic nominee for the succession to Chief Judge Andrews. This would still leave the court Republican, and would leave this fall's election, as it ought to be, to be contested as to assembly candidates and city tickets, upon the all-absorbing issue of home rule for cities and no interference from the State capitol at Albany.

#### WOMEN AS PLEADERS.

WHILE women were not denied the privilege of pleading their own causes in the courts of imperial Rome they were expressly prohibited from appearing as advocates for others, says Charles Moræ in the *Canadian Law Journal*. The origin of this disability is a sad one, and shows at least that there was some traditional ground for the modern barrister's aversion to opening the door of his profession to the more voluble sex. Valerius Maximus tells us that there was a certain lady named Cafrania, wife of a senator, who was addicted to verbal onslaughts of so violent a character upon a certain prætor whenever she appeared before him that in self-defence and in the interests of justice he made an edict forbidding all females from pleading for others in the courts of Rome. Valerius calls this disbarred lady the most shocking

names, which we deem it prudent not to translate. This prætorial inhibition found its way into the pandects, where the reason for its promulgation is also stated in language quite as denunciatory of the embargoed Cafrania as that above referred to. (See Dig. 3, 1, 'sec. 1, in Galisset's Corpus Juris Civilis.) It would seem, however, that notwithstanding this ban upon female pleaders, the study of the law was regarded as a becoming pursuit by educated women in the reign of Justinian. Testimony of this fact is to be had in the following epigram by Agathias upon the death of his sister Eugenia, translated by Lord Reaves in his notes in the fourth edition of Lord Mackenzie's Roman Law :

Blooming in beauty and in song before,  
 Skilled in the splendid truths of legal lore,  
 Here hid in earth Eugenia's seen no more.  
 Venus, the Muse, and Themis, at her tomb,  
 Cut their fair locks in sorrow for her doom.

As there is authority to show that women once pleaded before the Roman courts, so we have it on record that they used to sit in the Anglo-Saxon witenagemot of parliament. Gurdon (History of Parliament) tells us that in Wightred's great council at Beconceld, held in the year 964, the abbesses sat and deliberated with the witas, and five of them signed the decrees of that council, along with the king, bishops and nobles. Even so late as the reigns of Henry III and Edward I abbesses were summoned to parliament. The right of ladies of quality to sit was still recognized in the reign of Edward III, when the countesses of Norfolk, Ormond, March, Pembroke, Oxford and Athole were summoned "*ad colloquium et tractatum*" by their proxies.

#### GERMAN LAWYERS.

GERMAN lawyers are prepared to undertake the performance of professional duties at a rate of remuneration which would be deemed ridiculous in England. So we gather from the interesting report which Mr. Brickdale has written as a result of the investigation he made with the authority of the treasury, into the working of the system of registration of title to land in Germany and Austria-Hungary. The fee of a German lawyer who is employed in connection with the transfer of registered land is on the same scale as the fee of the registry. Hence, if the value of the land is £100, the lawyer is entitled to the magnificent sum of 7 shillings 3 pence; while in a £1,000 transaction he gets 80 shillings. It is to be hoped that no reader of Mr. Brickdale's report will be led to believe that, because such arrangements are "made in Germany," they are possible in England.—*London Law Journal*.

#### Legal Notes of Pertinence.

The Boston *Traveller* is waging an energetic campaign against what it calls the barbarous workings of the Massachusetts poor-debtor law. It says that creditors take advantage of the harsh and unjust provisions of this law to inflict cruel hardships upon unfortunate persons owing them money, and that the statute is especially harsh in the case of women debtors, who, under it, can be subjected to outrageous humiliations. Rowdy constables are able to extort what amounts to blackmail by threatening instant enforcement of the law's severest requirements, and then selling such measure of leniency as the victim is willing to pay for. A bill to reform this antiquated process of collecting debts is now before the legislature, and there seems to be considerable public demand for its speedy passage.

In a murder case in Michigan, the defence being emotional insanity, the court gave this as a part of its instructions:

"And in this case it is for you to determine whether the insanity relied upon by respondent's counsel is that convenient form of it which enables a person who does not choose to bridle his passions to allow them to get and keep the upper hand just long enough to enable him to commit an offence and then let them subside."

And it was held to be error, as being in the nature of an argument belittling the defence.

The finding of lost property has often given rise to curious points of law. A workman who found a valuable ring in a London theatre claimed the return of the ring from the proprietors, who had taken possession of it. The court, however, rejected his claim, as the ring had been picked up while the man was fulfilling his duties as a servant. At first sight this decision appears to be inconsistent with that arrived at some years ago in a case in which a chimney sweep sued a jeweler for a precious stone. The sweep had found a brooch on his rounds, which he took to the jeweler, who extracted a precious stone and substituted a worthless imitation. On this being discovered, the jeweler replied to the sweep's demand for the return of his stone that the stone did not belong to the sweep, as he had found it, the inference being that he could, therefore, steal it with impunity. The court, however, held otherwise, and the sweep recovered his jewel.

An eviction of a life tenant from a room in a house is held in *Grove v. Youell* ([Mich.] 33 L. R. A. 297), to be made so as to constitute a breach of a bond securing the right to its occupancy, when access to the room by passing through the house is denied,

and there is no other mode of access thereto, and occupation is abandoned in consequence thereof.

An extensive discussion and review of the authorities as to the private ownership of lakes is made in *Fuller v. Shedd* ([Ill.] L. R. A. 146), in which it is decided that lakes, whether large or small, if they are of such size that in making the original survey they are meandered, are subject to the same rule as to riparian rights, and that a grant bounded thereon conveys only to the water's edge with riparian rights, but does not include land under the water.

Discrimination in the use of a wharf for a landing place is held unlawful in *Barrington v. Commercial Dock Co.* ([Wash.] 33 L. R. A. 116), although the wharf is owned by a private person and is not at the terminus of any street, but is reached by a bridge used by the public as a thoroughfare, and the owner conducts a general wharfing business under a statute authorizing the erection of wharves and a charge of reasonable rates.

The *Chronicle Paris* correspondent says: Another grave scandal, showing the abuses of the secret criminal "instruction," has occurred at Bayeaux. During the trial of a peasant named Huet for theft, the prisoner affirmed that he had been forced to sign his self-accusation by M. Duc, the examining magistrate, who struck him in the face when he refused. An inquiry has led to the discovery that M. Duc, in the presence of his "greffier," M. Trefaux, had used his fists to male and female prisoners or witnesses. M. Manoury, a local chemist and president of the Tribunal of Commerce, deposed that cases of severe maltreatment had come under his notice. M. Duc still remains a magistrate, but has been removed from the Criminal Investigation Department.

The right of a woman deceived into a void marriage with a man already married, to maintain an action against him for deceit, is sustained in *Morrill v. Palmer* [Vt.], 33 L. R. A. 411, and her cause of action is held not to accrue so as to start the statute of limitations to running until she discovers the fraud. The case of *Payne's Appeal* [Conn.], 33 L. R. A. 418, holds that a man who is deceived by a married woman into assuming the relation of husband to her by her representations that she is single, has no claim against her estate for the value of necessities or presents furnished by him to her, because the right of action does not survive. It will not survive, on the ground that it is a *quasi* contract unless the wrongdoer acquired specific property increasing the assets of the estate.

### Notes of Recent English Cases.

**MARINE INSURANCE—POLICY—LOSS OF FREIGHT—CLAIM CONSEQUENT ON LOSS OF TIME.**—A time policy of insurance upon freight contained a clause "waranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." After the commencement of a voyage the main shaft of the steamer was broken from a peril of the sea, and she returned to her port of loading. Repairing the ship necessitated a delay which frustrated the object of the venture; and the charterers, as they were entitled to do by the law of Portugal, which was applicable, canceled the charter, and the freight was lost. In an action on the policy for a total loss of freight: Held, that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable. Judgment for plaintiffs below. Here reversed in favor of company. (*Bensaude & Co. v. Thames and Mersey Marine Ins. Co.* [Eng. C. A.], 1 Queen's Bench Division [Law Reports, Jan. 1, 1897], 29.)

### Notes of American Decisions.

**EASEMENT — LICENSE — REVOCATION.**—G., owning a tract of upland, and also a separate tract fronting on the sea, conveyed to S. and his heirs, by warranty deed, the tract of upland, and, after describing it by metes and bounds, continued as follows: "Together with the free use and full right of sufficient land on my sea front for bathing purposes, with the right to enter thereon, erect bath-houses, and use the same, free of charge, undisturbed at any time." Held, that by this deed G. gave to S. an easement of way over his land to the sea: Held, also, that the right given to erect bath-houses and use the same free of charge, undisturbed at any time, was a license merely, which was revoked both by the death of the parties and by a subsequent conveyance. (*Eckert v. Peters* [N. J.], 36 Atl. Rep. 491.)

**FIRE INSURANCE POLICY — WAIVER — POWER OF SECRETARY.**—A provision of a fire insurance policy that it shall be void in case the insured procures additional insurance, "unless consent in writing is indorsed hereon by the company," is a valid condition, and under a further provision that no agent of the company has any authority to waive or modify any of its conditions, the secretary of the company cannot be presumed, in the absence of proof, to have power to consent for the company to the procuring of additional insurance, or to waive the indorsement of such consent on the policy. Judgment for plaintiff below. Here affirmed in favor of company. (*O'Leary et al. v. Merchants and Bankers' Mutual Ins. Co.* [Iowa S. C.], 69 Northwestern Reporter [Jan. 9, 1897], 420.)

**PARENT AND CHILD — SERVICES.**— Before a son can recover for services rendered for his father while a member of his father's family, he must rebut the legal presumption that such services were rendered gratuitously. (*Enger v. Lofland* [Iowa], 69 N. W. Rep. 526.)

**RAILROAD COMPANY—CONTRIBUTORY NEGLIGENCE.**— Where a woman on horseback is about to cross a railroad at a crossing where there is a deep cut which prevents a view of an approaching train, it is not contributory negligence *per se* to only bring her horse to a slow walk in order to listen for a train, instead of coming to a full stop. (*Illinois Cent. R. Co. v. Mizell* [Ky.], 88 S. W. Rep. 5.)

**TRADE-MARK — USE OF ONE'S OWN NAME.**— A man has a right to use his own name in connection with any business he honestly desires to carry on, but he will not be allowed to use it in such a way as to injure another having the same name; and, to prevent such injury, equity will direct him how he shall use his name to devote his own individuality. (*Walter Baker & Co. v. Baker*, U. S. C. C., W. D. [Va.], 77 Fed. Rep. 181.)

**WILL — DISTRIBUTION OF LANDS.**— Where a wife appoints her husband the testamentary trustee of her daughters, and devises to them lands, "to be equally divided among them when the youngest attains the age of 21 years, share and share alike, but not to be disposed of until that time," the lands pass to the daughters, freed from the trust, when the youngest attains the age of 21. (*Mason v. Broyles* [Tenn.], 88 S. W. Rep. 92.)

### Humors of the Law.

It was when Attorney W. E. Brown used to try criminal cases. One day he was defending a man charged with assault and battery with intent to kill. The evidence was all in, the people had opened the argument to the jury, and Mr. Brown was about half through with his argument for the defense, when the midday adjournment arrived. While at lunch, Mr. Brown learned of a new witness who could give material testimony in behalf of his client, and when court reassembled at two o'clock, leave was granted, upon application, for the production of the new evidence.

Mr. Brown examined the witness-in-chief and turned him over to the special counsel for the people for cross-examination. The witness maintained perfect ease and dignity under a very rigid cross-examination, at the close of which the special counsel for the people endeavored to ascertain when it was that Mr. Brown discovered that the witness knew anything material to the case. In an attempt to draw out this information from the witness, the counsel for the people, straightening himself up with great pomposity, inquired:

"When were you discovered?"

"About 1850," answered the witness with his usual composure.

The entire court-room was convulsed with laughter, and the special counsel for the people took his seat.—*Chicago Evening Post*.

"Ten dollars," said the Magistrate.

"But, Your Honor," said the prisoner, "I protest against this fine. I have the right to make a defense against the charge."

"But you have already pleaded guilty," said the Magistrate.

"I beg Your Honor's pardon; I denied the charge in the plainest terms."

"Young man," said the Magistrate sternly, "I want to call your attention to the fact that the Court understands the English language. You have pleaded guilty in unmistakable words. The plaintiff charges you with assault and battery. It is clearly evident that he has been assaulted and battered. According to your statement, he approached you on the street and used abusive language toward you. Then you say that you 'didn't do a thing to him.' If the Court understands the language spoken by seventy millions of people, you immediately wiped up the earth with him. The fine stands, and any further reflection upon the Court's knowledge of English will cost you ten more."—*Detroit Free Press*.

### New Books and New Editions.

**Handbook of the Law of Partnership.** By William George, of the St. Paul Bar. St. Paul, Minn.: West Publishing Co. 1897.

In putting out this work the author concedes that the labors of many distinguished predecessors in the same field have disparaged, in advance, the efforts of any one who would attempt to reduce the law of partnership to a system of rules, and at the same time he makes bold to say that the most conspicuous feature of his work is the attempt to work out the analysis of the subject into a complete and consecutive series of general propositions. This he has sought to do within the limits of a single volume of 606 pages. An examination of the book indicates that Mr. George has carefully and conscientiously performed his task, the result being a work which brings the subject down to date. It traces the changes which have taken place in the partnership relation during the past 100 years, while, in the notes, the reader is referred to the leading cases and the best text writers. Nearly 5,000 cases are referred to in different parts of the work, and evident care has been taken in the citation of cases to have each exactly support the proposition to which it is cited. The work, as a whole, constitutes a valuable addition to the busy lawyer's library.

## The Albany Law Journal.

ALBANY, APRIL 3, 1897.

### Current Topics.

FEW decisions, even of the august tribunal which constitutes the court of last resort in this country, have attracted so much attention or caused such universal comment as that recently handed down by the United States Supreme Court, in which the constitutionality of the Sherman Anti-Trust law was upheld, and its application to all traffic agreements between railroads to regulate rates distinctly affirmed. Some inkling of its far-reaching effect upon the great corporations of the country may be obtained from the confusion, in many cases bordering upon consternation, which instantly followed among railroad managers, who are practically unanimous in the belief that, without further amendments to the law, the only safe course is to cut loose entirely from these interdicted combinations in restraint of trade, leaving each individual corporation to "paddle its own canoe," and work out its own salvation, without resorting to combinations which are not only not permitted by their franchises, but, as the majority of the Supreme Court now holds, are clearly contrary to the spirit and intent of the laws passed by congress. While opinions as to the wisdom and justice of the decision are by no means unanimous, and arguments continue to be put forth by individuals and newspapers in behalf of this particular form of combination, as an exception to the general rule, there can be no doubt that the great body of the American people, who seek no special legislative favors, applaud and uphold it as a telling blow, already too long delayed, at corporate monopoly, whose steadily growing power has threatened to produce, if, indeed, it has not produced, widespread commercial and industrial paralysis. The point emphasized by Justice Peckham, in the majority opinion of the court, that under the act of 1890 an agreement to maintain rates is illegal if in restraint of trade,

whether the contract is reasonable or unreasonable, and whether the intention of the companies was to restrain trade or not, is sharply antagonized by some newspapers. The New York Evening Post, for example, finds fault with the law as declared by the Supreme Court, to the effect that an agreement to maintain rates restrains trade, when, as the Post declares, "it is a matter of common knowledge that the object of such agreements is to promote trade." But note the cunning use of the word "object" in this sentence. Doubtless the ostensible "object" of such agreements, according to the say-so of those who enter into them, is to promote trade; but object and effect are often radically different things. The immediate object of these combinations is confessedly to prevent rate-cutting, which, it may be conceded, often reduces somebody's profits and wipes out somebody's dividends. However objectionable and demoralizing this "cut-throat" competition may be, in many instances, and however great may be its influence in causing fluctuations in the market value of railroad securities, its prevention by combinations unauthorized by law, as the Supreme Court now holds, may be a still greater evil, preventing that freedom of competition which is necessary to the untrammelled operation of the great law of the survival of the fittest. The same economic objection applies to these combinations as to others which it is clearly the aim and policy of the law to prevent, viz.: That they place in the hands of artificial creatures of the law the power to extort whatever rates they please—a power which is too often used to extort all the traffic will bear—in order to pay dividends upon enormously watered stock; and the people are to be congratulated that the highest tribunal in the land, although not unanimous in its opinion, has placed its seal of condemnation upon them.

We have not yet seen the full text of the majority opinion of the court, but the synopsis which the ALBANY LAW JOURNAL printed last week sufficiently indicates that it was written in the best style of that able, upright, fearless judge whom not only New York,



but every State in the Union, delights to honor — Rufus W. Peckham. On the strength of this decision it is worthy of note that so prominent a journal as the New York World has already seen fit to nominate Justice Peckham as the democratic candidate for president of the United States in 1900. Premature as this suggestion may be, in view of all the possible developments of the intervening time, it may be taken as an indication that the people, for whom the World confessedly speaks, recognize in this distinguished jurist a Palladium of their rights, whom no ulterior motives can influence, and whose clearness of mental vision cannot be clouded by pleas, however specious, put forth in the interest of great monopolies and combinations which can thrive only at the expense of the masses of the people.

The bar of the State of New York has sustained a heavy loss in the death of Matthew Hale, of Albany, N. Y., who, for more than a quarter of a century, had been a distinguished and highly successful practitioner in the courts of the Empire State. In addition to being learned in the law, and an attorney whose services were frequently enlisted in famous cases, both civil and criminal, Mr. Hale was a man of broad general culture, a constant student, whose thirst for knowledge was never satisfied, and an original thinker. More than this, he was morally and intellectually honest and straightforward. Upon such a man party ties rest lightly. He was a shining example of that great body of independents who make the Empire State so fascinating a study for students of politics, absolutely fearless in the expression of his personal views, and ever willing to make possible personal advantage subservient to principle. Mr. Hale was a member of the State senate in 1868-9, and was a candidate on the Republican ticket for the Supreme Court bench, but was defeated by the Hon. Rufus W. Peckham, now a distinguished member of the Supreme Court of the United States. Mr. Hale was president of the State Bar Association in 1890-91. He frequently read papers before literary and scientific societies in this and other States. He received

the degree of LL. D. in 1883 from the University of Vermont. In disposition he was genial, in manner courteous, in conduct upright. An ornament to the bar, a light in polite literature, a purifier of politics, and a noble example of American citizenship, the death of such a man constitutes, indeed, an irreparable loss.

The death of Mr. Hale is not the only one which the bar of Albany has recently been called upon to mourn. Mr. S. O. Shepard, one of the oldest and best-known members, and the Hon. Galen R. Hitt, a criminal lawyer whose fame was more than local, have also answered the final summons and joined the great, silent majority.

The New York Court of Appeals in *People v. Hawker*, the decision in which case is printed in full in other columns of THE ALBANY LAW JOURNAL, decides a very important question as to what constitutes an *ex post facto* law. The Public Health law (chapter 661, Laws of 1893, as amended by chapter 398, Laws of 1895) provides (section 153) that no person shall practice medicine "who has ever been convicted of a felony." The facts of the case under discussion show that the defendant was convicted in the year 1878 of the felonious crime of abortion. In 1896 he was convicted of a misdemeanor, under the Public Health law already referred to for practicing medicine in 1896. In sustaining the conviction the court was not unanimous. Judge O'Brien dissents outright, while Judges Martin and Bartlett concur in the result solely on the ground that the record was not in such shape as to technically show that defendant was a physician, and thus present the question of his being distinctly deprived of rights of property or means of earning a livelihood. There can be no doubt that the legislature intended to disqualify from practicing medicine all persons who had been convicted of felony before as well as after the passage of the act. The court finds no difficulty in disposing of the contention of defendant's counsel that the Public Health law violates the provisions of the Constitution of the United States, which provide that no State shall pass any

bill of attainder, but the additional contention that the law is *ex post facto* raised a much more serious question, upon which the judges found themselves divided, a majority holding that the defendant had been deprived of no rights secured to him either by the United States or State Constitutions. It is worthy of note, however, that four of the five justices passing upon the case in the Supreme Court held the law *ex post facto*, so that, while the weight of legal argument seems to be with the majority of the Court of Appeals, the question presented was not without serious difficulty.

Three State legislatures have already taken the necessary preliminary steps toward preventing the exhibition, in those States, of kinetoscope pictures of the recent unpleasantness between Messrs. Fitzsimmons and Corbett, which the Nevada State authorities, by special legislative enactment, invited and permitted within its borders. The States referred to are Massachusetts, Minnesota and Illinois. The passage of anti-kinetoscope bills by the legislatures of these commonwealths ought to be followed by similar action in every State in which the law-makers have not yet concluded their labors. Especially should the legislature of New York, before final adjournment, do its plain duty in preventing the reproduction of the brutal spectacle witnessed at Carson, Nev., on March 17th last, within the borders of the Empire State. The fight at Carson, in which one of the principals was rendered *hors de combat* by a sledge-hammer blow over the heart, has already indirectly caused several homicides in this State, due to other ambitious pugilists practicing the so-called Fitzsimmons blow upon their opponents, and it is entirely within bounds to say that the kinetoscope pictures will surely produce another crop of such homicides. It is well known that the promoters of the Nevada prize fight have counted upon large profits from the kinetoscope reproductions, otherwise they would never have paid \$13,000 to each of the principals as their respective shares of the prospective returns therefrom. With the managers of the late fight, the kinetoscope

pictures were evidently a main reliance, and if the sun had not shone on the day appointed (for sunlight was necessary in order to obtain satisfactory pictures) there would have been a postponement until such time as the weather conditions were found favorable. Nevada is entitled to all the bad eminence of being the only State in the Union which would have passed a special act for the purpose of legalizing such a brutal exhibition, and New York ought not to permit even a pictorial representation of it. Many State legislatures have either adjourned *sine die* or held no session this year, and as a consequence the kinetoscope is certain to find a large field for its operation, but New York should have none of it.

In a recent case in the Cook County (Ill.) Criminal Court the defendant, who had been found guilty by a jury, was granted a new trial by the judge, on account of the inefficiency of the counsel who had defended him. This seems to be establishing a new principle, for the almost uniform tenor of the decisions is to the effect that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, is reason sufficient for setting aside a judgment or granting a new trial. Any other course would, perhaps, be apt to lead to collusions and confusion in the administration of justice, and for this reason courts are strongly disposed to hold parties as bound by the acts of their attorneys in their behalf, in all cases where they are authorized to appear, and in which no fraud is shown, the client being left to his remedy against the attorney for negligence. There are few reported cases in which the contrary has been held, the leading one being that of *State v. Jones* (12 Mo. App. 93), where the record presented such a lamentable example of ignorance and incompetency that the Court of Review held that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent attorney to defend the prisoner. The Chicago Law Journal, in discussing the Cook county case, while conceding that the action of the judge may have done violence to technicality, nevertheless

believes it tended to compass the ends of justice — and for such purposes are courts established and maintained.

That there are still some queer laws on the statute books of England was shown the other day, when an ex-chancellor of the exchequer was convicted at Bow street and fined because the chimney of a house he is at present occupying caught fire. The conviction was under section 23 of 28 and 29 Vict. c. 90, which provides that if the chimney of any house within the metropolis is on fire the occupier of such house is liable to a fine of twenty shillings. No defense whatever seems to be available to the occupier if the fact of the fire be established. In this case the right honorable defendant had been only a very short time in occupation of the house, and it was shown that he had employed sweeps on this very chimney just before the fire, but he was mulcted, nevertheless. Although no defense is available to the occupier, it is provided that if he can prove that the fire was caused by the neglect or wilful default of some other person, he can recover the penalty he has had to pay summarily from such other person. In the case under consideration, however, there seems to be no such loophole of escape for the distinguished defendant. When an ex-cabinet minister is thus summoned to a police court, and fined, it may be conceded that in old England the law is no respecter of persons.

Litigation over the use of the name "Carlsbad" to designate artificial mineral water has been in progress for the past ten years. In the case of the City of Carlsbad et al. v. Carl H. Schultz, wherein it was sought to restrain the defendant from using the name "Carlsbad" to designate artificial mineral water manufactured and sold by him, and for profits and damages, the United States Circuit Court for the southern district of New York has just decided in favor of the defendant, permitting the continued use of the name in question, under certain specified conditions. At the outset the court concedes that this controversy is *sui generis*,

nothing like it being found in the law, and that therefore it must be determined upon its own facts. It was shown that from the discovery of the Carlsbad spring, about 1370, until 1845, the waters were not exported, the policy being, for five centuries, to keep the springs as a close local monopoly, for the purpose of attracting invalids. It also appeared that, for twenty-four years prior to the first exportation, artificial mineral water was made after the Carlsbad analysis, and sold under that name, the business being carried on in many of the principal cities of Europe on a large scale, and was inaugurated by the defendant in the city of New York in the year 1862, or five years before a single bottle of natural Carlsbad water was seen in this country. It is conceded that there was no fraud or deception on either side. The defendant was shown to have carried on the manufacture of artificial mineral water in the most careful and scientific manner; that his product was more expensive than the natural water, and that it was free from the bacteria found in the imported article, being for that reason preferred by many to the latter. The defendant's bottles and labels are radically different from those of the complainants, and there was no evidence adduced to show that any one was ever cajoled into taking the Schultz water when he wanted the imported water. The court holds that, under these circumstances, the defendant having been the first to make a market for Carlsbad water in the United States, and being engaged in a perfectly honest and legitimate business, he has acquired vested rights which a court of equity is bound to protect. Starting with the plain proposition that he had a right to sell artificial Carlsbad water in 1862, the court very pertinently inquires when he lost that right. He was not interfering with the business of the complainants then, for they had no business in this country. The court thinks it will hardly be disputed that the defendants have the right to make and sell the water in question, but the complainants insist that he must not use the name Carlsbad in any form — which is only another way of saying the business must cease. "Both parties,"

says the court, "are engaged in a legitimate business. So long as neither interferes with the lawful occupation of the other, neither has a right to complain. There is room enough for both." The court decides, finally, that the defendant may use the name Carlsbad, with a qualifying adjective such, for example, as "artificial," in order to show to the public that the water is manufactured in this country, and is not the product of the Bohemian spring. The complainants are awarded costs, but are decreed not to have made a case for an accounting. The decision reached appears to be entirely just and equitable.

The Supreme Court of South Dakota, in *Skinner v. Holt* (69 N. W. Rep. 595), holds unconstitutional two statutes of that State which sought to render a life insurance policy exempt from the claims of creditors. The first of these was the act of 1890, chapter 51, section 21, which provided that a "policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts." This was held to be in controversion of the following provision of the State Constitution: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sales a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws," on the ground that "a law which, without any limitation as to value, specifies a kind of property that a debtor, solvent or insolvent, may acquire, by investing therein or diverting thereto his entire estate, to the exclusion of *bona fide* creditors, is neither 'wholesome' in character nor 'reasonable' as to amount, and is by far too generous to be just."

The other act was that of 1895, chapter

89, which provided that "the avails of any policy or policies of insurance heretofore or hereafter issued upon the life of any person, and payable upon the death of such person to the order, assigns, estate, executors, or administrators of the insured, and not assigned to any other person, shall, if the insured in such policy at the time of death reside or resided in this State, and leave or left surviving a widow or husband or any minor child, to an amount not exceeding in the aggregate the sum of five thousand dollars, inure to the separate use of such widow or husband or minor child or children or both, as the case may be, independently of the creditors of such deceased, and to such amount shall not in any action or proceeding, legal or equitable, be subject to the payment of any debt of such decedent." This was held to contravene article 1, section 10, of the Constitution of the United States, which enacts that no State shall pass any law impairing the obligation of contracts, and with article 6, section 12, of the Constitution of South Dakota, which contains a substantially similar provision.

The Westminster Gazette, in a recent issue, well remarks that apparently no subject is protected from the "advanced school" of American journalism, and mentions what it regards as a startling illustration. An eminent queen's counsel — one of the leaders of the English bar — not long ago received a letter, which read as follows: "The editor of the New York — notifies me that he is preparing an elaborate and notable Easter edition, to be filled with articles of a most important character. He bids me to present his compliments to you, and to ask you if you will be so good as to write a short argument on the subject of 'Christ's Rising from the Dead,' stating whether, in your opinion, there is any evidence of this which *would be acceptable in a court of law*." Needless to say, the busy and learned recipient of this extraordinary letter has replied that he has neither time nor disposition to write such an article.

The Constitution of the State of Utah, recently admitted into the Union, contains,

among other provisions, one to the effect that in capital cases the right of trial by jury shall remain inviolate, but in courts of general jurisdiction, except in capital cases, the jury shall consist of eight jurors, and in courts of inferior jurisdiction, of four jurors. While in criminal cases the verdict must be unanimous, in civil cases three-fourths of the jury may find a verdict; also, a jury in civil cases shall be considered waived, unless demanded by the parties, or one of them. This provision was recently attacked in a case before the Supreme Court of Utah (*State v. Bates*, 47 Pac. Rep. 78) as in conflict with the Federal Constitution, and therefore void. The court ruled that the amendment to the Federal Constitution regarding the right to trial by jury applies only to the United States government, and not to the States. The purpose of the provision of the Utah Constitution, as the court states it, is to "secure the right to life, liberty and property, and the benefit of just laws. Hence, if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end, for there can be no magic in the number twelve, though hallowed by time. Intelligence, impartiality and integrity are qualifications which enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number. Legal process must submit to reform in the light of experience and advancing intelligence. True principles must endure, but the methods, modes and means of securing their application to human conduct, human rights and duties—the social system—will change with development and progress and more complicated conditions." The court was of the opinion that the people of the State had the power in the Constitution to abolish the common-law jury or to change it, as they did, by reducing the number from twelve to eight. The court cites, among other cases, *Walker v. Lauvinet* (92 N. S. 90), wherein the United States Supreme Court, nearly twenty years ago, held that a trial by jury, in suits at common law, pending in the State courts, is not a privilege or immunity of national citizenship which

the States are forbidden by the fourteenth amendment to abridge. While a State cannot deprive a person of his property without due process of law, this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. The constitutional requirement is met if the trial is had according to the settled course of judicial proceeding, and due process of law is process according to the law of the land, as regulated by the law of the State. States, therefore, may, if they choose, provide for the trial of all offenses against the States, as well as for the trial of civil cases, in the State courts, without the intervention of a jury, or by some different jury from that known to the common law.

#### TRIBUTES TO THE LATE MATTHEW HALE.

THE Albany Bar Association met on Saturday, the 27th inst., for the purpose of taking action on the death of Hon. Matthew Hale. Justice D. Cady Herrick called the meeting to order and proposed Judge John Clinton Gray, of the Court of Appeals, as presiding officer. Judge Gray was chosen chairman, and in accepting the honor said, in the course of some very feeling remarks:

"It was my privilege to know Matthew Hale many years before my official life commenced in this city, and after I came here my acquaintance ripened into a friendship, which enables me to testify to his possession of rare mental accomplishments and of remarkable abilities. I have had many occasions upon which to form an opinion of his capacity as a lawyer, and I unhesitatingly say of him that he had no superior at the bar in the manner of his preparation and presentation of cases. He was lucid in his statements, logical in his argument and always fair in his treatment and advocacy of the cause he undertook. He was one of the profoundest of lawyers, and one of the most skillful of counsel. His talents were very great, and they were manifest in other fields than that of jurisprudence. Independent in thought, fearless in utterance, he was always in the van in every movement which he believed to be on the right road for political and civic reform and progress. He gave it the powerful aid of his pen and of his voice. He allowed no considerations of personal convenience or of personal ambitions to interfere with his endeavors in behalf of the public good, and his zeal was by all conceded to be pure and disinterested. The activities of his life covered a wide range, and his example is valuable to all as that of one who set before him high standards in

his private and professional life, and who practiced the best civic virtues. His life was one of great usefulness, and the State can ill afford to lose so public-spirited a citizen or the bar so brilliant an ornament.

"Matthew Hale was made to inspire confidence, affection and respect in all who came in touch with him, and he leaves behind him the imperishable legacy of an untarnished reputation and of a name held in high honor by his fellow-citizens. His was the record of a brave and noble life. The world is the richer for the lessons it teaches, though we, who knew and loved him through these many years, are the poorer for his taking off."

Messrs. Abraham Lansing, Isaac Lawson, Lansing Hotaling, Marcus T. Hun and Hon. Clifford A. Gregory were appointed a committee to draft suitable resolutions.

The Hon. Hamilton Harris followed in an equally feeling tribute to the deceased. He said in substance:

"Our hearts were saddened by the announcement of the death of the Hon. Matthew Hale. His fine natural endowments had been thoroughly trained and cultivated in the best schools and universities. When he came to the study of the law he brought a mind well fitted to grasp its principles, and attain a thorough knowledge of the law with the highest qualifications for success.

"Crowned with these laurels, he, more than a quarter of a century ago, became a member of this bar. He at once took his place amongst us in the foremost ranks, and maintained it to the end. His career has been eminently successful. He has been engaged continuously in important cases, many of which were of great magnitude. His practice extended to all branches of the profession. He was equally able as a counselor, an advocate at the Circuit, and a pleader in the highest courts. He was fully equipped for any work of the profession. He had a peculiarly well and evenly balanced mind; his faculties worked so harmoniously that he was able to get the greatest possible results out of his abilities. He brought intense labor and persevering application to the cases in which he was employed. He was dexterous and adroit in their management. His arguments were logical and forcible. His addresses to jurors and before the bench were plain, lucid and direct statements, exactly fitting his case without any attempt at flight of fancy or flourish of oratory. He was always sincere and earnest. His affable and courteous manners added grace to his efforts. He achieved a splendid reputation as a successful advocate, and will long be remembered as an accomplished lawyer."

Extemporaneous remarks were also made by District Attorney Eugene Burlingame, Hon. Edwin Countryman, Lewis E. Carr, Judge William L. Learned and Mr. George L. Stedman.

#### PLEADING NEGLIGENCE.

**I**N actions of tort for injuries resulting from negligence, the common law required that the declaration should show that the act or conduct of the defendant by which the plaintiff was injured was a negligent act or negligent conduct, and this was sufficiently made to appear when the declaration stated the injurious act or conduct and averred the same to have been negligently done or suffered to be done by the defendant (1).

The common law never required in "*actions on the case*" for negligence that the plaintiff's title or the defendant's liability should be specially stated. And in this, as in other cases, the objects of good pleading were best subserved by the allegation of conclusions of fact. Conclusions of fact are distinguished from the evidence on the one hand and from conclusions of law on the other; and whereas it would be infinitely tedious to have the evidence stated in the declaration, it would, at the same time, utterly confound the functions of court and jury for the plaintiff to allege in his complaint only legal conclusions. But the beauty and excellence of good pleading consisteth in that it condemns the allegation of conclusions of law and the recitation of the evidence, and requires the ultimate facts as established by the evidence to be stated (2).

And negligence, in the sense in which we now use it—that is, as descriptive of the conduct of parties—is a conclusion of fact, and being such, it is sufficient to allege it. It would subserve no good purpose to state in the declaration the manner or mode of doing the thing which occasioned the injury, and which is characterized as being negligent. Thus, at common law the following was considered a sufficient allegation of negligence, to wit: "For that defendant so negligently drove his horse and carriage that the same struck against the horse and carriage of the plaintiff," whereby, etc. Where the declaration *points out the act of the defendant which occasioned the injury to the plaintiff, and characterizes this action as being negligent, this is sufficient*. For says Mr. Chitty: "With regard to the statement of the injury itself, it is frequently sufficient to describe it generally, without setting out the particulars of the defendant's misconduct. Thus, in an action on the case for inducing the plaintiff's wife to continue absent, it is sufficient to state that the defendant unlawfully and unjustly persuaded, procured and enticed the wife to continue absent, by means of which persuasion she did continue absent, whereby the plaintiff lost her society, *without setting forth the means of persuasion used by the defendant* (3).

(1). *Stephenson v. R. R. Co.*, 34 Pa. R. 619; *Chitty Pleading*, vol. 1, p. 212.

(2). *Gould's Pld.*, pp. 152-169, ch. 3; *Stephen on Pld.*, pp. 229-280; *Chitty on Pld.*, pp. 209-300.

(3). *Chitty on Pld.*, p. 380.

But, to quote from the same author, the *certainty* required in pleading depends on the circumstances of each case; and there are some acts or conduct which cannot be sufficiently described by merely alleging that they were negligently done or suffered; or, rather to so characterize the act or conduct does not convey sufficient notice to the defendant of the charge against him. Thus, the declaration charged, that a fire was caused wholly by the default and negligence of the defendant, such averment was held to be "broad enough to impute negligence to everything that the defendant did or suffered to be done" (4).

It is true that the declaration need only show a *prima facie* liability; and if a defendant is the negligent cause of a fire, it may appear at first blush that the declaration shows a *prima facie* liability. But rules of pleading are framed with reference to practical results, and on a declaration so general as this a defendant would not know what act of his life was characterized as negligent. Under such a general charge of negligence, the plaintiff might show on the trial a cause leading to the fire which had its inception six months before the fire; such, for example, as suffering grass to grow and decay on a right of way. There might be fifty different causes on which the plaintiff could rely on the trial under such a general charge, and the defendant would come down to the trial ignorant of which one of the fifty possible different causes of the fire he might be called on to meet; so, in such cases the declaration must point the mind of the defendant to some particular act of negligence. This accords likewise with the principles of pleading, since the declaration is intended as a notice to the defendant of the evidence which will be offered against him on the trial; and if the declaration is framed in such general terms that almost any evidence can be offered under it, on the general subject, at the trial, then such declaration is lacking in that certainty which the law requires (5).

And this, too, is important, for whilst under the modern lax rules of practice a defendant can, without demurring, object on the trial for many defects, by a motion to exclude the evidence when offered, yet if a declaration be wanting in that certainty which the law requires, and the defendant, instead of demurring, or by a motion to make more certain, goes on to trial, then he cannot, after coming down to the trial with things in this plight, claim that he is surprised by the introduction of any particular evidence of negligence, and move to exclude the evidence, because the answer will be that, if the declaration is lacking in certainty now, it was so deficient when filed, and

when you had ample opportunity to object—*leges subserviunt vigilantibus, non, etc.*—it is too late to object (6).

The acts constituting negligence are frequently related as cause and effect, and consist of several successive steps, and each link is necessary to constitute the chain. If one be omitted, the chain is broken, and the declaration is defective. Thus, a long freight train was descending a steep grade; the brakes were very defective; by reason of the defective brakes the train acquired a great speed; the plaintiff, a brakeman, attempted to set the brakes, but could not, and in passing from one car to another to and for the purpose of setting the brakes on a forward car, fell off and was seriously injured; therefore he sues, etc. This is a substantial statement of the declaration in a recent reported case (7).

Now, a little examination and reflection will demonstrate that this declaration is fatally defective in that, waiving other defects, it fails to connect the plaintiff's injury with the defective brakes, admitting that the defective brakes were a result of defendant's negligence. We may admit that the brakes were negligently defective, if I may use such a term, and that in consequence of these defective brakes the train acquired a rapid and dangerous speed, yet it is not alleged that the speed of the train, or the defective brakes, had anything to do with plaintiff's falling from the train. The plaintiff may have fallen from the train through his own negligence (8).

A majority of the State courts, I believe, hold that the plaintiff must not only show negligence on the part of the defendant, but must allege that he was free from negligence; and whilst this modern rule of pleading is contrary to both the old rules of pleading and evidence—to pleading, because it requires the plaintiff to anticipate the defense of his adversary, and negative facts which "do not appear," which was formerly never required except in pleas of abatement and such pleas as were not favored by the law, and contrary to the rules of evidence, because it requires the plaintiff to prove a negative (9).

Yet it is now too firmly established to be shaken in the States which so hold. (*Barr v. Railroad Co.*, 37 N. E. R. 816; *Conner v. Railway Co.*, 105 Ind. 346; *Chicago R. Co. v. Braryan*, 37 N. E. R. 193.) In pleading his freedom from negligence the plaintiff may do so in general terms. Thus,

(6). Gould's Pld., 461-467, ch. 9; Stephen on Pld., 125.

(7). Louisville R. Co. v. Miller, 37 N. E. R. 347; Railroad Co. v. Rainbolt, 99 Ind. 55.

(8). Railway Co. v. Snyder, 117 Ind. 435; Murray v. Silver City R. Co., 9 Pa. R. 374.

(9). Meyer v. King, 16 So. R. 247; Hickman's Case, 66 Miss. 154; Greenleaf on Evidence, vol. 1, p. 220.

(4). Brinkman v. Bender, 92 Ind. 234; Louisville, etc., R. Co. v. Hicks, 37 N. E. R. 44.

(5). Pennsylvania Co. v. Marion, 104 Ind. 239; Railway Co. v. Kurtz, 35 N. E. R. 201.

where a freight train was loaded with coal, and in consequence of too much coal being piled up on each car, a brakeman, in going from one car to another to set the brakes, fell and was injured by reason of the piled-up coal rolling from under him and causing him to fall. It was held that "the general allegation of negligence on the part of the defendant, and of freedom from fault on the part of the plaintiff, rebutted any inference that the plaintiff loaded or assisted in loading" (10).

Of course, if the plaintiff had assisted in loading the car, he would have been aware of the danger to which he was exposed in acting as brakeman on an overloaded freight car, and so would have been guilty of negligence in thus acting. But the general allegation of freedom from negligence negated any such presumption.

It is not necessary to allege plaintiff's freedom from negligence when the same is a presumption from the facts stated. "Thus, where the declaration stated that the plaintiff was lawfully a passenger in defendant's passenger car, and that the giving away of a railroad bridge precipitated him into the river below, inflicting on him the injury complained of," it was held that the presumption of negligence on the part of the plaintiff was rebutted by these averments (11).

In pleading negligence the plaintiff is frequently placed at great disadvantage by reason of the fact that he is ignorant of the causes which lead up to and caused his injury. He, of course, knows that he was injured by the defendant, but as to exactly how that injury was caused he may be unable to state. And this is frequently the case where the injury results in the death of the party injured, and the suit is brought by his administrator, or other personal representative. This representative was not present at the time of the injury, the injured person is dead, and perhaps there is no person living to whom he can go for information; and in such cases, if he brings suit at all, he can allege little else than the fact that the plaintiff's intestate came to his death through the negligence of the defendant. Legislators have not been unmindful of this great disadvantage under which the plaintiff labors, and in most of the States have made the fact of the death of a person caused by the running of trains *prima facie* evidence of negligence. And the courts also have animadverted on this difficulty on the part of the plaintiff, and have to some extent relieved him by applying that familiar principle of pleading, that where the facts lie more especially in the knowledge of the defendant, a general system of pleading is allowed—that is to say, the rules of pleading which require that the declaration shall be *certain* to a *general*

*intent* are so far relaxed as to require the lowest degree of certainty only that is *common certainty* (12).

The fact that the circumstances surrounding the transaction lie, usually, more especially in the knowledge of the defendant, has occasioned that rule of pleading negligence which requires greater certainty in a plea of negligence than in a declaration founded on negligence. Mr. Chitty well illustrates this distinction when he says "that the difference is between the case where the plaintiff in his declaration lays a charge on the right of the defendant, and where the defendant in his plea prescribes in right of his own estate; in the former case the plaintiff is presumed to be ignorant of the defendant's estate, and therefore need not state it, but in the latter the defendant, knowing his own estate, in right of which he claims a (13) privilege, must set it forth."

Hence the rule is that a plea of negligence must state all the facts, and must show by a direct allegation of the facts that the plaintiff was guilty of contributory negligence. (*Johnson v. Louisville R. Co.*, 16 So. R. 76; *Railroad Co. v. Herndon*, 14 So. R. 287.) For the plaintiff to successfully and properly plead negligence, he must show, in an action *ex delicto*, first, a defect in the cars, roadbed, implements, tools, etc., of the defendant; second, he must show a knowledge, either actual or imputed, of this defect on the part of the defendant, and that this knowledge came to the defendant in time for him to have remedied the defect; third, he must show that he was without knowledge of the defect, or a promise on the part of the defendant to repair, and a breach of that promise; fourth, in most of the States he must show his own freedom from negligence, and, fifthly, he must show that in consequence and as a direct result of these things he was injured. The doctrine of *res ipse loquitur* has no place in actions *ex delicto*, and this doctrine can only be relied on where the defendant can allege the injury he received as a breach of contract; and even in cases of contract the defendant is not an insurer of the safety of the plaintiff; so even here the plaintiff must show, in addition to the injury, a defect on the part of the defendant—that is, must allege some fact which shows that at the time of the injury received the defendant was not keeping his contract. Any other doctrine would make the defendant an insurer of the plaintiff's safety. Here the defendant might well reply that he was in the railroad and not in the insurance business (14).

Direct notice to the defendant of the existence of a defect is seldom shown, except in the case of

(10). *Louisville, etc., R. Co. v. Hicks*, 37 N. E. R. 45.

(11). *Louisville, etc., R. Co. v. Miller*, 37 N. E. R. 347; *Railroad Co. v. Rainbolt*, 99 Ind. 551.

(12). *Stephenson v. Southern Pa. Co.*, 34 Pa. R. 619; *Rio Grande R. Co. v. Burnstein*, 38 Pa. R. 77; *Ficklen v. Jones*, 28 Cal. 618.

(13). Chitty on Pleading, vol. 1, p. 370.

(14). *Louisville R. Co. v. Miller*, 37 N. E. R. 348.



employees who threaten to quit if the defect is not remedied, and who are afterwards injured. Such notice is generally shown by alleging the long existence of the defect, and the defendant being held to the duty of inspection, is thus chargeable with notice (15).

The plaintiff should state his injury fully, but there is no occasion to descend to the minute details. But the plaintiff should be careful to spread on the record every material and substantial fact as to the nature of his injury (16).

In pleading negligence, the plaintiff should avoid the common vice of duplicity—that is, alleging in one count several distinct and separate causes of the injury—that is, tracing the injury to several distinct and separate causes. This method of pleading, though it may not be a cause of demurrer under the loose code system, is still very objectionable to the court and confusing to the jury, and it best comports with the convenience of all parties, as well as being much to the interest of the plaintiff, to allege his several separate and distinct causes of the injury in separate counts (17).

Before drawing a declaration for negligence in the case of young practitioners, the attorney should consider carefully each item and each step necessary to constitute a cause of action. He should consider, first, the defect; second, knowledge of the defect on the part of the defendant; third, the absence of knowledge on the part of the plaintiff; fourth, the plaintiff's freedom from negligence, and, fifth, the injury.

If he finds that he can answer all these questions satisfactorily, then he must allege them in due form and in order. *Beginning with the defect, he must show what it was, and that it was a negligent defect, though this term negligence is in no sense sacramental; then he must proceed in regular order with the other requisites of his cause of action, connecting each with the other as he proceeds, so that in the end he will find the injury alleged and the damages as a necessary consequence of the preceding allegations.* And thus the injury and damage will appear as a necessary result of the preceding allegations, and thus of the negligent conduct and acts of the defendant.

LINTON D. LANDRUM.

COLUMBUS, Mississippi.

A well-known lawyer is said to have received a postal card written as follows: "Will you please tell me where you learned to write? I have a boy I wish to send to school, and I am afraid I may hit upon the same school that you went to."

(15). *Railway Co. v. Adams*, 105 Ind. 151.

(16). *Railway Co. v. Kurtz*, 35 N. E. R. 201.

(17). *Atchison R. Co. v. Laimger*, 42 Pa. R. 343; *Hoffman v. T. C. W. Co.*, 10 Cal. 416.

## PRACTICE OF MEDICINE.

### CONVICTION OF FELONY.

Section 153 of chapter 661, Laws of 1893, as amended by chapter 398, Laws of 1895 (the Public Health law), providing that no person shall practice medicine who has ever been convicted of a felony by any court, applies to persons who had been convicted of a felony before the passage of the act. As to such persons the statute is not an *ex post facto* law, but is constitutional.

### COURT OF APPEALS.

Decided March 16, 1897.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. BENJAMIN HAWKER, Respondent.

Appeal from a judgment of the Appellate Division, First Department, reversing a judgment of the General Sessions of the Peace for the city and county of New York convicting the defendant of a misdemeanor.

John D. Lindsay and Robert C. Taylor for Appellant; Hugh O. Pentecost for Respondent.

HAIGHT, J.—The defendant was indicted in the Court of General Sessions of the Peace for a misdemeanor, charging that on the 6th day of March, in the year 1878, the defendant was convicted in the Court of Sessions of Kings county of the crime of abortion, upon which he was sentenced to be imprisoned in the penitentiary for Kings county for the term of ten years; that afterwards, and on the 22d day of February, 1896, at the city of New York, he did unlawfully practice medicine by examining, treating and prescribing for one Dora Hoenig against the form of the statute in such case made and provided. To this indictment he interposed a demurrer, to the effect that the facts stated in the indictment did not constitute a crime, in that the statute alleged to have been violated is prospective in its application, or, if it is not prospective in its application, it is null and void, as being in violation of article 1, section 10, of the Constitution of the United States and of the fifth amendment to said Constitution, and also of article 1, sections 1 and 6, of the Constitution of the State of New York. The demurrer was overruled by the court, and the defendant demanded a trial. A jury was then impaneled, and thereupon his counsel conceded all of the facts as stated in the indictment to be true. He then moved the court to advise the jury to acquit, upon the grounds set forth in his demurrer, which was refused, and an exception taken. The case was then submitted to the jury upon the charge of the court, and a verdict of guilty was subsequently rendered, upon which the defendant was sentenced to pay a fine.

The statute under which the defendant was in-

dicted was chapter 661 of the Laws of 1893, as amended by chapter 398 of the Laws of 1895, and is known as the Public Health law. Section 140 provides that "no person shall practice medicine after September 1, 1891, unless previously registered and legally authorized, or unless licensed by the regents and registered as required by this article; nor shall any person practice medicine who has ever been convicted of a felony by any court, or whose authority to practice is suspended or revoked by the regents on recommendation of the State Board." Section 153, among other things, provides "that any person \* \* \* who, after conviction of a felony, shall attempt to practice medicine, or shall so practice \* \* \* shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than \$250 or imprisonment for six months for the first offense, and on conviction of any subsequent offense, by a fine of not more than \$500 or imprisonment for not less than one year, or by both fine and imprisonment."

It is contended that this statute should be construed prospectively. Undoubtedly it has reference only to misdemeanors committed after the passage of the act, but as to the felony charged as the former offense, we think it has reference to those committed before as well as after the passage of the act. As we have shown, the provisions referred to are part of the Public Health law of the State, which provides a system for the preservation of the public health and the practice of medicine, and its provisions, so far as possible, should be construed as in harmony with each other. Section 140 of the act relates to the qualifications of persons who shall be permitted to practice medicine, and prohibits all persons not so qualified from engaging in such practice, including those who had *ever* been convicted of a felony. Section 153 provides for the punishment that shall be inflicted upon those who violate the provisions of the law. If the provisions of section 153 stood alone unexplained there might be some basis for the contention that it was intended to relate only to felonies thereafter committed, but when it is read in connection with the provisions of section 140 it seems clear that such a construction was not intended, for that section expressly prohibits any person from practicing medicine "who has *ever* been convicted of a felony." The word "ever" to our minds clearly indicates the legislative intention to prohibit the practice of medicine on the part of any person who has been convicted of a felony either before or after the passage of the law.

Is the law in question violative of the provisions of the Constitution of the United States, which provides that no State shall pass any bill of attainder or *ex post facto* law? (Art. 1, sec. 10.) We can hardly believe the claim to be serious that the provisions of the law constitute a bill of attainder.

If such is the case, then every statute which provides for an additional punishment for the commission of a crime after a former conviction must fall within the condemnation of the Constitution. Bills of attainder having been abolished in this country upon the adoption of the Constitution of the United States, but little is known with reference to their peculiar characteristics. In England a bill of attainder was understood to be "the stain or corruption of the blood of the criminal capitally condemned," the effect of which was that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights of inheritance. The bills were acts of parliament relating to a certain specified person or persons usually named in the acts, in which they were convicted, sentenced and punished without a judicial trial, and generally without the presence of the accused or his counsel, or an opportunity to be heard, or to establish his innocence. (Ex parte Garland, 4 Wall. 333, 387.) It will thus readily be seen that the provisions of the Public Health law have none of the characteristics of a bill of attainder.

A more serious question is presented with reference to the contention that the law is *ex post facto*. An *ex post facto* law, as defined by Chief Justice Chase in the case of Calder v. Bull (3 Dallas, 386), is one that punishes as a crime an act done before its passage, and which, when committed, was not punishable; and an act that aggravates a crime or inflicts a greater punishment than the law annexed to it when committed; or a law that alters the rules of evidence in order to convict an offender. It is not contended that the law in question makes any change with reference to the felony of which the defendant was convicted, or that there has been any aggravation or change, with reference to the punishment provided therefor. What has been done is the creation of a new offense, a misdemeanor after a felony, dependent upon acts thereafter committed in violation of the statute and providing a punishment for such misdemeanor. It is in the nature of providing punishment for a second or an additional offense, and it is claimed, with reference thereto, that it operates to deprive the defendant of his rights of property, of his right to earn a living by the practice of medicine, and that, by being deprived of this right, the effect is to aggravate his punishment for the felony. The difficulty, however, with this contention is, that it does not appear from the record in this case that he ever had any right to practice the profession of medicine, and that no presumption can be indulged in to that effect. The felony of which he was convicted was not based upon the charge that he was a physician or a practitioner of medicine. He was charged with having committed an abortion, and upon this charge he was convicted. Whether he was a physician or not was entirely immaterial, so far as determining

whether that crime had been committed. It does not now appear that he ever studied medicine a day in his life; that he ever received a diploma from any medical college or university; that he was ever registered or licensed to practice medicine, or that he ever did practice before the 22d day of February, 1896, the charge upon which the indictment in this case was founded. So that there is an entire absence of any evidence showing, or tending to show, that he was deprived of any rights of property, or of means of earning a livelihood, that he theretofore enjoyed and possessed.

One of the highest functions of government is the preservation of the public health. It was for this purpose that the law in question was enacted. Under it delicate and important duties are intrusted to physicians, involving skill, ability, learning and integrity. The Constitution provides that no person shall be deprived of life, liberty or property without due process of law, yet this provision of the organic law is made subordinate to that of paramount necessity, and the rights secured thereby to the citizen must yield to that of the preservation of the public health. The property of a citizen may be seized and burned if, in the judgment of physicians, it is infected and liable to cause the spread of contagious disease. He may be certified into an insane asylum or carted away to a pest-house, and there restrained and imprisoned if, in the judgment of the physician, such a restraint and detention is advisable, and under certain circumstances the physician, in his practice, may destroy life if, in his judgment, it be necessary to save another life. Aside from these important duties and privileges, the physician is admitted into the family circle. He is intrusted with the family secrets of physical ailments and defects. He is permitted to administer powerful drugs and poisons, and is intrusted with the care of the lives, health and welfare of its members. The patients, as well as the public, are deeply interested in having the person in whom such trust and confidence is reposed possess all the skill, ability, learning and integrity that is required for the proper and faithful discharge of the duties and trust imposed in him. The legislature, therefore, in the exercise of its discretion under the police powers of the State, may, by act, impose reasonable conditions and requirements under which individuals may practice the profession of medicine, and to restrain and prohibit all persons not complying therewith from engaging in such practice. This power of the legislature was fully recognized in the Dent case by the Supreme Court of the United States. (129 U. S. 114.) In that case the statute required every practitioner of medicine to obtain a certificate from the State Board of Health that he was a graduate of a reputable medical college, in a school of medicine to which he belonged, or that he had practiced medicine in the

State continuously for ten years prior to the passage of the act. Persons who continued to practice without such certificate were declared to be guilty of a misdemeanor. Dent was a physician and had practiced his profession for five years. He continued to practice after the time prescribed by the act. He was indicted, tried and convicted, and that judgment on review was affirmed by our highest Federal Court.

One of the conditions imposed upon persons who seek to practice medicine is that they shall possess a good moral character (sec. 145). The presumption of bad character attaches to a person convicted of a felony. Formerly it was not thought safe to allow him to be sworn as a witness. He may now be sworn and give his testimony, but the fact that he is a felon may be shown to impeach his credibility, and the jurors, in the exercise of their judgment, may disregard his testimony. The defendant knew at the time he committed the felony that the presumption of bad character would follow his conviction, and that he would have to bear the resulting consequences. If, therefore, the legislature may impose conditions upon which persons of good moral character shall engage in the practice of medicine, and may impose a punishment for all persons violating the conditions, it appears to us that the legislature may also prohibit from practicing a person who has been convicted of a felony, whose character is presumed to be bad, who has never before studied or practiced medicine, and who has not conformed to a single condition or requirement of the statute under which other persons are licensed to practice.

The defendant has been deprived of no rights secured to him either by the United States or State Constitutions.

The judgment of the Appellate Division should be reversed, and that entered upon the conviction affirmed, and the proceedings should be remitted to the Court of General Sessions of the Peace in and for the city and county of New York, there to be proceeded upon according to law.

All concur (BARTLETT and MARTIN, JJ., in result solely on the ground that the record contains no evidence that the defendant, at the time of his conviction, or at any other time, was a physician) except O'BRIEN, J., who dissents as per following memorandum:

"I cannot concur in this judgment. I think it was correctly decided in the court below, for these reasons:

"1. The statute is wholly prospective.

"2. The statute in question punishes the defendant for an offense committed twenty-five years ago, and of which he was then convicted, and for which he was punished. This statute plainly inflicts an additional punishment, and is in conflict with the Constitution."

Judgment accordingly.

**MEASURE OF DAMAGES IN CASES OF INABILITY TO CONVEY GOOD TITLE TO LAND.**

**T**HAT the decisions on this subject are irreconcilable is not surprising when one considers the diversity of opinion as to the ground upon which the distinction made in this regard between the case of a vendor's breach of a contract for the sale of realty and the like breach of a contract for the sale of chattels, rests.

In *Drake v. Baker* (34 N. J. L. 358), the New Jersey Supreme Court held, that where one agrees to sell real estate and subsequently discovers that his title is defective, and is on that account unable to complete his bargain, nominal damages only can be recovered against him, but limited the scope of the rule to the case of a vendor unable to perform by reason of a defect in his title, which was unknown to him when he entered into the contract. In *Gerbert v. Congregation of the Sons of Abraham* (35 Atl. Rep. 1121), the Court of Errors and Appeals overrules this case and, following *Bain v. Fothergill* (L. R. 7 H. L. 158), holds that the rule restricting the recovery to nominal damages applies to every case where the vendor fails to convey through inability to make title; and that the rule is the same, whether the vendor has been guilty of fraud or not.

In several of the States a rule exactly the reverse of that adopted in New Jersey prevails. In these States the vendor's good or bad faith is treated as irrelevant to the question of the damages to be awarded, and in either case a recovery of substantial damages is allowed. (*Maupin's Marketable Titles to Real Estate*, 213.)

The doctrine which finds general favor in this country seems to be that which prevails in New York. By this, while a vendor contracting to sell in good faith, believing he has a good title, and afterwards discovering his title to be defective, for that reason, without any fraud on his part, refuses to fulfill his contract, is held liable to nominal damages only (*Conger v. Weaver*, 20 N. Y. 140; *Cockraft v. The N. Y. & H. R. R. Co.*, 69 N. Y. 201), yet, where he is chargeable with wrongful conduct, as where he fraudulently misrepresents or conceals the state of his title, or covenants to convey when he knows he is without authority to do so, even though he acts in good faith, believing that he will be able to procure a good title for the purchaser, he is held liable for the loss of the bargain. (*Pumpelly v. Phelps*, 40 N. Y. 59.) In this latter instance, however, if the purchaser knew, at the time he entered into the contract, that the ability of the vendor to convey good title depended upon a contingency, his recovery is limited to nominal damages, for under such circumstances the vendor can scarcely be said to have been guilty of wrong doing. (*Magraff v. Muir*, 57 N. Y. 155.)

For a discussion of the reasons advanced for and

against each of these rules, see *Maupin on Marketable Titles to Real Estate*, sec. 90, etc.; 3 Sedg. on Dam. 196; Sedg. El. of Dam. 320.—University Law Review.

**Notes of Recent American Decisions.**

**Carriers — Negligence — Assisting Passenger on Train.**—According to a recent decision of the Court of Civil Appeals of Texas, the mere fact that a train fails to stop the usual and reasonable time to enable passengers exercising ordinary diligence to get on and off does not constitute negligence as to a person who gets on to assist a passenger, and is injured in getting off after the train has started. He must give notice of his intention to alight before getting on. (*International & G. N. R. R. Co. v. Satterwhite*, 38 S. W. Rep. 401.)

**Constitutional Law — Actions Against State.**—The Supreme Court of the United States has recently declared, in consonance with its prior rulings, that a suit to enjoin State officers from seizing private property under authority of an unconstitutional statute is not a suit against the State (*Scott v. Donald*, 17 Sup. Ct. Rep. 262), and that a suit for damages against State officers, who have seized and carried away private property under color of an unconstitutional statute, is not a suit against the State, within the prohibition of the eleventh amendment. (*Scott v. Donald*, 17 Sup. Ct. Rep. 265.) From this latter decision Mr. Justice Brown dissented.

**Contract — Services Rendered in Expectation of Marriage.**—In *Lafontain v. Hayhurst* (36 Atl. Rep. 623) it is held by the Supreme Judicial Court of Maine that services rendered in expectation of marriage with the party served, and without any expectation of other remuneration, will not sustain an action of *assumpsit*, even though the party served refuses the expected marriage. The remedy, if any, is an action for breach of the contract to marry, and the offering in evidence the services as elements of damages.

**Equity — discovery — forged letters.**—A bill in equity may be maintained for the recovery of letters written by complainant to her son, and by the son to her, where the former were wrongfully taken by defendant from possession of the son, and the latter from complainant's possession. (*Dock v. Dock* [Penn.], 36 Atl. Rep. 411.)

**Judge — Misconduct on Trial.**—When a judge, after the jury has retired, goes to the door of the jury-room at the request of that body, and returns and informs counsel that the jury, through its foreman, had requested a repetition of certain instructions, his acts constitute such misconduct as will justify a reversal of a conviction. (*State v.*

Wroth [Supreme Court of Washington], 47 Pac. Rep. 106.)

**Husband and Wife — Domicile.**—The Supreme Court of New Hampshire has recently decided that, under the married women's property acts, and the other enabling statutes which have removed the wife's disabilities, she may now, after her abandonment by her husband, acquire a separate domicile in another State, and on her death her estate will be administered under the laws of the new domicile. (*Shute v. Sargent*, 36 Atl. Rep. 282.) In the case in hand the husband, who was domiciled in Massachusetts, had expressed his assent to his wife's will in writing on the back, as required by the statutes of that State, while they were living together as husband and wife. After the abandonment the wife became domiciled in New Hampshire, whose laws do not recognize the binding nature of such an assent, and the court decided that it was inoperative, and that the husband took his share of her estate under the distribution law of New Hampshire.

**Municipal Corporation — Negligence — Accident to Travelers.**—In *McHugh v. City of St. Paul*, it is held by the Supreme Court of Minnesota that a city is not ordinarily liable for an injury to a traveler while straying outside of an unfenced street, when the whole street is safe and convenient to travel upon, and that a city is under no obligation to light its streets, where they are safe and convenient for travel the whole width, unless the duty to do so is imposed by its charter.

**Physicians — Refusal of Board of Health to Grant Certificate of Admission to Practice.**—The Supreme Court of Missouri has lately ruled that the State Board of Health has no authority to refuse a certificate authorizing an applicant to practice medicine in the State, on the ground that the medical college from which he had graduated had not complied with a resolution of the board requiring every college, by a certain date, to furnish the board with a list of its matriculates and the basis of their matriculation, when it appears that the applicant was graduated before the college received notice of the resolution; and that, though mandamus will not lie to compel the State Board of Health to issue a certificate to practice medicine, when they have determined that the applicant is not a graduate from a medical college "in good standing," the decision of that question being within their discretion, yet the question of good standing cannot be made to depend merely on whether the college has complied with a resolution of the board such as mentioned above, the statute giving them no such power; and that a mandamus will accordingly issue in such a case to compel the granting of the certificate. (*State v. Lutz*, 38 S. W. Rep. 323.)

**Torts — Joinder of Actions — Animals.**—The

Supreme Court of New Jersey decides, in *State v. Wood* (35 Atl. Rep. 654), that a joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals. Citing *Denny v. Correll*, 9 Ind. 72 (1857); *Buddington v. Shearer*, 20 Pick. (Mass.) 477 (1838); *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562 (1837); *Auchmuty v. Ham*, 1 Denio (N. Y.) 495 (1845); *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479 (1855); *Adams v. Hall*, 2 Vt. 9 (1829).

### Notes of Recent English Cases.

**Corporations — Meetings — Voting — Proxies — *Viva Voce* Vote.**—In *Ernest v. Loma Gold Mines, Ltd.* ([1897] 1 Ch. 1), the Court of Appeal of England has affirmed the decision of Justice Chitty ([1896] 2 Ch. 572) that on a *viva voce* vote, at a meeting of a corporation, the vote of each person who holds a proxy must be counted as a single vote, and not as a vote for each person for whom he holds a proxy; and that when a notice calling a special meeting was accompanied by a circular from the secretary and directors with a proxy attached, asking for the return of the proxy in support of the resolution, the date of the meeting being left blank in the proxy by a printer's error, and several of the members executed and returned their proxies duly stamped without filling up the blanks, which were filled up by the secretary before the proxies were lodged with the corporation, the proxies were valid.

**Trustees — Breach of Trust — Improper Investment — Application for Relief.**—*Ivimey and Turner* held £900 upon trust for the plaintiffs, with power to invest upon real securities, under the will of Mrs. Strong, who died in 1876. Ivimey was a solicitor, and was allowed by his co-trustee, who was a linen-draper, to manage the trust fund. In 1880 he invested it upon a mortgage of freehold property, consisting of an undivided moiety of a common and an undivided fourth part of china-clay works. No valuation was obtained. The property mortgaged turned out insufficient, and this action was brought to recover the loss against Ivimey and the executors of Turner, who had died. The executors of Turner asked for relief under the Judicial Trustees act (1896, section 3), on the ground that they had acted "honestly, reasonably, and ought fairly to be excused." This appeared to be the first application of the kind. Byrne, J., refused the application on the ground that Turner had not acted reasonably in the matter. (*Re Turner* [deceased] *Barker v. Ivimey*, H. C. of J. Chan. Div.)

### Legal Notes of Pertinence.

A criminal lawyer of long experience at the Bar was heard to say the other day: "I have made juries in murder cases an especial study. There are a large number of men — larger than most people suppose — who have scruples about finding death as a punishment for a murderer. I used to make it my business to study jurymen's faces and see if I could read by the lines whether or not they had scruples about the death sentence. I gave this up, though, as being beyond my power of comprehension. Later, continued study of the jury-box led me to a discovery. That was what in nine cases out of ten a jury composed mostly of tall, lean men would, when the evidence was sufficient, never have the slightest hesitation about fixing extreme sentence. On the other hand, a jury where short, fat men predominated in number would occupy twice as much time in finding its verdict, and when brought in it would generally be a term of imprisonment for the murderer."

A bill has been introduced at Lansing requiring that all menu cards or bills of fare in restaurants or hotels shall be printed only in the English language. Is the consideration of such a bill a matter for which the people of this State pay legislators? And in the title the worthy legislator himself uses the word "menu." It is said that the reason for the introduction of the bill is a personal one. Our friend, the originator of the measure, was in Chicago a short time ago. The bill of fare was mostly in French. He started at the head and said to the waiter: "Give me some of that." He got soup. He skipped down the list a little way and tried again. He got another variety of soup. He was hungry and went pretty well to the bottom of the card and got toothpicks. You would have felt annoyed yourself.—*Michigan Law Journal*.

In New Jersey they vote with ballots enclosed in envelopes. When the election officers of Madison township were counting the ballots Tuesday, they found in one envelope a dollar bill. One member of the board thought it must be taken as a rejected ballot and strung as such. The other members thought differently, and after some discussion it was decided to create a precedent and spend the dollar for cigars and other things.

A bill has passed the Iowa Senate limiting the time which lawyers may consume in arguing cases before juries — another shining example of fool legislation. The courts are the best judges in such a matter, and should be clothed with ample authority to act.

An interesting lawsuit is promised on a question which may be said to turn on the attraction of gravitation, says the *New York Evening Post*. A scientific gentleman has written a book to prove that there is no such thing, and a scientific publi-

cation has undertaken, in reviewing his book, to show that he does not know enough to understand the nature of the argument by which the law of gravitation is demonstrated. He says, in reply, that this is a false and malicious libel, and has damaged him to the extent of many thousand dollars. As a general rule, courts take what is called judicial cognizance of the laws of nature, or, in other words, do not allow proof to be taken to show that water runs down hill, or that fire burns, or that ice freezes, or that the earth goes round the sun. On the other hand, they generally refuse to take cognizance of frivolous causes. If these difficulties can be surmounted, the case will attract attention the world over.

The Missouri Supreme Court has declared that the law against opium smoking and opium joints is unconstitutional, because it interferes with the right of men to smoke whatever they choose.

The principle that a railroad company cannot delegate to a contractor its charter rights and privileges so as to exempt it from liability is held, in *Sanford v. Pawtucket Street R. Co.* [R. I.], 33 L. R. A. 564, to be inapplicable to the use of ordinary means in constructing a road, and therefore the negligence of a contractor building a street railway in stretching a rope or wire across a street does not render a street railway company liable, although he is not a resident of the State, if the manner of constructing the road was left to the skill and judgment of the contractor.

In Pennsylvania, recently, a woman brought suit against a railroad company for damages on account of the death of her husband, who was killed while crossing the track. The decision has just been announced, and has interest for all bicycle riders. The facts proved at the trial were that the woman's husband was riding a bicycle at the time the accident occurred. As he approached the crossing a freight train was passing, and he had to wait. Instead of dismounting, he made what is called a "bicycle stop," riding his wheel around in a circle. As soon as the freight was out of the way, he started across the railroad, and was struck by a train on the other track. The court held that the "bicycle stop" is not a stop in the legal sense; that the rider had not exercised due diligence, but was guilty of contributory negligence, and that the widow could not recover damages.

The new law firm of Root & Clarke, of which Elihu Root is the senior partner, possesses one of the most commodious and unique offices in New York, having secured the rooms of the old Insurance Club, on the top floor of the Mutual Life Building, when that organization collapsed a year or so ago. Much of the club's furniture was obtained with their lease, and these offices, in which is done a business equalled by few of the great firms, still possess something of the appearance of a social club.

## LEGAL LAUGHS.

It has not been so very long since the old English court rules passed out of observance, and when they were in vogue nowhere were they observed more strictly than in South Carolina. A rule provided that a lawyer, when he spoke in court, must wear a black gown and coat, and that the sheriff must wear a cocked hat and sword. On one occasion a lawyer named Pettigrue arose to speak in a case on trial.

"Mr. Pettigrue," said the judge, "you have on a light coat. You cannot speak, sir."

"Oh, your honor," Pettigrue replied, "may it please the court, I conform to the law."

"No. Mr. Pettigrue," declared the judge, "you have on a light coat. You cannot speak, sir."

"But, your honor," insisted the lawyer, "you misinterpret. Allow me to illustrate. The law says that the barrister must wear a black gown and coat, does it not?"

"Yes," replied the judge.

"And does your honor hold that it means that both gown and coat must be black?"

"Certainly, Mr. Pettigrue; certainly, sir," answered his honor.

"And the law further says," continued Mr. Pettigrue, "that the sheriff must wear a cocked hat and sword, does it not?"

"Yes, yes, Mr. Pettigrue," the court answered, somewhat impatiently.

"And do you mean to say, your honor," questioned Pettigrue, "that the sword must be cocked as well as the hat?"

"Eh? — er — h'm," mused his honor. "You — er — continue your speech, Mr. Pettigrue."

Lawyer — Now, Mr. Thrift, describe to the court the chickens that you charged my client, the defendant, with stealing.

Farmer Thrift goes into the details, but is interrupted by the lawyer, who exclaims: "I have some chickens like those myself."

Farmer Thrift (resuming) — The chickens he took are not the only ones I have had stolen.

"Michael Egan to the bar!" called out the clerk of the criminal branch of the United States Court. But this was altogether a matter of form and superfluous, for the reason that several days prior Mr. Egan had been to the bar and sawed it in twain, and Sheriff Tamsen is quite unable to produce him in court. — *New York Advertiser*.

It was in an Irish court that a man was called into the witness-box not long ago, and being old and just a little blind, he went too far, in more than one sense, and, instead of going up the stairs that led to the box, mounted those that led to the bench. Said the judge, good-humoredly: "Is it a judge you want to be, my good man?" "Ah, sure, your honor," was the reply. "I'm an old man now, and mebbe it's all I'm fit for."

Maud (in court-room) — What a villainous-looking person the prisoner is.

George — Sh! That isn't the prisoner; it's the celebrated expert witness answering hypothetical questions. — *New York Evening World*.

## New Books and New Editions.

The Law of Receiverships, as Established and Applied in the United States, Great Britain and Her Colonies, with Procedure and Forms. By John W. Smith, Esq., of the Chicago Bar. Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1897.

Our constantly changing conditions of business institutions and methods are naturally being followed closely by a constant and steady growth of remedial jurisprudence, and conspicuous in this branch of the law is that of receiverships. It is in view of aiding the practitioner in familiarizing himself with this kaleidoscopic branch of the law that the author has, although aware of many previous publications on receiverships, so carefully and successfully undertaken a thorough survey of the ground and brought the results of his observations and research before the reader in a careful and methodical arrangement of the general features of the law and method of appointment of receivers, treating fully of the power, possession, title and liability of the receiver as involved in the receivership of corporations, national banks, railways and decedents' estates.

Such examination as we have been able to give this volume indicates that the author has not only conscientiously sought to state the law applicable in receivership cases, but to make clear the reasons underlying the law, as well as to show how it has been applied under the varying conditions of each of the 4,000-odd cases which have been reported in the courts of America, England, Canada and other jurisdictions where the cases are printed in English. No case has been cited without personal examination by the author, and every effort has been made to include all reported cases down to January 1, 1897. The work is very full on matters of practice.

An additional feature is the chapter of forms, in which the author has, with noticeable exactness, collated a set of forms which, though acknowledged to be particularly adapted to the code practice in Indiana, are still of value to the lawyers in all the code States. While the author does not attempt the discouraging task of reconciling conflicting decisions, he has sought to establish general rules and exceptions derived from a pretty thorough examination of the differentiating facts and circumstances of a long line of well-selected cases. The work contains 805 pages, is of good print, fully indexed, and is exceptionally well arranged.

## The Albany Law Journal.

ALBANY, APRIL 10, 1897.

### Current Topics.

ILLINOIS is not only agitating the question of abolishing department stores, but the passage of a bill or bills now pending in the legislature of that State, whose object is to tax those concerns out of existence, is being seriously urged by large delegations of Chicago business men. The arguments of those who support this remarkable proposition are curious, to say the least. It is not the consumers, as consumers, who are injured, they declare, but there are 240 or more stores in Chicago that the rise of the department store has made vacant, owing to the ability of the big retail merchant to undersell the small dealer. Granting this, it may be inquired whether the injured proprietors of these vacant stores are in any general sense "the public," and whether special legislation should be passed in their behalf. However much some of the results of this modern way of doing business may be regretted, particularly in the closing up of so many small concerns, there can be no foundation for the claim that the department store is such an evil that it should or can be legislated against. It is not possible, in our opinion, to pass a bill for any such purpose which would stand the test of constitutionality in any court in Christendom. Those who think that department stores constitute a commercial evil and a menace to society—and there are, doubtless, thousands of such persons—are certainly entitled to hold these views and to urge them in public and in private. It would be equally proper for the proprietors of department stores to urge their side of the case; but it is a noticeable and noteworthy fact that the latter are doing absolutely nothing in this line in Illinois. While the proposed legislation would wipe their vast business out of existence, they have asked no hearings. They are so sure of their ground, and so confident that the

governor, or, if necessary, the courts, would scatter to the winds any such enactment as is proposed that they see no necessity for wasting any time or effort on preliminary battles. They have never sought any special privileges; they simply ask to be judged by their fruits in a free, competitive market. While THE ALBANY LAW JOURNAL does not desire to be considered their special advocate, it is willing to go on record as opposing any such foolish and futile legislation as is proposed to be enacted in Illinois against a perfectly legitimate business.

An important contribution to the discussion of the anti-monopoly question is embodied in an article by Prof. Arthur T. Hadley, of Yale in the current *Atlantic*, in which the writer points out that much of the confusion on this subject is due to the use of the word "combination" in two distinct senses. Combination, as opposed to isolation, is one thing; combination, as opposed to competition, is another. In the former sense, he thinks, it represents an unmixed good; in the latter sense, whatever good it may accomplish is attended with most serious industrial dangers. It is not always easy to distinguish between the two kinds of combination. The principle of mutualism and coöperative effort is not only legitimate, but it is beneficent in its operation; but the difficulty seems to be, with many, to discover at what point combination becomes conspiracy. This is well shown in the senseless agitation now going on against the so-called department stores. It should be remembered always that natural concentration inevitably tends to the diffusion of the means of enjoyment, not only benefiting consumers, as such, by cheapening products, but doing corresponding good to the wage-laborers. The anti-department store crusaders do not deny the benefit to consumers, but they do deny the benefit to wageworkers. On this point Professor Hadley shows that concentration of the means of production has greatly cheapened production, otherwise the smaller domestic industries never would have been driven out. But have workingmen lost



more by the consolidation of capital than they have gained by the cheapening of products? In answering this question Professor Hadley directs special attention to the fact that improvements are improperly called labor-saving. Modern machinery and other improvements are not only labor-saving, but product-making. The supposed reduction in the demand for labor he regards as a myth; all that can take place is a change of direction of labor, and a reduction of demand in certain lines of acquired skill. But the general effect is to increase the demand for labor and to put wages up. The argument that railroad development has diminished the demand for labor he regards as too absurd to consider. The amount of wages paid annually for track repairs alone, he says, is probably greater than the compensation which all carriers ever received on any wagon road. The same is true of every other great improvement. It would be equally absurd to say that typesetting machines have diminished the demand for labor. The popularization of literature by cheapening it means an increased demand for labor, though no one will deny that there is a change in its direction. Professor Hadley applies the same argument to the department stores, viz.: That they increase consumption of commodities by cheapening them, that they are product-making as well as labor-saving devices. Those persons who are temporarily injured by being displaced are entitled to our sympathy, but their special interests are not to be permitted to stand in the way of normal progress.

Carrying this argument a little farther, Professor Hadley inquires whether it follows that the prevailing agitation against trusts is as irrational as the outcry against combination and concentration generally; and he answers unhesitatingly in the negative. The "dominant motive" in trusts is not economy; it is rather the securing of a monopoly of commercial power than a gain in productive power; to limit output and raise prices rather than to develop the industry and lower prices. It is conceded that monopoly, if not backed by some legal privi-

lege that removes all possibility of competition, eventually defeats itself by inviting a repetition of the very evils it was designed to correct. Experience has shown that monopoly is inevitably selfish, and the demand for protection against its greed and rapacity is, therefore, natural and legitimate. The public will never be willing to dispense with competition as a regulator of prices and stimulus to efficiency. It has no faith in the beneficence of monopoly; it is too much like inviting a repetition of what occurred when the fly was invited into the spider's parlor. While the question is extremely complicated, and the difference between so-called department stores and trusts is not, perhaps, clearly defined at all points, it should be remembered that there is this radical distinction—the former neither ask special favors nor resort to illegal or inequitable methods. They simply seek opportunity to demonstrate their fitness to survive in a free and fair field. Moreover, they do not eliminate competition, as the trusts notoriously do, for every large city in the country has many of these department stores, the fierce rivalry between them bringing about economy of production, with consequent cheapness, diffusion of enjoyment and improved standards of living. Monopoly, on the other hand, as we know, is neither economical nor efficient if protected against rivalry.

It is gratifying to learn that a reform is to be instituted in the matter of digesting reports of the decisions of the courts. Serious complaint has been made by lawyers, as well as by leading papers, of the digesting of decisions as they appear in unofficial reports, and that there are no citations of the official reports, except in those cases where the official volumes come out prior to the time of their going to press with the annuals of these digests. The objections to this practice are so many and obvious that there is no need of enumerating them; and no one will be likely to dispute the proposition that no case ought to be digested in any permanent form until it has been officially reported.

THE ALBANY LAW JOURNAL fully agrees with the American Law Review when it remarks that "if this policy had been adopted in the first instance by the West Publishing Company and by the Lawyers' Coöperative Publishing Company with regard to the annuals of their respective digests, we should not have been obliged to run the hazard of citing decisions which are no decisions; nor should we have been obliged to resort, in order to search for the official reports, to that abominable expedient of the St. Paul house, known as the "Blue-Label Book." With a view of remedying this unsatisfactory state of things, the Lawyers' Coöperative Publishing Company have determined upon a new departure by which their permanent volumes are to be semi-annuals. The temporary volumes, which are designed to keep abreast with the work of the courts will hereafter be issued in the form of quarterlies, bound in paper covers. A permanent volume will be issued every six months, which will include no case which has not been officially reported. This is certain to prove a very satisfactory scheme, and the example of the Rochester house ought to be followed by the St. Paul publishers without delay.

The suggestion has been made that the celebration of the sixtieth year of good Queen Victoria's reign be marked by a codification of English law; that if a Victorian Code of Civil and Criminal Jurisprudence and Procedure were commenced in celebration of the diamond jubilee the name of the queen would, like that of Justinian, be inscribed on "a fair and everlasting monument." The suggestion meets with some favor, but the sentiment is not unanimous.

The London Law Journal, for example, shows that, not only would the proposed plan require ten or twelve years' work, but that wholesale codification has its serious objections. The Journal thinks it better that branches of the law should be codified as they become ready for such treatment than that an attempt should be made to pass the whole length of English law through one process of codification; in which observation

there is a great deal of wisdom. The prevalent lay notion that codification would so simplify the law that he who ran might read would be found to need revising too. Reference to a code which required a dozen years or more for its preparation would not be likely to prove an easy task, even for the trained lawyer.

In the case of *Guy Weber v. Shay & Cogan*, the Supreme Court of Ohio decided a very interesting, as well as unusual, question. It was whether a contract made by attorneys-at-law to render services in preventing the finding of an indictment against one accused of crime is illegal and void without respect to the belief of such attorneys as to his guilt. *Shay & Cogan*, the attorneys, brought suit against *Weber* in the Court of Common Pleas, alleging in their petition that the defendant entered into a contract with them by which it was agreed that they, *Shay & Cogan*, should protect the interests of the said *Weber*, and one *Anderson*, in certain criminal actions threatened and pending in the Court of Common Pleas, of Hamilton county, Ohio, and in the United States Circuit Court for the sixth judicial circuit and southern district of Ohio. For their services *Weber* was alleged to have agreed to pay \$1,000. To certain interrogatories the plaintiffs replied that they were to protect *Weber* from public scandal; protect him, if possible, from being indicted by the United States or State authorities, and defend *Anderson* against charges of burglary in feloniously entering a postoffice. One of the charges against *Weber* was that some of the stolen postage stamps were found in his possession. On the trial of the action the jury rendered a verdict in favor of the plaintiffs for the amount claimed, and that judgment was affirmed by the Circuit Court. The Supreme Court reversed these findings, holding that public policy requires all offenses against the law shall be punished, and all contracts which tend to suppress legal investigations concerning them are immoral and void. Courts being charged with the duty of administer-

ing the law, they should not lend their aid to the enforcement of any contract which looks to its subversion. The Supreme Court further finds that it was not material whether the plaintiffs knew or believed that Weber was guilty or not; their belief in his innocence would not have made the contract valid. It was held as error in the lower courts to leave to the jury to determine whether there had actually occurred the secret and corrupt practices which the contract encouraged. The decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of such agreement.

The State of Indiana is to institute a new system of dealing with criminals. The legislature of that State, at its recent session, passed an indeterminate-sentence law, which takes away from Indiana juries the power to determine the length of the sentence as well as the guilt of a prisoner, and leaves them only the power to decide his guilt or innocence. In future, on conviction, the Court will sentence a convict to prison or to the reformatory, stating at the time what the minimum and maximum period of punishment is for the crime, but it will impose no definite term. This will be decided later by the conduct of the prisoner himself, and by the belief he awakens that his after life will be free from crime. The terms of the new law are substantially as follows: When the minimum term for which a prisoner has been sentenced has expired he has the right to be heard as to whether he shall not be released upon parole or be given an absolute discharge. The board before which he must appear to make this request is to be composed of the warden, the directors, the chaplain and the physician of the prison in which he is confined. If this board decides favorably on the application of the prisoner he is released on parole, but he is still under the legal custody of the authorities until the maximum period for which he was sentenced expires. If at any time during this period he violates his parole he can be re-

arrested, taken back to the prison and made to serve out the full term of his imprisonment. In order to enable the board to act intelligently on the application of prisoners to be paroled wardens are required to keep complete records of the conduct of the inmates of prisons, and also learn as much as possible about their past life, education and general demeanor.

It has long been a favorite theory of many penologists that the system of definite periods of time as a sentence for crime is not only nonsensical but unjust—a relic of by-gone ages; that it entirely nullifies every effort which the convict may make on his own behalf, or which the prison authorities may make for him. The Hon. Carroll D. Wright, a high authority on criminal statistics, finds that of the convicts in the United States six-eighths are short-term prisoners, one-eighth incorrigible, and one-eighth amenable to reformatory efforts. The incorrigible eighth, he argues, men of purely criminal minds, should never be returned to society under any circumstances; but the reformable eighth, composed largely of young men who are in prison as a result of some spree or through other indiscreet action, should not only be sentenced on the indeterminate plan, but every effort which the State is capable of should be made to bring them into harmonious relations with law-abiding citizens. The probation system of first offenders has been tried in England with satisfactory results. Out of 8,000 cases treated in this way in the years 1891, 1892 and 1893 only ten per cent. were called upon for judgment. The superintendent of the Chicago Bridewell in his last annual report says that of the 9,655 persons sent there in 1896 over half were “repeaters,” and one of the chief causes of this, he says, is the system of committing for definite terms. Investigation in England has shown that out of every 100 persons who go to prison for the first time thirty return the second time, after the second conviction forty-eight return for the third time, after the third conviction sixty-four return for the fourth time, after the fourth conviction seventy-one return for the fifth time, and after

the fifth conviction seventy-nine return for the sixth time. These figures show how small a deterrent effect imprisonment has upon crime. The Indiana experiment will be watched with great interest throughout the country, and if the results prove to be what prison reformers confidently predict, radical changes in the methods of dealing with criminals are altogether likely to be made in other States.

The law courts of San Francisco will soon be called upon to decide a novel case, in which the right of a stereopticon company to project its pictures upon the dead walls of a building is in question. The parties to the prospective litigation are the trustees of the Parrott estate and the Lantern Advertising Company. One of the landmarks of the Golden Gate city is a huge structure on Market street owned by the plaintiffs, and known as the Parrott building, whose high walls, rising far above the roofs of adjoining buildings, and painted a solid drab color to correspond with the stone front of the building, present an enticing surface for the projection of images—a sort of huge ready-made screen for the lantern-slide advertisements. In addition to this, is the fact that the building is located on the busiest thoroughfare of the Pacific coast metropolis, just where the night crowds of theatre-goers and promenaders can best see what is going on. The lantern-slide people did not attempt to get the permission of the trustees of the Parrott estate to use the dead walls; they simply obtained the consent of the owners of the adjoining buildings to place their apparatus on the roof, and nightly these blank, dead walls have blazoned forth the superior advantages of certain brands of soap, hair dyes, cigars, tooth powders, etc., etc., together with race-track quotations and other interesting, if not valuable, information. Right here has come the conflict. The Parrott estate has ordered the Lantern Advertising Company to desist, setting up the claim that the building, both inside and out, and the land on which it stands, from the center of the earth to the sky, is its property, and subject to its right

to control its every use; that as it would have the right to forbid signs to be painted or pasted on these walls, so it has the right to forbid the placing of signs thereon by any other means. This is the question which the courts will have to decide.

Judge Seligman, of Louisville, Ky., recently laid down the principle that an estranged husband is liable for the expenses of his wife's burial, notwithstanding that they have been, for some time, separated. The plaintiff in the case, Mrs. Johnson, it appears, had advanced, temporarily, the money necessary to pay for the funeral of the wife, and brought suit against the husband for its recovery. "Ordinarily," says the court, "one cannot compel another to be his debtor by performing for him, without his request or sanction, any undertaking on his behalf. In the case at bar, the wife died of a wasting disease, and it was necessary to promptly inter her remains. It would have been inhuman, uncivilized and degrading to permit her remains to be uncared for until the bickerings and contentions of her opposed family could be reconciled. It was an act of humanity and necessity under the circumstances to pledge credit for these expenses, and, having paid the same, plaintiff has a right to be indemnified at the hands of the defendant."

The Supreme Court of Massachusetts, after having the matter in hand for more than a year, has decreed that the disbarment of Attorney Elisha Greenhood shall be made permanent, thus sustaining all the findings and conclusion of Judge Braley. The Court holds that it is not necessary, in pleading charges against a member of the bar, for misconduct, to plead the charges with the particularity required in a criminal case; it is sufficient that an attorney is reasonably and definitely informed of the matters alleged against him. It further holds that the removal of an attorney who has been guilty of deceit, malpractice or other gross misconduct may be absolute, leaving the removed party to apply to the court for readmission if his offense is of such a kind

that, after a lapse of time, he can satisfy the court that he has become trustworthy. In closing his opinion Judge Knowlton says: "It is important that the oath of office taken by attorneys on admission to the bar should not be considered and treated by those who take it as an empty form. Nothing in the life of the people more deeply concerns their welfare than the administration of justice in our courts. The high standard of integrity which is prescribed by our Constitution and our laws for the officers of our courts should be maintained. The removal or suspension of an attorney is necessarily damaging to him, and may even be ruinous. It should only be ordered after careful investigation of the alleged causes for it. But when it appears that one has ceased to regard the principles of morality, and that fidelity to truth and justice, without which the practice of law is mockery, a court should not hesitate to remove him."

Greenhood was adjudged guilty of deceit, malpractice and gross misconduct in two separate cases, and the prosecution, which has resulted in his permanent disbarment, was instituted by the Bar Association of the State.

Under a law, enacted ostensibly to encourage the investment of foreign capital in the province of Quebec, the usurers of Montreal appear to be doing a "land-office" business. In that city a suit on a loan of \$250 has just been decided, and the plaintiff has received an award, under the law, of the principal remaining unpaid and interest at the rate of five per cent. a day. This is the decision, rendered by Justice McGill, of the Superior Court: "Whereas the plaintiff claims from the defendant the capital sum of \$150 for balance due on his note of \$250, dated at Montreal the 30th November, 1894, and by which, at one month and a half from date, for value received, he promises to pay to the order of the plaintiff the said sum of \$250, with interest, in default of payment at maturity, at the rate of five per cent. per day, or 1,825 per cent. per annum, giving for the sum claimed of \$150 that of \$2,737.50, annual interest, and for

interest accrued since December 20, 1894, according to the claim of February 26, last, day of the inscription, an amount of \$5,985, which, added to the said balance of \$150 of principal, forms a total of \$6,135, which the defendant is condemned to pay with interest at five per cent. per day from the 26th of February, 1897, with costs."

This can hardly be regarded as anything except confiscation and robbery by law. Its continuance on the statute books of the province is a standing disgrace, which there ought to be sufficient public sentiment to wipe out speedily and forever. No such outrageous law is needed for the "encouragement of capital," or for any other purpose except to oppress and rob those whose necessities compel them to be borrowers.

The Supreme Court of Illinois not long ago decided a case which exhibits in a somewhat startling manner the injustice of some jury awards. Robert M. Simons was insured in the two associations now consolidated under the name of the Star Accident. In August, 1891, he injured his left foot, and in November following was paid the full amount of his claim. In March, 1892, the assured wrote Secretary Quincey that he had been ordered by his physician to lay up from all duties on account of having sprained his right foot, caused by favoring his left. This letter was followed a few days later by the first proofs and also by three letters, in which the cause of the injury to the right foot was stated to have been from "walking on said foot" owing to the former accident. In February, 1893, the assured filed final proofs, and, much to the surprise of the officers of the company, alleged that on March 2, 1892, in getting off a cable car he came down on his right heel too hard, and by so doing bruised it, causing a loss of forty-nine weeks' time. The claim was disallowed, and Mr. Simons entered suit against the two associations, alleging the cause to have been so stated in the final proofs, and the jury rendered a verdict against the company for \$1,433.39.

The case was appealed and the verdict of the jury set aside. Justice Shepard, who rendered the decision of the court, said: "It is incredible that the appellee could have made the written statements he did so near the time of the alleged accident in March, 1892, without mentioning such circumstance if it occurred. \* \* \* While verdicts of juries as to facts must ordinarily be sustained, there is no rule that requires them to be upheld when they are manifestly contrary to the great preponderance of the evidence. But, on the other hand, it is our plain duty to reverse the judgments that are entered upon verdicts so opposed to the evidence. \* \* \* The verdict in this case was so clearly opposed to the overwhelming evidence furnished by the appellee's own statements on the vital questions at issue, that no court should hesitate to set it aside."

Criminal liability for the reckless riding of a bicycle was visited with a sentence of four months' hard labor in the English case of *Regina v. Parker*, which was tried at Lewes Assizes. The defendant was charged in an indictment with manslaughter and also with furiously driving a carriage or vehicle contrary to section thirty-five of the Offenses Against the Person act of 1861. The sentence was imposed upon a plea of guilty to the second indictment. This plea was accepted, although the prosecution considered that a conviction for manslaughter would be supported. The Law Journal quotes Mr. Justice Hawkins as saying that the counsel for the prosecution had very mercifully asked only for a conviction on an indictment to which the prisoner was ready to plead guilty, and he was glad that some one had thought fit to put the law in motion, and let those who were careless and reckless of the lives of others know that they were punishable by law. The justice also said that a man or woman who rides a bicycle is bound to conduct it with care and caution, and no more entitled to ride recklessly and furiously than to drive a cart at a furious pace through the street.

#### THE KISS IN COURT.

A LAWYER met a pretty miss  
While he was walking out one day,  
And stole from her a honeyed kiss—  
Which was not just the proper way.  
At once a case of tort was brought,  
Which legal rules could not deny;  
The lawyer held no justice ought  
So frail a suit as that to try.  
The action, when it got to court,  
Met with a jury lenient,  
And many a quillet and retort  
Day after day on it was spent.  
The lawyer claimed no maiden should  
So much rare loveliness display;  
A kiss like this he understood  
Was flotsam on the State's highway.  
The maiden said her rosy lips  
No easement were for him to use,  
Tho' they all others might eclipse—  
His answer was somewhat abstruse.  
And thus progressed the argument  
Concerning kisser and kissee,  
When to the jury it was sent,  
Who failed entirely to agree,  
But, sent into their room again,  
They gave their voice to the defense;  
And found the girl in fault, for plain  
"Contributory negligence."

—Harper's Bazar.

#### THE ALIENATION AND HYPOTHECATION OF CORPORATE FRANCHISES AND CORPORATE PROPERTY.

THE question of the alienation and hypothecation of corporate franchises is one enveloped in a realm of judicial authority, almost equaling a wilderness, in the study of which the investigator must not lose sight of certain principles, lest he will hardly escape the result of a befogged conception. Three fundamental propositions may be laid down from all this array of authority from both England and America, which, however, are nevertheless always subject to contradictions, by reason of the interminable conflict in the decisions. And these propositions may be said to be based upon radical distinctions, and may be stated thus: (a.) The franchise which calls a corporation into existence, that is, of existing or being a corporation, cannot be alienated or encumbered; (b.) no franchise which involves the performance of public duties or functions, nor its rights and property used to carry on its legitimate business, can be assigned or mortgaged, without first having obtained the right or consent so to do from the State, or city, or other municipal corporation having granted the franchise which is sought to be assigned, or such property sold; and (c.) that with the limitations set out in the second proposition,

any corporation may sell or mortgage, or lease, its franchises, save the franchise which creates it, as it sees fit. These franchises, other than the franchise to be a corporation, are considered as being property, and are hence held to be subject to the same rules of law as to ownership and disposition as any other species of property.

A convenient method of classification of franchises is, that the franchise creating or of being a corporation may be designated as the primary franchise, and all others as secondary, and bearing these fundamental distinctions in mind, it will be possible to analyze intelligently the conflicting multitude of American cases involving the question at issue. It will readily be seen that the franchises which a corporation owns of prosecuting a certain business enterprise, or of exercising acts of ownership over specific property necessarily required in the use of such franchises, are exclusively of the class above designated as secondary franchises.

Corporations, such as railway companies, gas and electric light, street railway, turnpike road and canal companies, and the like, are corporations which receive their franchises as such upon well-known principles of public policy — upon the consideration that the public convenience will be subserved thereby — and the extent of this consideration of such a grant on the part of the municipality or State, is the due performance of these duties on the part of the corporation thus invested with these privileges.

Hence, upon the same principles, it has often been held that in the absence of express authority from the legislature so to do, a corporation cannot assign its franchise to be a corporation, nor can it encumber the same. Reason and the weight of authority supports this doctrine. (*Stockton v. Ry. Co.*, 50 N. J. Eq. 65; *Black v. Canal Co.*, 24 Id. 455; *Archer v. Ry. Co.*, 102 Ill. 493; *Fietsam v. Hay*, 122 Id. 293; s. c., 2 Am. St. Rep. 492; *Stewart's Appeal*, 56 Pa. St. 413; *Ry. Co. v. Allegheny Co.*, 63 Id. 126; *Clarke v. Ry. Co.*, 4 Neb. 458; s. c., 19 Am. Ry. Cases, 423; *State v. Coal Co.*, 46 Md. 1; *Hays v. Ry. Co.*, 61 Ill. 422; *Arthur v. Bank*, 48 Am. Dec. 719; *Com. v. Smith*, 87 Id. 672; *Ry. Co. v. Hubbard*, 92 Mass. 448; *Richardson v. Sibley*, 87 Am. Dec. 700; *Ry. Co. v. Ry. Co.*, 115 Mass. 351; *Braslin v. Ry. Co.*, 145 Id. 67; *Richards v. Ry. Co.*, 44 N. H. 127; *Pierce v. Emery*, 32 Id. 484; *Lumber Co. v. Company*, 65 Id. 290; *Ry. Co. v. Com.*, 112 U. S. 609; *Snell v. Chicago*, 152 Id. 197.)

The franchise or the right to be and act as an artificial body is not vested in the corporation itself, but rests in the individuals composing the company, and, therefore, since this artificial body, or political entity, is not the owner of this primary franchise, it is not difficult to divine the reason for holding that a corporation cannot assign the franchise creating it, for it is not the

owner of it. This restriction is then founded upon the plainest of principles, and can only be avoided by legal enactment. (*Fietsam v. Hay*, *supra*; *Pierce v. Emery*, *supra*; *Coe v. Ry. Co.*, 75 Am. Dec. 527; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666; *Burns v. Ry. Co.*, 8 Sawyer 553; *Wells, Fargo & Co. v. Ry. Co.*, 8 Id. 616.)

The Federal Supreme Court laid down the rule of instruction in this regard, in *Ry. Co. v. Com.*, where Judge Matthews, in writing for the court, said:

"The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment." (112 U. S. 619.)

This is, however, the same doctrine which was established in Massachusetts some years before, in *Com. v. Smith*, *supra*, where it was said:

"The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible."

The general rule to be invoked in matters of this kind by the courts was early announced by the Supreme Court of the United States in plain and forcible language in *Rice v. Ry. Co.*, where Judge Clifford said:

"Taken together, these several cases may be regarded as establishing the general doctrine that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms."

Nor can one corporation sell and transfer its powers to another, without the special authority of the legislature, for to do so would be in contravention of public policy, and the courts will refrain from enforcing such a transaction, as it is in total disregard of the duties and obligations of the company toward the public. Such a contract or transfer is *ultra vires*, and hence invalid for any purpose. (*Hays v. Ry. Co.*, 61 Ill. 422.)

Since then a railroad or other *quasi* public corporation is not permitted to sell or mortgage its franchise to be a corporation without express legislative authority therefor, a judicial sale based upon a mortgage made by it would not, as a matter of course, invest the purchaser at such sale with any corporate capacity. (*Atkinson v. Ry. Co.*, 15 Ohio St. 21; *Metz v. Ry. Co.*, 17 Am. Rep. 201.)

Yet it has also been held that a mortgage deed intended as a conveyance of the franchise to be a corporation, would, in that respect, be wholly inoperative, still for that reason it would not be entirely void, and might operate as a transfer of the company's property to the grantee. (*Butler v. Rahm*, 46 Md. 541; *Pullan v. Ry. Co.*, 4 Biss. 35.)

Upon the principle that a grant of corporate authority is a trust, which should be carried out with

equal fairness towards the general public, as it would be were the State itself executing the trust, the corporation, in so far as the performance of the public functions implied by the incorporation are concerned, standing in the shoes of the state, it has been held that such grant of authority for corporate existence is not assignable without express provision therefor. (*Stewart's Appeal*, 56 Pa. St. 413.)

In *Arthur v. Bank*, the court said: "The franchise itself cannot be sold or assigned without the consent of the power which granted it. It is a mere easement, a privilege granted to an artificial being, not the subject of sale. The sale or assignment of the road does not carry the franchise with it, nor does it work a dissolution of the corporation." (48 Am. Dec. 721.)

But the question as to whether or not a *quasi*-public corporation has power to alienate its property and the franchise of the company with which such property is connected is one with which third parties have no concern, being a matter entirely between the State and the corporation. (*Ry. Co. v. Lewis*, 53 Iowa 101; s. c., 4 N. W. R. 842; *Ry. Co. v. Bushnell*, 11 Neb. 192; s. c., 8 N. W. R. 389; *Wade v. Society*, 45 Am. Dec. 324; *Arthur v. Bank*, 48 Am. Dec. 720.)

The doctrine supported by the great weight of judicial authority is, that a franchise involving the performance of public functions intended for the public good cannot be alienated or encumbered without the consent of the power that granted it in the first instance. The principle of law involved in, and upon which the restraint upon alienation is founded, in regard to such *quasi* public corporations, was recognized by the Federal Supreme Court as early as 1804, in *Head v. Ins. Co.*, the eminent Chief Justice Marshall writing the opinion of the court (2 Cranch, 127), and again in the case of *Bank v. Earle* (13 Pet. 519), and in *Perrine v. Ry. Co.*, in which case the court held that a canal company did not have the same unlimited control over the works of the company as a private individual would have over his property under the salient principles of the common law, but holds the property only for the purposes for which it was created. (9 How. 172.)

In Maryland the rule is given in this manner: "We think it may be considered as well settled that a corporation of this kind cannot voluntarily alien its franchises or its property so as to disable itself from performing its duties and obligations to the public, without the authority of the legislature." (*State v. Coal Co.*, 46 Md. 1.)

The franchise or the property necessary to utilize it cannot be sold under judicial process at the instance of creditors, without express legislative authority. Could this be done, without such permission, the corporation would consequently put itself in a position where it could not discharge its public duties imposed upon it by reasons of its

very existence. Stated in its most comprehensive terms the principle is this: That a corporation having, by reason of the object for which it was organized, assumed the performance of public duties, cannot so incapacitate itself by any act or contract with another person or corporation from performing such public functions so undertaken by it, and hence cannot, by any agreement to which the public is not a party, make public accommodation and convenience subordinate to its own private concerns, without the consent of the state or other authority granting such franchise, to such contract, assignment or transfer. Nor may this be done indirectly by the enforcement of judicial process against it, at the instance of a creditor seeking to enforce his claims. Public policy forbids the grantees of such franchises from relieving themselves from such imposed duties by transferring the burdens upon other shoulders, as a violation of the contract and a breach of good faith with the State. Hence, should any such corporation sell its franchises and properties by either lease or mortgage, or by sale, to some other company, thus, in effect, substituting such other corporation in its stead, and by virtue of the substitution devolve upon it the performance of the public duties resting upon itself, in the absence of statutory enactment permitting it, and should such new corporation commit any tort against third persons, the first corporation would be liable for the tort, because it could not substitute the other corporation in its place and cast its duties and obligations toward the public upon the latter. (*Chollett v. Ry. Co.*, 41 N. W. Rep. 1106; *Naglee v. Ry. Co.*, 83 Va. 707; *Anderson v. Ry. Co.*, 9 Am. St. Rep. 263; *Ry. Co. v. Kuehn*, 70 Tex. 582; *Thomas v. Ry. Co.*, 101 U. S. 71; *Canal Co. v. Bonham*, 42 Am. Dec. 315; *Ammant v. Turnpike Co.*, 15 Id. 593; *Gibbs v. Gas Co.*, 130 U. S. 396; *Transportation Co. v. Pullman Car Co.*, 139 Id. 47.)

By express legislative authority to that effect, a railroad company may relieve itself from performing its original duties and obligations toward the public, by reason of a transfer of its franchises to some other company, but this consent sanctioning the transfer must, in express terms, provide for an exemption of such company from liability, relieving it from further duties. The legislative consent to the transfer alone is not sufficient, but there must be a release of the company from the obligations to the public in unequivocal terms. (*Chollette v. Ry. Co.*, 41 N. W. 1106; *Balsley v. Ry. Co.*, 119 Ill. 68; s. c., 8 N. W. R. 859; *Singleton v. Ry. Co.*, 70 Ga. 464; *Nelson v. Ry. Co.*, 26 Vt. 717; *Ry. Co. v. Mays*, 49 Ga. 355; *Ry. Co. v. Dunbar*, 20 Ill. 623.)

The main consideration for giving such a railroad, gas and electric light, street railway and canal companies, and the like, a corporate existence is the benefit derived from them by reason of the performance of public duties, and a corpora-



tion organized for public purposes cannot, by contract, lease or otherwise, relieve itself from, or in any manner make itself incapable of, performing these public functions, unless under the conditions above mentioned. (*Ry. Co. v. Morriss*, 4 S. W. R. 156.)

For the same reasons a company is prohibited from avoiding the performance of its duties or obligations imposed upon it by its charter or the general statutes of the State, or by virtue of its general nature, by voluntarily surrendering its road or property into the hands of its lessees, when it is not expressly authorized to do by the statute. (*Breslin v. Ry. Co.*, 13 N. E. R. 65; *Navigation Co. v. Ry. Co.*, 9 Sup. Ct. Rep. 409; *Freem v. Ry. Co.*, 10 N. W. Rep. 594; *Lakin v. Ry. Co.*, 11 Pac. Rep. 68; *Acker v. Ry. Co.*, 84 Va. 648; *Harmon v. Ry. Co.*, 5 S. E. R. 835; *Palmer v. Ry. Co.*, 16 Pac. Rep. 553; *Ry. Co. v. Eckford*, 71 Tex. 274.)

Chief Justice Fuller, in writing for the Supreme Court of the United States, in *Gibbs v. Gas Company*, forcibly says:

"It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation subservient to its private interest." (130 U. S. 410.)

Of similar import are many other well-considered cases in both state and federal courts. (*Iron Co. v. Extension Co.*, 129 U. S. 643; *Irwin v. Williar*, 110 Id. 499; *Thomas v. Ry. Co.*, *supra*; *Trust Co. v. Guthrie*, 35 Ohio St. 666; *Arnot v. Coal Co.*, 68 N. Y. 558; *Woodruff v. Berry*, 40 Ark. 261.)

Where a franchise has been granted to a gas company to lay its pipes in the public streets, it cannot sell, lease nor assign its corporate rights and privileges to lay such pipes to another company. (*Gas Co. v. Gas Co.*, 35 Am. St. Rep. 385; *Gas Co. v. Gas Co.*, 2 Id. 124.)

The reason of the rule thus laid down, and upon which these decisions rest, is that corporations of this kind are, as above stated, *quasi* public in their nature, having large and important powers, involving the promotion of public interests, and it is therefore considered to be wholly inconsistent with the very nature of the corporation and subversive of the purposes of its creation to concede to it the right to divest itself, when it is thought beneficial to its private interests, of all its property, and thereby avoid its obligations and duties to the public. The public being directly interested in the result produced by such companies, by way of increased facilities for travel, convenience, trade or commerce, and that it is against public policy to permit a disturbance of the use of franchises or property, by seizure of any such property, or by disposition on the part of the company. If any creditor has a claim against it, he must recover his debt by a sequestration of the

earnings of his debtor, allowing, in the meantime, the progress of the general business of the corporation to go on, so that the accommodation of the public will not be interfered with. What has been said regarding the assignment of its franchises also holds true as to the property and effects of such a corporation necessarily required by it in the exercise of its functions in carrying out the objects and purposes of its incorporation, and by a parity of reasoning it is self-evident that if it cannot assign, it cannot mortgage the franchises or property connected with it.

The doctrine has also been announced by an able writer on the law of railroads, thus:

"The company cannot, according to the current of the decisions, without special authority of statute, alienate its franchises or property acquired under the right of eminent domain or essential to the performance of its duty to the public, whether by sale, mortgage or lease." (*Pierce on Railroads*, 496.)

In Massachusetts it is held that a corporation created for the very purpose of building, owning and operating a railroad for the accommodation of the public is without authority, in the absence of distinct permission, to make any alienation, whether absolute or conditional, either of the general franchise to be a corporation or of the subordinate or secondary franchises to manage and carry on its corporate business, without which the primary franchise of being a corporation were nothing more than a mere nominal existence—an idle form—a myth. (*Richardson v. Sibley*, 11 Allen 65.)

And yet, though the right to assign a prerogative franchise is denied, there is authority to the effect that the right to construct and operate a railroad is not a prerogative franchise, and hence the restriction has no application. (*Ry. Co. v. Metcalfe*, 4 Met. [Ky.] 199.)

The contrariety is still more augmented and the conflict made still more irreconcilable by the rule in another form that a railroad company may sell or mortgage its personal property, but it cannot alienate or encumber by mortgage with the personal property the right to manage and control the road, nor any corporate right or franchise. (*Pierce v. Emery*, 32 N. H. 484; 2 *Redfield Ry. Cases*, 631.)

And that this restriction extends not only to its franchise and corporate rights, but also to its track and right of way necessarily used for the road. (*Ry. Co. v. Gilmore*, 37 N. H. 410.)

Though it has been held that the franchise to build and manage a railroad, and the privilege of taking tolls thereon, are not of necessity corporate rights, as they may be capable of existing in and being enjoyed by natural persons, and that there is nothing inconsistent with making assignability attributable to them. (*Bank v. Edgerton*, 30 Verm. 182; *Hall v. Sullivan*, 22 Law Rep. 138.)

A turnpike company is not invested with any interest or estate in the land over which the road

passes, it owns merely an easement which is not subject to alienation. (Kellogg v. Malin, 11 Am. Rep. 426; Ry. Co. v. Allen, 31 Id. 190; Ry. Co. v. Burkett, 42 Ala. 83; Dean v. Ry. Co., 22 N. H. 316; Heard v. Brooklyn, 60 N. Y. 242; U. S. v. Harriss, 1 Sumner, 21.)

But in North Carolina, Vermont and Minnesota the courts have maintained a doctrine in direct opposition to the foregoing rule, holding that a railroad company has an estate in the land over which it passes, and not merely an easement, and that such estate was subject to sale under judicial process against the company, and that the estate resulted not alone by virtue of the provisions of the charter, but from the necessity of the case. (State v. Rives, 5 Ired. L. 309; Ry. Co. v. Pattee, 42 Vt. 265; Robbins v. Ry. Co., 22 Minn. 286.)

From all that has been said, it will be seen that it may be said with confidence that, from the consensus of all cases, the only proposition upon which there is no conflict is that a *quasi* public corporation cannot assign or hypothecate its franchise to be a corporation without legislative permission. A careful analysis of the vast number of American cases upon the points under consideration will hardly suffice to establish any other conclusion than this.

The authority to grant the right or privilege to alienate, mortgage or lease its franchises or property resting in the State, as a matter of course, the State may authorize, by express legislative act, the sale even of the primary franchise. (State v. Ry. Co., 72 N. C. 634; Ry. Co. v. Parcher, 14 Minn. 297; State v. Sherman, 22 Ohio St. 428; Ry. Co. v. Ry. Co., 28 Iowa 437.)

And where authority was given by statute to a railroad company to alien, transfer and mortgage its income, road and other property of every kind, it was held that this was not sufficient to give it power to mortgage or assign its franchises, and only extended to its property as distinguished from the former (McAllister v. Plant, 54 Miss. 106; Phillips v. Windsor, 18 B. Mon. 431; Copeland v. Gas Light Co., 61 Barb. 60; Butler v. Rahm, 46 Md. 547), and where the ordinance granting the franchise does so by giving the same to the grantee and its "successors and assigns," it nevertheless is not a sufficient authority to permit the voluntary or involuntary sale of such franchises. The power of sale cannot be implied from the words, "successors and assigns," and express words must appear allowing it, or subsequent unqualified confirmation, if no consent was provided before the sale, and that these alone confer the right of enjoying the purchase. (O. R. & N. Co. v. Ry. Co., 130 U. S. 1; Thomas v. Ry. Co., 101 Id. 7.)

That a railroad company may dispose of by sale, or may mortgage its real and personal property, other than its franchises, is a question on which there is considerable conflict, some holding that both the real and personal property may be

sold by it (West v. Madison Co. Agr. Bd., 82 Ill. 205; Miller v. Ry. Co., 36 Vt. 452; Kelly v. Trustees, etc., 58 Ala. 489; Shaw v. Ry. Co., 16 Gray, 407), and in others that it may sell or mortgage its personal property (Clay v. Ry. Co., 6 Heisk. 421), while others hold that the personal property is subject to disposition if the same is not affixed to the real estate (Pierce v. Emery, *supra*), and still others promulgate the doctrine that a *quasi* public corporation cannot alienate its real estate which it acquired and holds for the exclusive use and purpose of the exercise of a franchise, where the franchise itself cannot be sold, but that it has the right to sell the property which is not required for its use, subsequent to the completion of the road. This doctrine seems to be most consonant to the dictates of reason. (Coopers v. Wolf, 15 Ohio St. 527.)

Notwithstanding the fact that the great current of judicial authority is otherwise, we find another jurisdiction where the doctrine promulgated is distinctively at variance with the general trend of the decisions. In this it is maintained that the rule forbidding the transfer of the powers and privileges conferred by a railroad franchise from the original corporators to some new or other body is untenable, and that the denial of such right to transfer is but little short of repudiation, and not supported by reasons sufficient to warrant the necessity of serious consideration. That the reason of the rule as founded upon public policy falls to the ground when it is considered how insignificant the consideration is which is attached to the personnel of the original corporators, who are liable to be displaced at any time by more than one cause, and new ones substituted in their stead, and that though at the beginning the concerns or affairs of the company are controlled by the corporators, yet ere long the board of directors will control such affairs. In passing upon this very interesting proposition the court said in *Shepley v. Ry. Company*:

"We confess that, after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void, because they may operate as a permanent transfer of the corporate powers from the original corporators to another body, seems to us to have little to commend it and much to condemn it." (55 Me. 395.) And in re-affirming the position taken in *Shepley v. Ry. Company*, the court expressed its satisfaction with the rule there laid down by stating that the reasons given in that case were "cogent and satisfactory," and based upon common sense and practical views. (Ry. Co. v. Ry. Co., 59 Me. 23; Hamlin v. Jerrard, 72 Id. 62.)

As a general proposition, as regards corporations purely private, it is beyond the peradventure of a doubt that the *jus disponendi* is as necessary an incident of ownership of property in a corporation as it is in an individual, except where this general power of disposition is limited by statute

or upon considerations of public policy. That in general a corporation may sell its goods and chattels, as well as its real estate, or any interest therein, as may best conserve its private interests or be expedient, or it may obligate itself in the legitimate prosecution of its business by note, bond or mortgage. (*Ditch Co. v. Zellerbach*, 37 Cal. 588; *Dater v. Bank*, 5 W. & S. 223; *People v. Ins. Co.*, 8 Am. Dec. 243; *Ins. Co. v. Ely*, 13 Id. 100; *State v. Bank*, 6 Gill. & J. 323; *Bank v. Hunter*, 4 B. Mon. 423.)

Finally, it may then be considered as settled by a practically unbroken current of decisions that the primary franchise is not subject to disposition by the company, whether directly or indirectly, for the very adequate reason that the title to the same is not vested in the corporation, but rests in the individual corporators; and that expediency and the force of reason alike dictate that the rule forbidding the alienation, leasing or mortgaging of the secondary franchises, such as that of constructing and of operating, for instance, of a railroad company, without previous explicit legislative consent therefor, is in harmony with the fundamental principles of our republican institutions and with common sense; and further, that it may be said with confidence that, according to the overwhelming weight of authority in this country, the franchise of a *quasi* public corporation designated as secondary, and the property necessarily required in utilizing the franchise, cannot be sold or seized under judicial process by creditors, for the reason that to do so would incapacitate the company from performing the public duties which it has assumed, and which constitute the principal consideration for the grant.

JOHN C. KLEBER.

OLYMPIA, Washington.

#### ALLEGED SHORTHAND SPEEDS.

To the Editor of the Albany Law Journal:

I have been interested in your account of shorthand speeds (*ALBANY LAW JOURNAL*, p. 196). I have heard of them before; likewise of typewriting speeds. When I was learning shorthand my instructor told me that Thomas Allan Reid, of London, could write 400 words a minute. Some years since the newspapers related that Isaac Pitman presented a watch to a stenographer for writing 300 words a minute. A few months since a girl of sixteen told me that she had only begun shorthand (not Pitman's) three months before, but could already write 150 words a minute. \*

On the other hand, I have, for nearly thirty years past, used Pitman's shorthand daily, as freely as any lawyer or literary man uses ordinarily writing. I have reported in the courts and in the lecture hall, and have been told that I wrote faster than some stenographers of repute. The reports I took were verbally exact. I had to use the lightest possible pen and to make it twinkle

from one side of the paper to the other; but the speed never much exceeded 100 words per minute; nor can I, notwithstanding a vast amount of practice, exceed that rate, or, at most, 120. This has puzzled me.

Some evenings ago I was conversing on this subject with a gentleman who had been a professional stenographer, and he assured me that it is impossible to speak or read (and reading is held to admit of higher speed than speaking) at a greater speed than 200. I am an *exceptionally* rapid reader, and believed my speed in reading aloud to have a maximum of 400; but on trial, with a watch, reading as fast as I could gabble, the speed was found to be 178.

The number of strokes required for each shorthand word ranges to four and averages two. A speed of 400 words a minute would average thirteen strokes each second. The speed advertised as attainable on the Hammond typewriting machine necessitates the accurate striking of twelve keys each second. But a man cannot tap the table with his finger twelve times each second.

Yours truly,

H. M.

#### Notes of Recent American Decisions.

**Accord and Satisfaction.**—The giving of notes by a husband, under an agreement that if paid at maturity they shall satisfy his wife's note, is a good accord and satisfaction, though they are not paid at maturity, where, after default, the payee accepts payment of some of the husband's notes, and sues on the others. (*Watson v. Tanner* [R. I], 36 Atl. Rep. 715.)

**Admiralty Practice — Release on Stipulation.**—After a vessel has been released on stipulation, she is freed forever of the lien, and the court therefore has no authority to require the claimant to give any additional security. (*Barney Dumping Boat Co. v. The Mutual*, U. S. D. C., D. [Conn.], 78 Fed. Rep. 144.)

**Carriers of Passengers — Rejection of Passenger.**—In *Zackery v. Mobile & O. R. Co.* (21 Smith's Rep. 246), decided by the Supreme Court of Mississippi, it was held that a carrier cannot reject a person as a passenger, otherwise qualified, on the sole ground that he is blind. It was admitted in this case that the appellant (*Zackery*) was not so infirm as to require extra care. While disclaiming any intention to prescribe what rules and regulations a railroad company may make as to passengers, the court declined to hold that, as a proposition of law, stripped of all attending circumstances, public carriers of passengers can reject a person otherwise qualified, upon the sole ground that he is blind.

**Continuing Contract.**—A life policy, delivered upon payment of the first year's premiums, is a

continuing contract for the life of the insured, subject to be forfeited for non-payment of premiums, and not merely a contract for a year, renewable by payment of subsequent premiums. (*McMaster v. New York Life Ins. Co.*, U. S. C. C., N. D. [Iowa], 78 Fed. Rep. 33.)

**Criminal Law—False Pretenses—Bogus Check on Bank.**—In *Brown v. State*, it is held by the Court of Criminal Appeals of Texas that false pretenses may consist of acts, without any verbal assertion; that the mere fact that a purchaser draws a check, in payment, on a bank in which he has neither money nor credit, is not a fraudulent representation that he has money or credit there, which alone constitutes the offense of swindling.

**Criminal Law—Larceny from the Person.**—It is not necessary, to constitute larceny from the person, that the property be either forcibly or secretly taken. (*Higgs v. State* [Ala.], 21 South. Rep. 353.)

**Federal Courts—Rights Created by State Statutes.**—Rights created or provided by the statutes of the States to be pursued in the State courts may be enforced and administered in the national courts either at law, in equity, or in admiralty, as the nature of the rights or remedies may require. (*Darragh v. H. Wetter Manufg. Co.* [U. S. C. C. of App., Eighth Circuit], 78 Fed. Rep. 7.)

**Fraudulent Conveyances—Notice.**—A sale is not a fraud of creditors where there is no secrecy about it, and the purchaser does not know that the sellers are insolvent, or are attempting to defraud, and has not such information as should put him on inquiry. (*Simmons v. Shelton* [Ala.], 21 South. Rep. 309.)

**Gift—Delivery.**—Decedent took out two policies of insurance on his life, payable to his legal representatives, to each of which he attached an assignment to a sister, made on a blank prepared by the insurance company for the purpose, which was furnished him by the agent, and witnessed by him. The assignments contained a printed notice that a certified copy might be sent the company to be filed, and noted on its books. There was evidence that insured told his sisters of the assignment, but no copies were sent to the company, and the policies, with the assignments attached, were retained by insured until his death. *Held*, that the assignments were void, as gifts *inter vivos*, there having been no act which was equivalent to a delivery, or which rendered the gifts irrevocable.

**Limitations—Carriers of Goods.**—The burden on a foreign corporation urging the statute of limitations to show the bar (Code Civ. Proc., § 458) is not sustained without proof that it has designated one on whom process against it may be served (St. 1871-72, p. 826), on its doing which

the right to avail itself of the statute is made to depend. (*Pierce v. Southern Pac. Co.* [Cal.], 47 Pac. Rep. 874.)

**Master and Servant—Contract of Employment.**—One who was employed for a year was told by his employer at the end of the year that, "so long as you stay here, and do what is right by the company, we will employ you, and pay you by the year." *Held*, that such hiring could be terminated at any time by either party. (*Booth v. National India-Rubber Co.* [R. I.], 36 Atl. Rep. 714.)

**Mortgage—Priority of Lien.**—Where a mortgage is given to secure an antecedent debt, it is not prior in lien to a judgment entered the same day on which the mortgage was filed, though the judgment entered was not filed until after the filing of the mortgage, but will prorate with the judgment. (*Goetzinger v. Rosenfeld* [Wash.], 47 Pac. Rep. 882.)

**Will—Joint Will—Probate.**—It is held by the Supreme Court of North Carolina, in *In re Davis Will*, that a writing purporting to be the joint will of two persons cannot be probated as such in the life of one of them; and that a writing jointly executed by a husband and wife, purporting to be their will, devising to a third person land, parts of which belong to each, can be proved as the separate will of the husband, on his death, while the wife is living.

**Wills—Power of Appointment.**—Testator, having given his property to his wife for life, with power of appointment to three children "or the survivors," with remainder to them "or the survivor or survivors of them" if she die intestate, and the children having agreed that the quoted words be considered as omitted from the will, and the wife having adopted this agreement in her will, the rights of the children and their heirs are to be determined as though such words were not in testator's will. (*Thorington v. Hall* [Ala.], 21 South. Rep. 335.)

### Notes of Recent English Cases.

**Mortgage—Tenants in Common—Power of Sale—Sale to One of Several Mortgagors.**—The appellant and D. were owners, as tenants in common, of a property which they mortgaged to T. By arrangement D. managed the property, collected the rents, paid the interest on the mortgage, and other outgoings, and accounted to the appellant. T., in a proper and *bonâ fide* exercise of the power of sale contained in the mortgage deed, sold the property to D. for a sum equal to the amount due for principal, interest and costs, without notice to the appellant. *Held*, that the transaction must be treated as a sale and not as a re-

demption, and that its validity could not be impeached. Judgment of the Court of Appeal (74 L. T. Rep. 599; [1896] 1 Ch. 762) affirmed by House of Lords.

**Trust—Precatory Trust—Words of Request—Construction.**—Where a gift of chattels is accompanied by words of request to the donee with regard to their future disposition, the words will be construed as having their ordinary signification, and as imposing no binding trust upon the donee, unless there should be some circumstances in the case showing that the words were used by the donor in a sense other than that which they usually bear. On the occasion of the marriage of the heir presumptive to a peerage, certain family jewels were given to his wife for her life, with the request that at her death they might be left as heirlooms. *Held*, that no precatory trust had been created. (*Viscount Hill v. Dowager Viscountess Hill*, Ct. of App., L. T. Rep., vol. lxxvi., 103.)

**Will—Gift for Life—Power for Tenant for Life to Dispose Amongst a Class—No Gift over in Default—Gift by Implication.**—By a marriage settlement real estate was settled on the wife for life, with remainder as she should by will appoint, in default of appointment as therein mentioned. The wife by her will gave the property to her husband for life, and gave to him "power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards other property which I have under my marriage settlement." The will did not contain any gift over of the property in default of the power being exercised. The husband died without having exercised the power, leaving several children. *Held*, that the power was a bare power, and did not impose any trust, and that there was no gift by implication to the children in default of appointment. Where there is a gift by will to A. for life, with a power to A. to appoint among a class, without more, and no gift over in default of appointment, the court is not bound to hold that there is a gift by implication to the class in default of the power being exercised. In order that a gift to the class may be implied, there must be an indication in the will of an intention that the class, or some of the class, shall take; an intention that the power shall be regarded in the nature of a trust, a power of selection only being given. (*Re Week's Settlement*, H. C. of J., Chan. Div., L. T. Rep. lxxvi., 112.)

#### PETIGRU, NOT "PETTIGRUE."

To the Editor of the Albany Law Journal:

The amusing anecdote of a South Carolina "lawyer named Pettigrue," in your last Saturday's issue, by misspelling his name, shows how ephemeral is the reputation of the most brilliant members of the bar. James Louis Petigru, who was born

in Abbeville district, S. C., in 1789, and died in Charleston in 1863, was one of the most distinguished lawyers in the south. He was attorney-general of South Carolina in 1822-30, was for a time United States district attorney, served in the State legislature, and near the close of his career was a commissioner for codifying the laws and statutes of the State. His virtues and his remarkable talent and ability as an advocate secured him the respect of the community in which he lived, and he held his prominence at the Charleston bar with scarcely a rival. During the nullification troubles of 1830-32 he vigorously opposed the doctrine of the State veto, and in 1860 he opposed almost singly the secession movement, though then too old to take an active part in political controversies. He was unshaken and fearless in the expression of his union sentiments to the hour of his death, and the memory of such a man, who lived in the hot-bed of secession, ought to be gratefully remembered.

T. C. C.

ALBANY, April 5th, 1897.

#### Humors of the Law.

The attorney for a large packing-house was consulting with the president of the concern regarding a lawsuit resulting over a certain shipment of sausage.

"We must win the case," insisted the attorney, "in order to establish a precedent. We surely must. It's a ground-hog case."

And then he wondered why the president of the company smiled.—*Chicago Post*.

The witty remarks of Judge Craig Biddle, of Philadelphia, if gathered together, would fill a good-sized volume, says the Philadelphia Record. Here is a good one gotten off by him recently while sitting in the Quarter Session Court: A German jurymen asked to be excused from serving on the jury. "Why?" asked the judge. "Well, your honor, I don't understand good English." "Oh, you will do," replied the judge. "You won't hear much good English here anyhow." Amid a general laugh the jurymen sat down.

When A. M. Jackson was judge of the thirteenth judicial district of Kansas he held, in a case pending before him in Greenwood county, that jackpot is a good English word, made so by usage, and therefore it should not be written within quotation marks. He also held that it is one word, not two.

The Spanish general was seated at a desk, a blue pencil behind his ear and a pair of scissors in his ready right hand.

"There is a newspaper man outside who desires to speak with you," said the subordinate officer.

"Ask him what he wants."

"He desires to inquire whether there are any proofs of the victory you have been winning."

"Proofs? Of course there are. Tell him I am just reading them."

### The Magazines.

A noteworthy feature of the North American Review for April is the opening article, entitled "How India Fights the Famine," from the pen of the Marquis of Dufferin and Ava. Dr. Henry Smith Williams ably discusses the question, "What Shall Be Done with Dependent Children?" and Mr. Andrew Lang contributes a charming essay on "The New in the Old." Under the caption of "What Will Bring Prosperity," Charles Stewart Smith and Francis B. Thurber present timely and practical papers dealing with the various aspects of this extremely vital subject. Admiral A. H. Markham, R. N., writes interestingly concerning "Antarctic Exploration," and the history of the present epidemic in Bombay serves as the theme for an elaborately prepared paper by United States Surgeon-General Walter Wyman, entitled "The Black Plague." Two very timely contributions are furnished upon "The Uprising of Greece," the Right Hon. Sir Charles W. Dilke, M. P., giving an English view of the affair, and Demetrius N. Botassi, Greek consul-general at New York, the Grecian. Captain José Guitierrez Sobral, naval attaché of the Spanish legation at Washington, gives "A Spanish View of the Nicaragua Canal," and "The Need of Copyright Reform" is forcibly advocated by W. Morris Colles, director of the Incorporated Society of Authors. An endeavor to forecast "The Foreign Policy of the New Administration" is deftly made by Mayo W. Hazeltine, and the Hon. Perry Belmont deals thoughtfully with the important topic of "Democracy and Socialism." Other subjects considered are: "Speculation in Damage Claims," by S. P. Crosby and Charles Nevitt: "'Chestnut' for Example," by Jane Marsh Parker, and "The Other Side of the Shield," by Christine Terhune Herrick.

An elaborate study of "The New Administration at Washington," by Albert Shaw, appears in the April Review of Reviews. Dr. Shaw draws an interesting comparison between the American and British administrative systems, pointing out the distinction between "ministry" and "cabinet" in both theory and practice. He also treats quite fully of Mr. McKinley's process of cabinet-building, its various difficulties and adjustments, and outlines the noteworthy characteristics of the president's official family as finally selected, both individually and in *ensemble*. The article further defines "the larger executive group at Washington"—the various assistant secretaryships, and

important bureau headships, and so far as possible the reader is informed as to the personnel and status of these important offices for the coming four years. Altogether, Dr. Shaw has made in this article an exceptionally useful contribution to current history. Two of the briefer articles discuss the question of direct employment of labor versus the contract system on municipal works. Sylvester Baxter cites Boston's experience with direct work in various municipal departments to show the superiority of that method over the contract method, while Mr. George E. Hooker, of Hall House, Chicago, exposes the inadequacy of the contract system as applied to street-cleaning in that city. President Thwing, of the Western Reserve University at Cleveland, writes on "How to Choose a College." Charles S. Bernheimer presents a rapid survey of the different agencies for "National Jewish Educational Work" in the United States. In the "Progress of the World" department the editor comments on the change of administration at Washington, on the tariff bill and other measures before the extra session of congress, and on President McKinley's diplomatic appointments. The Greco-Cretan situation is carefully reviewed, and other recent developments in foreign politics are treated with the thoroughness and impartiality to which the Review's readers have grown accustomed.

Harper's Magazine for April opens with a popular historical paper on "Washington and the French Craze of '93," by Prof. John Bach McMaster, who describes the enthusiasm for ostentatious republicanism aroused by the first successes of the French republic, and especially by "Citizen" Genet, the French ambassador. The illustrations, including the frontispiece in color, are in Howard Pyle's most forcible and virile manner. In "Paleontological Progress of the Century," the third of a series of profusely illustrated papers describing the history of modern science, Dr. Henry Smith Williams traces the development of our knowledge of fossils from the time when they were supposed to be the relics of Noah's flood until the final establishment by Darwin of the theory of evolution. George du Maurier's romance of reincarnation, "The Martian," continues to present, under a thin disguise, much of the author's own life and personality. "From Home to Throne in Belgium," by Clare de Graffenried, describes the domestic and political institutions of one of the most primitive, individual, and at the same time cosmopolitan of European nations. The third paper of the series on the Mexico of to-day, by Charles F. Lummis, entitled "The Awakening of a Nation," deals with Diaz, the soldier and the statesman, outlining a career which is the most adventuresome and romantic, and one of the most patriotic and heroic, of the nineteenth century. The sixth paper in the series on "White Man's

Africa," in preparation of which Poultney Bigelow spent many months of travel, describes the opening of the Cape Colony parliament, one of the most characteristic and impressive incidents of British colonial empire, and discusses the political and social questions which the Jameson raid has raised between the Dutch and English. "Wild Things in Winter" is a sympathetic study of bird life by J. H. Kennedy. "Our Trade with Brazil and the River Platte Republics," by Richard Mitchell, U. S. N., describes commercial conditions in South America favorable to the investment of capital from the United States. In the leading short story of the number, "The Wisdom of Fools," Margaret Deland raises the question of personal responsibility in the existing social order.

The growing taste in the United States for decorative painting, as shown in the costly decoration of many recent structures, public and private, gives special timeliness and interest to a paper by Mr. Will H. Low in McClure's Magazine for April. The paper is richly illustrated with reproductions of celebrated paintings by Paul Baudry, Puvis de Chavannes, and others. A series of hitherto unpublished letters written by Gen. Sherman to a young girl who applied to him anonymously for information regarding an army officer of whom she had once been the correspondent, is the most novel feature of this number of McClure's. A second instalment of "St. Ives," the new Stevenson novel, confirms the opinion started by the first, that in all the long and varied list of Stevenson's works is none more engaging than this, his last creation. Besides this, the April McClure's offers, of especially notable fiction, a Drumtochty story by Ian Maclaren; a story of the real western life of to-day, by Octave Thanet; a mysterious sea story, and another interesting chapter of Kipling's "Captains Courageous." Then, equaling the best of the fiction in strange, dramatic incident and spirited narrative, are three short, true railroad stories told by Cy Warman, himself once an engineer. A series of portraits of Alexander Hamilton and his wife, all from originals painted or drawn from life, accompany a very interesting paper on Hamilton, in both his public and private life, by the Hon. Henry Cabot Lodge.

A leading feature of Littell's Living Age for April 3, 1897, is the first instalment of Henry Seton Merriman's "In Kedar's Tents," an attractive story of adventure in Spain during the Carlist war. It is full of incident, and contains some clever sketches of character. Mr. Merriman's style is direct and forcible, and his humor delightful. "In Kedar's Tents" will continue through fifteen numbers. The remaining contents of this issue are fully as varied and interesting as usual.

In The Green Bag for April, under the title, "Why Thomas Bram Was Found Guilty," Charles

E. Grinnell, Esq., of the Boston bar, tells the story of the Herbert Fuller's voyage, the three murders, the trial, and the sentence of Bram, in the actual order of events. The author attended the whole trial because of its remarkable character, and heard every witness. He has sifted the testimony and restated it in this article as a plain, consecutive history of what happened on the Herbert Fuller before, during and after the murders, coming to the conclusion that the verdict was inevitable on the evidence.

Few more valuable reports have been issued by New York State than that of Prof. Charles H. Peck, State Botanist, for 1895, the receipt of a copy of which the LAW JOURNAL acknowledges. The feature which lends it such exceptional interest is a complete treatise on the mushrooms of the State, both edible and poisonous. In this work, which Prof. Peck has done with characteristic care and completeness, the learned author leaves an enduring monument, again demonstrating most forcibly the great practical value of the department over which he so ably presides. It is but stating a well-known fact, which this work again proves, to say that Prof. Peck is the highest living authority on mycology. The report is printed in handsome style, and is given additional value by reason of the copious illustrations, reproduced in colors, from the professor's own drawings, which cannot fail to greatly aid the public in distinguishing the edible from the poisonous, or worthless, varieties. In addition to this, Prof. Peck's work will be of invaluable assistance in disseminating a correct knowledge of the true food value of this too long neglected, and often very much abused, natural product of our fields and meadows.

### New Books and New Editions.

The Federal Courts, Their Organization, Jurisdiction and Procedure, by Charles H. Simonton, United States Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co., 1896.

This little work, being in substance the lectures delivered before the Richmond Law School, Richmond College, Virginia, by Judge Simonton, is a model, in its way, of concise statement and orderly arrangement. The author, who ranks as one of the ablest United States Circuit judges, has stated the law covering the practice in the Federal Courts in a forceful manner, and in addition has given a brief historical review. While intended primarily as a text-book for educational institutions where the study of law forms a part of the course, this work cannot fail to prove of great value to practicing lawyers who desire to acquaint themselves with the best manner of handling cases in the United States courts.

## The Albany Law Journal.

ALBANY, APRIL 17, 1897.

### Current Topics.

THE retroactive feature of the so-called Dingley tariff act with which the senate is now struggling has led to the expression of a variety of opinions as to the constitutionality of this feature of the proposed law. Many leading newspapers and not a few lawyers of repute have held that such a provision would be clearly contrary to the organic law, while others are equally confident that congress has the power to embody in the bill a retroactive, or, as they prefer to term it, a retrospective feature. It is not, of course, denied that the Constitution expressly inhibits the passing of *ex post facto* laws, but it does not appear to be settled either that this would be an *ex post facto* law, or that the provision of the Constitution referred to applies to civil acts. We publish, in this issue, a valuable contribution on the question, in which the author attempts to show that such a provision in the new law would be entirely within the power of congress to adopt. At the same time, it must be confessed, the subject is not without some difficulty. It will not, of course, be denied that there can be but one law at a time in operation. The nation has a law now on the statute book defining what the rates of duties shall be. Nobody claims that it has yet been repealed or superseded. Would not a retroactive clause be, in effect, an attempt to put two inconsistent laws in operation at the same time? A bill is not a law until it has been passed, and signed by the executive. Does it not follow that until the Dingley bill is approved by the executive the present tariff remains in force? This looks like sound logic, as well as reason and common sense. Moreover, if congress has the power to date a law back thirty or ninety days, could it not as legally do it for three years, or a longer time, if it saw fit? To compel citizens to conform their business to a law that does not exist,

and only possibly may be enacted, looks like a peculiarly dangerous operation. The secretary of the treasury, we observe, has already issued a notice to officials "prescribing suitable regulations" for the administration of the new law, but it is difficult to see by what authority this can be done. However, the suggestion has been made that there is no real intention to enforce the retroactive clause, through legal process, or to obtain a ruling of the Supreme Court upon it; but that the whole thing is intended only to act as a "cloud" upon the profits of importers. If this be true, it may accomplish its purpose.

The succession tax bill, which was drawn and is being energetically pushed by State Comptroller Roberts, seems altogether likely to be enacted into law in the State of New York; and upon this fact THE ALBANY LAW JOURNAL congratulates the people of the State. The fundamental idea of this tax is that large estates, in passing through probate, should be compelled to make considerable contributions to the State treasury; that, so long as a man is living and of sound mind he can do as he pleases with his property, provided he does not thereby injure other people, but with his death the ownership ceases, and it is only by sufferance that the property is permitted to pass into other hands. It is perfectly competent for the State to decree, by statute, the conditions under which the property of a decedent shall pass into the possession of those who are ordinarily considered his heirs, and this is what the act under consideration does. The State, as it were, reimburses itself for the services it performs in this relation, in transmitting title to the property from one person to another. The plan which the bill embodies is merely an adaptation of methods that have long been in use in England, Australia and other countries, with entirely satisfactory results. The principle of a graduated succession tax, such as this is, is recognized as entirely legitimate, and in those countries in which it has been tested in practice, the results have been all that



could be desired. Incidentally, the effect is to somewhat equalize social conditions; and, in connection with other tax-reform legislation, in which the Empire State appears to be setting a good example to the other commonwealths, it is within bounds to say that it will be quite possible to do away entirely with the tax on personal property, which experience has abundantly demonstrated, never can be enforced.

The London Law Journal, of recent date, refers to a case before Mr. Justice Williams, which illustrated a somewhat singular case of hardship where no one was to blame. The victim of the law or of circumstances was a trustee under a deed of arrangement, and the board of trade was proceeding against him for not rendering an account of his stewardship. The "estate" had realized £3 5s. The disbursements were £3 10s. The board called for an account; the trustee rendered it, but he neglected to stamp the account, as required by the rules, with a 5s. stamp, and the board refused to receive it unstamped. "We have no power," said the board, "to dispense with the stamp. It belongs to the inland revenue. We are bound by the act to exact the 5s." "I have no assets," pleaded the trustee. "I don't like sending a man to prison," said the judge, "unless he is contumacious." Each plea was in its way unanswerable. In the end the trustee was ordered to pay, but the court intimated that it was not a case for incarceration.

The lawyers residing in the cities and towns included in the flooded districts along the Mississippi are, as might be supposed, suffering along with all other inhabitants. A very good insight into the condition of affairs is afforded by a letter which was received a day or two ago by Banks & Bros., the well-known law-book publishers, of this city, in answer to a business communication. The facetious style of the writer shows how the legal mind is able to rise superior to all obstacles, and exhibit a calm and dignified

resignation to the will of Providence, no matter how disastrous the results may be. The letter follows:

"I have yours of recent date, enclosing bills for \$27, for Circuit Court of Appeals Reports. I write to request you to stop my subscription to the reports, and also to say that I will remit you the \$27 as soon as business at this place revives. You will understand that the whole face of the delta is under water from two to six feet, and that Greenville is to-day an island with an area of about two square miles, that is part of the city. The other part is emulating Venice, and the inhabitants thereof are utilizing batteaux and other water craft in lieu of gondolas; the unwritten law of this place during periods of distress is that any inhabitant who presents a bill to another inhabitant calls for a fight (and in the present condition of affairs), or a boat race instead of a foot race, and I cannot exercise maritime jurisdiction in such a contest for want of a boat.

"I am, therefore, barred from calling on my clients for assistance at this period, this being my only source of revenue, all of my landed estate having departed after the last high water, which washed everything off the plantation save the deed of trust which I had judiciously placed thereon, and under which it was sold.

"I trust you will understand the situation and kindly hold up your bill until I can hold up some of my clients."

One of the surprising features of the recent municipal election in Chicago was the handsome vote polled by John M. Harlan, the independent Republican candidate for mayor. Early in the canvass his candidature was laughed at, but Mr. Harlan had the pleasure of seeing his vote pass that of the regular Republican candidate, and come nearest to that of the successful aspirant, Mr. Harrison. Mr. Harlan's popularity with the voters was largely due to the courageous fight he made, as alderman, against corruption and jobbery in municipal affairs. He is a son of Justice Harlan, of the United States Supreme Court.

THE ALBANY LAW JOURNAL has received from Messrs. Baker, Voorhis & Co., of New York, a copy of a printed circular, in which they make reply to the statements put forth by Mr. Charles F. Beach, Jr., recently, in reference to the publication of a certain law-book by the firm mentioned, and upon which this journal, in a recent issue, made a few good-natured remarks. Messrs. Baker, Voorhis & Co. rightly assume that we had no intention to do injustice to them. The substance of Mr. Beach's statements was given for what it was worth, without any endorsement of the same, or in any way attempting to justify his course of action. Our intention was merely to show the position which Mr. Beach had taken in reference to the publication of what he saw fit to term a spurious and bastard edition of his work. In their circular, Messrs. Baker, Voorhis & Co. make certain statements, which are calculated to exhibit Mr. Beach in an unfavorable light before the public. This journal does not propose to detail these charges, relating, as they do, to merely private business transactions between publishers and author, in which the public have little, if any, concern; but, in the interest of fairness, we are quite willing to add that nothing heretofore printed in these columns was intended to detract from the well-known reputation of this firm for honorable and fair dealing, as well with authors as with the public.

The question as to whether the consular representative of another country is entitled to exemption from arrest in this country for alleged embezzlement of funds held by him in his private capacity, as a trustee, appears to have been settled by the United States Supreme Court, which affirms the decision of the lower court, denying Mr. Iasigi's application for a writ of *habeas corpus*. The counsel for Mr. Iasigi pleaded that as Turkish consul-general here he was exempt from arrest under the provisions of the Constitution, but the plea does not appear to have met the views of the court, unless it shall turn out that the decision is based on the fact that Mr. Iasigi had been dismissed from his consular office since the pending court

proceedings. In that case, the constitutional question involved in the case is still undecided.

Of all the singular criminal trials of late years that of Mrs. Carew, who was recently convicted, at Yokohama, Japan, of the crime of poisoning her husband, is entitled to the distinction of being *facile princeps*. The most extraordinary feature was the arrest, during the trial, of Miss Jacob, the nursery governess, who was the principal witness for the prosecution, on the charge of being the author of the bogus "Annie Luke" letters, and inferentially, of course, of being the author of the capital crime. For this purpose the trial itself was suspended, and Mrs. Carew herself took the witness stand to testify against the girl whose evidence she had to meet. This remarkable hocus-pocus was, it seems, the result of a bold attempt on the part of the defense to "play a trump card," but it failed utterly of its purpose. There was not a scrap of evidence against the poor girl, and the public showed their estimate of the manœuvre by subscribing liberally for the defense of the accused governess; so that the attempt of the defense, if it had any result affecting the trial, only served to fix the crime with greater certainty upon Mrs. Carew. The charge naturally led to a closer examination of the Annie Luke letters, and these were shown, to the entire satisfaction of the jury, to be in the handwriting of Mrs. Carew herself. Miss Jacob was not only discharged without a stain on her character, but she received a substantial token of the sympathy of the community.

#### THE RETROACTIVE PROVISIONS OF THE NEW TARIFF ACT.

THE announcement that an attempt is being made to give the new tariff act a retrospective operation has naturally excited a good deal of consternation among importers, and incidentally has led to the airing of a considerable amount of law, good, bad, and indifferent, in the metropolitan newspapers. In the correspondence columns amateur constitutional jurists have come to the front with their usual alacrity. The quality of the arguments which are thought by some of these gentlemen to point to the conclusion that congress

would transcend its powers if it undertook to pass the bill in the form proposed, will be appreciated when we find one writer relying on the prohibition against *ex post facto* laws. Others not less positive that such a bill would be invalid, but imbued with a distrust of the Supreme Court of the United States, derive much discomfort from the supposed deterioration of that venerable tribunal, and its recently developed tendencies towards the upholding of laws which would formerly have been held invalid. Whether the Federal judges of our own days are really less inclined than their predecessors to check the vagaries of legislatures is, of course, a question fairly open to argument, but it is difficult to comprehend the mental attitude of a person who, like one of the correspondents referred to, considers that the decision in *Munn v. Illinois*, and the ruling which left the executive officers practically a free hand in dealing with alien immigrants, have a bearing upon a question involving the limits of the taxing power. Even the *Post*, usually much the best informed of the New York papers in respect to subjects requiring expert knowledge, has, in this instance, allowed its very reasonable indignation at the gross impolicy of the proposed law to obscure its scientific judgment, and, after starting with the dogmatic assertion that a retroactive provision could not stand, seems to be incapable of receding from this position further than to concede that, although such a provision may not, theoretically, be unconstitutional, it would be so hard to draw it in a form which would pass muster in the courts that importers will not be exposing themselves to much danger if they act on the assumption that, whatever the words of the bill, the new duties will ultimately be declared leviable only from the time it becomes law.

The practical importance of the discussion which has thus been raised is undeniably very great, and, although it is not likely that many lawyers could be found who, except as paid advocates, would be willing to place themselves on record as supporters of the view which finds so much favor among journalistic authorities, it will not be amiss to draw attention, even in the columns of legal periodicals, to the few simple and decisive principles which are absolutely controlling in a case like this. Any business man who feels inclined to lay the flattering unction to his soul that any attempt which congress may make to levy duties on articles imported before the new act is passed will be abortive, is recommended to read, ponder and inwardly digest the following sweeping statement in Judge Cooley's "Treatise on Taxation" (p. 5):

"Everything to which the legislative power extends may be the subject of taxation, whether it be person, or property, or possession, or franchise, or privilege, or occupation, or right. Nothing but express constitutional limitation upon leg-

islative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes. And not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may, therefore, be employed, again and again, upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. The judiciary can afford no redress against oppressive taxation so long as the legislature, in imposing it, shall keep within the limits of legislative authority, and violate no express provision of the Constitution."

This passage, which the learned author supports by an ample array of cases, shows that the validity of a tariff act cannot be successfully assailed in the courts, unless it is shown to be in conflict with some specific constitutional provision. The whole question, therefore, really lies in a nutshell. The only restrictions which the Federal Constitution has placed upon the power of congress to impose taxes are the rule of uniformity and the rule of apportionment, and it is presumed that no one would have the hardihood to argue that an ordinary tariff act infringes either of these rules. On the other hand, the only prohibition against retroactive legislation generally is that which incapacitates congress from passing *ex post facto* laws. Here, again, there is no ray of encouragement for the assailants of those provisions of the act which fix the amount of the duties, though, of course, any penal clauses which may be inserted will only take effect from the date of its passage. The law of the subject being so perfectly clear, it is apparent that the newspapers which are fostering the idea that the courts will not give effect to an unequivocal declaration of the intent of congress, that the act is to have a retrospective operation, are exposing themselves to a practical refutation of the most ignominious character. Any regret or satisfaction, however, which this thought may give rise to is reduced to a minimum by the further reflection that, as long as there is the least uncertainty as to the matter, importers will not, except as a mere speculation, take any action on the assumption that the duties will continue to be what they are under the present statute until the new bill has been finally passed.

The hope that a retroactive clause might possibly be declared void has been to some extent stimulated by the idea that the Supreme Court of the United States has made a ruling to that effect in regard to the Wilson act. For this idea the customs officials, if the newspapers are to be be-

lieved, are mainly responsible. Whether these officials included a lawyer is not stated, and it may be charitably assumed that the case is one in which the *simplicitas laicorum* is accountable for a very ridiculous and inexcusable error. The only decision by the Federal courts which has any bearing on the subject is *Burr v. United States*, which involved the question whether goods imported between August 1, 1894, the date at which the levy of the duties under the Wilson act was nominally to begin, and August 28, the date at which the act became law with the approval of the executive, were subject to the new or the old duties. Under such circumstances, it is evident that there was a direct invitation to counsel to argue the case from the standpoint of the constitutionality of the provision to be construed, for if the act could only take effect from August 28th, there was no room for further discussion. The intent of congress was, then, quite immaterial. No resort, however, was had to this ready method of solving the problem presented. The theory on which the case was really submitted appears from the following passage in the opinion delivered in the Court of Appeals (66 Fed. Rep. 642):

"No question exists, or is really made, but that this whole subject was within the law-making power, but that a law should not have any retroactive application unless that is plainly intended is more strenuously urged."

This conclusion of both court and bar that there was no constitutional question involved, was based more particularly upon a sentence in *Stockdale v. Insurance Co.* (20 Wall 323), where it was said, with regard to the tax under discussion, that "congress could have passed a law to reimpose it retrospectively; to revive the sections under consideration if they had expired; to re-enact the law by a simple reference to sections."

Viewing the question as one merely of intent, the court held that the literal words of the act were controlling, and that the importers were entitled to liquidate their entries at the lower rates. The Supreme Court (159 U. S. 78) treated the case from the same standpoint of intent, but arrived at a different conclusion. The main point made by Chief Justice Fuller was that the new act comprised a saving clause to the effect that "all rights and liabilities under said law shall continue, and may be enforced in the same manner as if said repeal or modification had not been made."

"If," it was argued, "congress intended that this section should relate back to August 1, still the intention is quite as apparent that the act of 1890 should remain in full force and effect until the passage of the new act, on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof as to all parties interested, the United States included."

Other considerations relied upon, as showing that the act was intended to be prospective merely, were that the old provision authorizing the collector to require a license from a custom-house broker was new, and it must, therefore, have been anticipated in using the words, "the first day of August," that the bill would become a law before that day. So, also, it was pointed out that the section imposing a penalty for violations of the law incurred by making or selling cards without affixing the stamps prescribed, could not constitutionally be given a retrospective effect according to the terms employed. Again, some duties under the new act were higher, some lower, and some abolished altogether, and it was considered a wholly inadmissible supposition that duties paid between August 1 and August 28 should be refunded where the rate was lowered, and assessed where the rate was raised, or imposed where none existed. In view of the fact that the real intent of congress was thus left in uncertainty, the court deemed itself justified in referring to the journals of congress for the purpose of ascertaining whether they threw any light upon the contradictions disclosed by the face of the act, and, after reviewing the history of the bill, summed up its opinion as follows:

"We think it cannot be doubted that congress intended the rates of duty prescribed by the act to be levied on the 1st day of August, if the bill should then be a law, and, if not, then as soon after that date as it should become a law."

From the foregoing summary it is apparent that this case, so far from being in favor of the view that a retroactive tariff is unconstitutional, must be taken as strongly supporting the rule that the only question which can be considered under such circumstances is the intent of the legislature. The principle of construction accepted by the Supreme Court of the United States was long ago declared by it in the following words:

"Words in a statute ought not to have a retrospective application, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." (*United States v. Heth*, 3 Cranch, 398, 413; compare *Price v. Mott* [1866], 52 Pa. St. 315.)

The conclusion of the whole matter, therefore, is that if it is desired to make the new law retroactive, all that is necessary is that congress shall state its intent to that effect in unambiguous terms; and, whatever may be the shortcomings of that body in regard to statutory draughting, it would be altogether extravagant to suppose that it is incapable of expressing its meaning in a matter so simple as the date on which the provisions of a bill are to come into operation.

C. B. LABATT.

NEW YORK, April 8, 1897.

**MR. ELLSWORTH'S ANTI-CARTOON BILL.**

IT seems absurd, more than 200 years after the English parliament completed the emancipation of the press by its refusal to renew the licensing act, to engage in a serious discussion of the right of the State, and the individual, to a free press, but the fact that the leader of the senate of this State has introduced a measure looking to the abridgment of the liberty of the press, and that this measure is being seriously considered by a committee of that body, seems to justify a discussion of the question, to the end that the judgment of the people may be formed upon the capacity of the statesmanship which is being developed out of the era of selfishness which is to-day at its zenith in the politics of this State. It is not the purpose of this article to defend the gross and vulgar abuses of the privileges guaranteed by the Constitution to the press which have been developed in recent years in the "new journalism," but to consider whether there is any warrant in the Constitution for preventive legislation; whether it is in the power of the State to deny to the individual the right of a trial by jury, both as to the law and the fact. The measure introduced by Mr. Ellsworth proposes to make the fact of publication a crime, where that publication consists of pictures of individuals, regardless of the question of whether such publication is complimentary or vicious, thus taking from the jury the power to pass upon the material fact of the justification for such publication, and this is so clearly a violation of every principle of American constitutions that it does not seem possible that rational-minded men could consent to listen patiently, and in seriousness, to its consideration.

The Constitution of this State, which, in respect to the liberty of the press, has undergone no changes during the many revisions, is so broad and comprehensive in its scope that its mere statement ought to be enough to convince any intelligent man that the bill proposed by Mr. Ellsworth cannot stand the test of the courts. It declares that "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

It will be observed that the language of this provision is very broad; every citizen is authorized freely to "speak, write and publish," not merely the facts, but "his sentiments on all subjects,"

the only restriction being that he must be "responsible for the abuse of that right." Commenting upon this clause, the court, in the case of *Republica v. Dennie* (4 Yates, 267), says: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty." What is the meaning of the words, "being responsible for the abuse of that liberty," if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection, that the determination of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them when party spirit runs high in other criminal prosecutions. But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method prescribed.

Mr. Justice Story, in his "History of the Constitution" (vol. ii., 610), speaking of the first amendment of the Federal Constitution, in spirit the same as that of the State of New York, says: "It is plain, then, that this amendment imports no more than that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property or reputation; and so always that he does not disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel." Judge Cooley, in his great work on "Constitutional Limitations" (321, fifth edition), says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in other words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, as long as it is not hurtful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established, and in reference to which they have been accepted."

Again Judge Cooley says: "The constitutional freedom of speech and of the press must mean a

freedom as broad as existed when the Constitution which guarantees it was adopted. \* \* \* The constitutional provisions do not prevent the modification of the common-law rules of liability for libels and slanders, but they would not permit bringing new cases within those rules when they do not rest upon the same or similar reasons."

Blackstone (iv., 152) says: "In this and the other instances, which we have recently considered where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the laws of England, some with greater, others with less, degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is, indeed, essential to the nature of a free State; but this consists in laying no previous restraints upon publications, and not in the freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in government, religion and learning. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."

Delolme, in his quaint "History of the English Constitution" (202-203), tells us "they do not allow, as in other States, that a man should be deemed guilty of a crime for merely publishing something in print; and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case. It is even this latter circumstance which more particularly constitutes the freedom of the press." This work was published at Amsterdam in 1771, before the adoption of any of our State constitutions, and plainly shows the condition of the rules of the common law at the time of the framing of the provision which Mr. Ellsworth now seeks to violate.

The first continental congress, which met in 1774, three years after the publication of Delolme's work, quoted above, declared that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the

vicinage, according to the course of that law," and in 1789 Thomas Erskine argued the case of Stockdale before the English parliament, securing from that body a reversal of the judgment of the English courts, and establishing the right of juries to pass upon the criminality of the matter charged as libelous, as well as the fact of publication. This was followed by the introduction of the libel act by Mr. Fox in 1791, which was finally enacted in 1792, which declared the action of the parliament in the case of Stockdale to be, and always to have been, the law of England. This same doctrine had prevailed in the colony of New York for many years before the action of parliament in declaring the common law of England. In 1733 Lewis Morris, who had been removed from the chief justiceship by Governor Crosby, began a series of drastic articles in Zenger's New York Weekly Journal, reflecting upon the administration of the affairs of the colony. Zenger was indicted for criminal libel, and was defended by Andrew Hamilton, the story of the trial being told in the "Narrative and Critical History of America" (v., 199-200), as follows: "Zenger's trial began on the 4th day of August, and resulted in a verdict of 'not guilty.' The publishing of the alleged libel had been admitted, but it was claimed to be neither false, nor scandalous, nor malicious. When the New York lawyers who had been engaged in the defense were disbarred, Andrew Hamilton, a prominent leader from Philadelphia, took the case. He managed it so adroitly, met the brow-beating of De Lancey so courageously, and pleaded the case of his client so eloquently that he at once achieved a more conspicuous fame than belonged to any other practitioner at the bar of that day. The corporation of New York fell in with the popular applause in conferring upon him the freedom of the city, enclosing their seal in a box of gold, with the added assurances of the 'great esteem that the corporation had for his person and merits.' The result of Zenger's trial established the freedom of the press in the colonies, for it settled here the rights of juries to find a general verdict in libel cases, as was done in England by a law of parliament passed many years later, and it took out of the hands of the judges appointed to serve during the king's pleasure, and not during good behavior, as in England, the power to do mischief."

"The liberty of the press," says Blackstone, "consists in laying no previous restraints upon publications." Macaulay, in his "History of England" (iii., 398), tells us that in the midst of the angry debates in parliament over the Irish war, in the time of William III., Walker, the defender of Londonderry, had "arrived in London, and had been received there with boundless enthusiasm. His face was in every print-shop. Newsletters describing his person and his de-

meanor were sent to every corner of the kingdom. Broad-sides of prose and verse, written in his praise, were cried in every street," showing that at that early date the practice of representing public characters in the current publications was in vogue, and that custom is as much within the protection of the Constitution as is written language, and it comes under the same rules of law as to libel. Indeed, before the art of printing was invented, the ideas and sentiments of men were conveyed in rude pictures, and they have, in all ages, been used in carrying intelligence and in preserving the history of events.

The common law of England, and of the colony of New York, at the time of the adoption of the Constitution, imposed no "previous restraints upon publications;" it appointed no punishment, "only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals," and the Constitution itself, at section 16 of article 1, declares that "such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the 20th day of April, 1777, which have not since expired, or been repealed or altered; and such acts of the legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the legislature shall make concerning the same." "The constitutional provisions do not prevent the modification of the common-law rules of liability for libels and slanders," says Judge Cooley, "but they would not permit bringing new cases within those rules when they do not rest upon the same or similar reasons." This precludes, therefore, the possibility of Mr. Ellsworth's measure becoming a valid law. The common law of England, and of the colony of New York, in so far as the liberty of the press is concerned, is the constitutional law of the State of New York, and it cannot be abridged by any action of the legislature.

BEN. S. DEAN.

JAMESTOWN, N. Y., April 3, 1897.

#### THE PETTIFOGGER AND THE SHYSTER

THE late E. G. Ryan, Chief Justice of the Supreme Court of Wisconsin, was a man of irascible temper, but possessed of much learning, great juridical ability, phenomenal independence of character and terrible vigor of expression, as the following description of two vermin of the legal profession will show. It is from a discourse to a law class of some years back in the University of Wisconsin:

"Behold the pettifogger, the blackleg of the law! He is, as his name imports, a stirrer up of

small litigation; a wet-nurse of trifling grievances and quarrels. He sometimes emerges from professional obscurity, and is charged with business which is disreputable only through his tortuous devices. For the vermin cannot forego his instincts, even among his betters. He is generally found, however, and he always begins in the lowest professional grade. Indeed, he is the troglodyte of the law. He has great cunning. He mistakes it for intelligence. He is a fellow of infinite pretense. He pushes himself everywhere, and is self-important wherever he goes. You will often find him in legislative bodies, in political conventions, in boards of supervisors, in common councils. He is sometimes there for specific villainy; sometimes on general principles of corruption, waiting on Providence for any fraudulent job. He is always there for evil. The temper of his mind, the habits of his life, make him essentially mischievous. In all places, he is virtually dishonest. What he cannot cheat for gain he cheats for love. He haunts low places, and herds with the ignorant. It is his kindly office to set them by the ears, and to feed his vanity and his pocket from the quarrels he incites or foment. He is in everybody's way, and pries into everybody's business. He meddles in all things, and is indefatigable in mischief. He is just lawyer enough to be mischievous. He is a living example of Pope's truth, that a little learning is a dangerous thing. Among his ignorant companions he is infallible in all things. Sometimes he is reserved and sly, with knowing looks which gain credit for wisdom and character, for thinking all that he does not utter. Generally he is loquacious, demonstrative of his small eloquence. Then his mouth is too loose for truth. By his own account, he is full of law and overflowing. Among his credulous dupes he cannot keep it down. He knows all things. Nothing is new to him. Nothing surprises him. Nothing puzzles him. But it is in the law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law, among his followers. He prates law mercilessly to every one, except to lawyers. He discourses of his practice and his success to the janitor of his office, and the charwoman who washes his windows. He revels in demonstrative absurdity, and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance. He is the oracle of dullness. He hangs much around the justices' courts. There he is the leader of the bar. But he finds his way into the courts of record. In them he is a plague to the bar and an offense to the bench. He is flippant, plausible, captious, insolent. He is full of sharp practice, chicane, surprise and trick. He is the privateer of the court, plundering on all hands, on private account. He is ready to sell his client or himself. He is equal to all things, above nothing, and below nothing. He is ready to be the coroner of the county, or the chief justice of

the United States. He would be a bore, if it were not too dangerous for that harmless function. He is a nuisance to the bar and an evil to society. He is a fraud upon the profession and the public; a lawyer among clowns and a clown among lawyers.

"There is a variety of the animal, known by the classic name of *shyster*. He has forced the word into at least one dictionary, and I may use it without offence. This is still a lower specimen; the *pettifogger* *pettifogged* upon; a *troglodyte* who penetrates depths of still deeper darkness. He has all the common vices of the family, and some special vices of his own. This creature frequents criminal courts, and there delights in criminal practice. He is the familiar of bailiffs and jailers; and has a sort of undefined partnership with them, in thieves and ruffians and prostitutes. These he defends or betrays, according to the exigencies of his relations with their captors or prosecutors. He has confidential relations with those who dwell in the debatable land between industry and crime. He is a friend of pimps and fences. He has intimacies among the most vicious men and women. He is the standing counsel of gambling dens and houses of ill-fame. He knows all about the criminals in custody, and has extensive acquaintances among those at large. He is conversant with their habits of life, and calls them familiarly by their Christian names. He prowls around the purlieus of jails and penitentiaries, seeking clients, inventing offenses, organizing perjury, tampering with turnkeys, and tolling prisoners. He levies blackmail on all hands. His effrontery is beyond all shame. He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man; in the virtue of no women. He loves vice better than virtue. He enjoys darkness rather than light. His habits of life lead him to the back lanes and dark alleys of the world. He is the counsel of guilt, the attorney-general of crime."

#### THE MANUSCRIPT OF THE "MAYFLOWER."

THE log of the "Mayflower" is to be given to the people of the United States, and to be deposited in Pilgrim Hall, at Plymouth, Mass., or in some other safe place to be designated by the president. Everybody knows about the "Mayflower," but comparatively few Americans ever heard of the log. In truth the manuscript that is coming is not a log, though it has received that nickname. It is an account of the voyage of the "Mayflower," and a history of the Plymouth colony from 1602 to 1646, written by Governor William Bradford, and handed down in his family through at least four generations. Massachusetts was originally a part of the diocese of London, and this manuscript, with others, found its way to the library of the see of London, where it was discov-

ered in 1846. It contains a registry of births, marriages, and deaths of Pilgrims, and records about their property. At the desire of the government of Massachusetts, the American Antiquarian Society, the Massachusetts Historical Society, the Pilgrim Society of Plymouth, and the New England Society of New York, the president, through the American ambassador, asked that it be given to the United States. The Archbishop of Canterbury and the Bishop of London backed the ambassador's request, and on March 25 a Consistory Court of the diocese of London determined to gratify the president's wish, and to hand over the log to Mr. Bayard whenever he was ready to receive it. The only conditions of the transfer are that a photographic, certified copy of the book shall be left with the present custodians of it, and that the original shall be put in a safe place where persons concerned can have access to it.—Harper's Weekly.

#### ABANDONMENT OF EASEMENTS.

THERE is no time fixed by law for the non-user of an easement to amount to an abandonment. It has been sometimes thought, on the analogy of the Prescription act, that twenty years' non-user must be shown; but the Prescription act deals solely with the proof of the existence of an easement, and does not touch the ceaser of it by abandonment or otherwise. The true question to be answered in such a case is, What was the intention of the owner of the easement? Did he intend to abandon it or not? As Lord Chief Justice Denman said in *Reg. v. Chorley* (12 Q. B. 515), in 1848, "the period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances." The defendant in this case had been indicted for driving a carriage through a narrow lane which was a public footway. He set up as a defense a private right of carriageway, preceding the public user, and inconsistent with it. The question was, whether this right had been released or abandoned, and the jury was directed that no interruption by the public for a less period than twenty years could destroy the private right. After verdict for the defendant, the case was taken to the Court of Queen's Bench, and a new trial was granted on the ground of misdirection. This was followed in 1867 by *Crossley v. Lightowler* (16 L. T. Rep. 438; 3 Eq. 279; 2 Ch. 478), where the same principle was applied. Dye works on the bank of a stream had not been used for more than twenty years, and had been allowed to fall into ruins, and this was held evidence of an abandonment of a right to foul the stream with the



refuse from them. Lord Chelmsford, L. C., said: "The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. \* \* \* Reg. v. Chorley shows that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of a right."

Another question which has come before the courts for decision is, whether the destruction or alteration of the dominant tenement involves an abandonment of the easement, or whether, in the case of destruction, the easement attaches to a building erected in the place of the one destroyed. This is the well-known case of *Scott v. Pape* (53 L. T. Rep. 598; 54 L. T. Rep. 399; 31 Ch. Div. 554), in 1886, in which Mr. Justice North was affirmed by the Court of Appeal. The plaintiff had acquired a right to light in respect of a certain building. He pulled it down, and erected a new one in its place. The windows were larger than those in the former building, but corresponded with them to a material extent. It was held that the easement was not abandoned, and the defendant was restrained from obstructing the access of light to the new windows, so far as they corresponded with the windows in the old building. And, in the same year, Vice-Chancellor Bacon held, in *Greenwood v. Hornsey* (55 L. T. Rep. 135; 33 Ch. Div. 471), that the mere alteration of a building containing ancient lights did not of itself imply an abandonment of the right to the access of light to any substituted building, but the intention to abandon must be clearly established by evidence. And what evidence is sufficient for this purpose was considered by the judicial committee of the Privy Council in *James v. Stevenson* (68 L. T. Rep. 539; [1893] A. C. 162). This was an action to assert a right of way granted by A. to B. by deed in 1839, the appellant — whose predecessor A. was — pleading that it had been abandoned. Non-user of the right was proved over certain portions of the way, also user by the appellant and his predecessors for farming purposes of the land over which the way existed. But it was held that neither of these circumstances was conclusive to prove an abandonment of even a portion of the right. As Sir Edward Fry remarked, "It is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it." — *Law Times* (London).

#### LABOR COMBINATIONS AND THE LAW.

IN the minority opinion of the Supreme Court in the *Trans-Missouri Freight Association* case, its author, Justice White, says that the remedy intended to be accomplished by the Anti-Trust act was to shield against the danger of contracts or combinations by the few against the interests of

the many and to the detriment of freedom. He regards the construction now given to the act by the majority of the court as striking down the interest of the many to the advantage and benefit of the few. What he calls the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workmen seek peaceably to better their condition. However this may be, there never has been any doubt that the Sherman act applied to combinations of labor, and it has, indeed, been the gravest subject of complaint against the act that the labor unions appeared to be the only kind of combinations that it was able to reach. This branch of the subject was pretty fully examined in the argument on the Debs case in December, 1894. It was then pointed out that the discussion accompanying the passage of the bill through congress indicated that neither house had any thought of legislating against combinations of workmen, formed for whatever purpose. But it was also shown that this method of interpreting a legislative act is not followed implicitly by the courts, and, in point of fact, only one judge of the lower federal courts has ever intimated his dissent from the idea that the Anti-Trust law affected labor combinations.

When a suit was brought five years ago, under the provisions of the act, for an injunction restraining certain draymen on strike in New Orleans for interfering with interstate commerce, District Judge Billings, in granting the injunction, said: "The question simply is, Do these facts establish a case within the statute? It seems to me this question is tantamount to the question, Could there be a case under the statute?" This order was affirmed by the United States Circuit Court of Appeals for the fifth circuit, and another judge of the same circuit held that a rule of the Brotherhood of Locomotive Engineers, requiring its members to strike under certain circumstances, was a violation of the act. Circuit Judge Putnam has dissented from this view, but it has been concurred in by all the other circuit judges who have had occasion to deal with the question. Circuit Judge Woods, in granting the order of injunction against Eugene V. Debs and other officers of the American Railway Union, pointed out that the legal character of this conspiracy and the responsibility of its participants was exactly the same as though it had been formed by other palace car companies for the purpose of gaining control of the sleeping car business of the United States by excluding the Pullman cars. Labor, in short, as well as capital, is prevented under the Sherman act from combining for the restraint or hindrance of interstate commerce.

It is easy, however, to overrate the importance of the bearing of these decisions, now virtually approved by a majority of the Supreme Court, on

the conduct of trades unions. The court has already held that it has no power to interfere with a monopoly in manufacture, and that it is only when the instrumentalities of interstate commerce are affected that the act of congress comes into play. But if the whole question of manufacturing combinations be relegated to the police power of the States, the labor combinations whose sphere of action is similarly circumscribed must be held to be a matter of State supervision also. In the New Orleans case there was a distinct interference with interstate and international commerce, as there was in the Debs case, growing out of the Chicago strike. But, except where such interference or obstruction is proved, it is difficult to say what terrors the Sherman act can have for combinations of workmen formed for perfectly legitimate purposes. We suspect that the necessities of argument have carried Justice White somewhat too far in this connection, and that the construction placed upon the statute by the majority of the court does not "read the rule of reason" out of it so completely as he seems to believe. — Boston Herald.

#### A MILLION HINGES ON A WORD.

ACCORDING to a San Francisco dispatch, the ownership of \$1,000,000 worth of property in the State of California depends upon the legal construction of the word "brought." The act of Congress approved March 3, 1891, provides that no suit shall be "brought" by the United States to vacate or annul any patent to public lands issued before the date mentioned within five years from the passage of the act. This period of limitation expired March 3, 1896. Consequently, it appears that all patents to public lands issued before March 3, 1891, became absolute and irrevocable March 3, 1896, unless previously attacked by suit brought as the law requires. The case in which the point has been raised is that of the United States against the American Lumber Company, of Chicago, and the Central Trust Company, of New York. The government seeks to have canceled, upon the ground of fraud and conspiracy, more than one hundred and sixty different patents to railroad timber lands in California, situated in Humboldt and Mendocino counties. The American Lumber Company holds the patents to these lands, which embrace 27,000 acres, and their value has been estimated at in the neighborhood of \$1,000,000. The Central Trust Company issued mortgage bonds on the security of the lands to the amount of \$300,000. The bill of complaint was filed in the Circuit Court, in San Francisco, February 3, 1896. That was just a month before the statutory period of limitation expired after which the government could not institute suit.

The question to be decided is, Was the suit brought when the bill was filed? The matter was

argued before Judge Morrow and submitted upon briefs. It is said to be the first case involving the question of when a suit is "brought" in connection with United States land patents and the limitation of five years thereon. The decision will thus afford an important precedent for both courts and lawyers.

#### CONTEMPT OF COURT ABROAD.

WE are familiar with the extremes to which the doctrine of contempt of court has been carried in this country, but not so much so with the absurdities to which it has been carried in England and Germany, says the Springfield Republican. An English judge named Philbrick has developed a curious theory of "perturbation," which in practice means that any one outside his court who "perturbs" his honor may be summoned before him and punished for contempt. Not long ago this eminent jurist heard the sound of hammering, and it "perturbed" him seriously. He set the machinery of the law in motion, and forthwith there was brought before him a frightened chemist, or druggist, whose shopboy, across the street, had been hammering in a nail. It was a most serious offense, so it was, and his honor sentenced the chemist to forty-eight hours in jail. Although the judge afterward relented and released the man, he in no wise surrendered his principle or theory of contempt of court. Under this theory, of course, any street vendor who cries his wares, or Italian organ-grinder, or German street band, or church sexton who rings a bell, or truckman who does not drive a cart with rubber tires, may be punished for contempt of Judge Philbrick's court. A case from Germany is reported by the correspondent of a London paper which is extreme, yet which does not go to the preposterous length of the English case. This happened in a Berlin law court:

A stranger of the "young-man-from-the-country" type, seated in the gallery during the progress of a trial, was so carried away by the eloquence of counsel for the defense that at its conclusion he shouted "Bravo!" He was instantly seized by the officials and put into the area of the court. Up rose the public prosecutor and said: "This man has been endeavoring to interfere with the course of justice. I propose that he be sentenced to not less than six" ("Himmel!" ejaculated the culprit), "not less than six hours' imprisonment." The judge nodded a smiling assent, and before the bewildered provincial could say "Kreuz-sapperment-himmel-donnerwetter" he was behind lock and key.

It may be that the doctrine of contempt has been developed to an equal length in this country, but we much doubt that any American judge would sentence a man to forty-eight hours in jail because his own employe hammered in a nail in his own shop.

### SOME FOOL BILLS.

WHEN somebody introduced into the legislature the other day a bill to make the ten commandments a part of the statutes, there was a good deal of laughing at this State all over the country, but in the language of the street, "There are others." This seems to be a year for legislators to introduce fool bills. A Massachusetts solon asks for a salaried State board to examine blacksmiths; North Dakota proposes to license barbers; an Indiana man has a project to tax whiskers; Massachusetts also wants all chiropodists to pass a State examination; Michigan and Missouri propose to tax bachelors, and a Missouri legislator has also introduced a bill to punish by a heavy fine any widow or unmarried woman who refuses an honorable offer of marriage. Minnesota comes forward with a bill to prevent women from sending flowers to criminals. Missouri wants to fine railway hands \$25 for flirting with women passengers, and Nebraska asks that all bulls' horns shall be removed when the animal becomes two years old. Michigan and Indiana demand that bills of fare shall be printed in English only, and a measure was recently introduced in the Indiana legislature making it a misdemeanor to wear squeaking boots to church. Oklahoma has tried legislation against bloomers, and Alabama against shirt waists. This country may, or may not, be "the home of the brave," but it certainly is fast becoming the land of the freak.—Abilene (Kan.) Reflector.

### CURIOSITIES OF WILLS.

OFTEN the eccentricities of a man do not appear until he comes to make his last will and testament. A collection of the rare and curious wills which have been probated in English and American courts would be amusing and perhaps edifying. The story is told of a famous Indian chief, a redoubtable warrior in his day, who yielded sufficiently to the influences of civilization to make a will. Among other things it provided that at his death his skin should be made into drumheads, so that, even when dead, he might strike terror into the hearts of his enemies. John Rudge, of Trysull, in Staffordshire, left a will, dated April 17, 1725, bequeathing to a friend the sum of five shillings per Sunday to go about the parish church during sermon, wakening the sleepers and keeping the dogs out of church. A vindictive London merchant, in the same generation, left a goodly legacy to a distant relative on condition that he should ring a bell at half-hour intervals during the night, in front of the house of an enemy and rival. Edward Worthy Montagu, of Yorkshire, England, once Ambassador to Turkey, left a will in which he took occasion to vent his posthumous wit and spite on his relatives and associates. After some

bequest to "my noble and worthy relation, the Earl of ———," he adds: "I do not give his lordship any further part of my property, because the best part he has contrived to take already." "To Sir Francis ——— I give one word of mine, because he has never had the good fortune to keep his own. To Lord M. I give nothing, knowing that he will bestow it upon the poor. To Sir Robert ——— I leave my political opinions, never doubting he can well turn them into cash, who has always found such an excellent market in which to change his own. My cast-off habit of swearing oaths I give to Sir Leopold ——— in consideration that no oaths have ever been able to bind him yet."

### A SUBSTITUTE FOR HANGING.

JUDGE J. C. ROYLE, a leading jurist of Salt Lake City, has a novel theory, all his own, of a substitute for capital punishment.

Judge Royle is opposed to capital punishment on biblical as well as humanitarian grounds. He is actively in favor of abolishing it, and never fails to go on record to that end.

He believes that when one man kills another he should be forced to labor the remainder of his life for the maintenance of the family whom he has deprived of its chief, perhaps only, means of support. If the murdered man have no immediate family, let him work for the remote members of it, says the judge, and if he have none, let his labor go to the enrichment of the state. He believes that it is poetic justice that the man who robs another of his life shall devote the remainder of his own life to the task of restitution as far as may be. If the murdered man be one of wealth, the products of the murderer's labor should go to the further filling of the coffers of the surviving family, according to the Utah judge.

### MAN, POOR MAN!

THERE is a new business opening for young women, provided they are young enough, and the possibilities are almost limitless, says the Chicago Post. A New York judge has held that a girl who is a minor may enforce the performance of any and all matrimonial contracts into which she may enter, but may not be compelled herself to carry out any of them. Being a minor she is legally incapable of making a binding promise, but she is nevertheless capable of making it very interesting for any one who may make any promises to her. If this isn't a gift of a license to flirt to girls who are just at the most flirtatious age, we would be glad to know how it can be properly described.

But the New York girl who can put a weight on her age and keep it down has even greater

liberty than this under the decision. She cannot be compelled to give up an engagement ring under any circumstances. She may promise to be "his'n" forever in order to get it, and the next minute she can order her big brother to throw him out of the house and "sic" the dog on him. He has no redress. She is a minor, and anything she gets is hers, while anything she gives away is also hers, if she cares to claim it again. She may go on merrily gathering in rings and, presumably, other tokens of affection in the jewelry line, until her poor father is ready to open a retail store to get rid of the stock, and the young men who have contributed can do nothing but go away into some dark, dense forest and kick themselves.

And yet there are some people who claim that tyrant man will not give woman a fair chance in this world.

#### NEW YORK LAWS OF 1897.

THE following additional bills passed by the New York legislature, which are of special interest to the legal profession, have been signed by Governor Black:

Chap. 36. Senator Nussbaum's, establishing the State Board of Claims as a court of claims.

Chap. 37. Senator Malby's, providing that if a woman die leaving illegitimate children, and no lawful issue, such children shall inherit her personal property as if legitimate.

Chap. 38. Senator Brackett's, providing that a married woman may confess judgment if the debt was contracted for the benefit of her separate estate, or in the course of business carried on for her separate account.

Chap. 42. Senator Martin's, an anti-knockout drops bill, providing that any one who is found in possession of an anæsthetic, unless upon a physician's prescription, shall be guilty of a felony.

Chap. 80. Senator Ellsworth's, exempting from taxation State bonds issued to pay for the \$3,000,000 canal improvement.

Chap. 81. Senator Guy's, appropriating \$5,000 for the law library of the Appellate Division of the Supreme Court, first department, and the law library of the Supreme Court, first district.

Chap. 90. Assemblyman Peterson's, providing for the appointment by the county judge in Chautauqua county of a board of examiners to regulate the practice of midwifery in that county by others than legally authorized physicians.

Chap. 91. Assemblyman Nixon's, designating April 27, 1897, a public holiday in New York, Kings and Westchester counties.

Chap. 92. Assemblyman Marshall's, authorizing the judges of the Supreme Court of the second judicial district residing in Kings county to appoint interpreters and to fix their salaries.

Chap. 104. Senator Brackett's, amending the

Code of Civil Procedure relative to actions to determine the validity of the probate of wills.

Chap. 119. Senator Ellsworth's, amending the Code of Civil Procedure relative to possession of real property in reference to the foreclosure of mortgages.

Chap. 121. Assemblyman Laimbeer's, amending the Criminal Code relative to the form of entries in justices' criminal dockets.

Chap. 122. Assemblyman Laimbeer's, amending the Criminal Code providing that a disorderly person committed on failure to give security may be discharged by the committing magistrate or two justices of the peace, or the county judge, by afterwards giving security as originally required.

Chap. 149. Assemblyman Lewis', amending the Code of Civil Procedure relative to the appointment of committees for incompetent persons who are inmates of State institutions.

Chap. 153. Assemblyman Lewis', protecting purchasers on sales of real estate of infants by special guardians prior to January 1, 1872.

Chap. 119. Senator Ellsworth's, amending the Code of Civil Procedure relative to possession of real property in reference to the foreclosure of mortgages.

Chap. 121. Assemblyman Laimbeer's, amending the Criminal Code relative to the form of entries in justices' criminal dockets.

Chap. 122. Assemblyman Laimbeer's, amending the Criminal Code providing that a disorderly person committed on failure to give security may be discharged by the committing magistrate or two justices of the peace, or the county judge, by afterwards giving security as originally required.

Chap. 187. Senator Lexow's, providing that every interlocutory or final judgment heretofore filed for entry shall be deemed to have been duly entered as of the time of such filing, and the entry of every such judgment is declared confirmed.

Chap. 188. Senator Lexow's, amending the Code of Civil Procedure providing that county clerks shall, in addition to docket books, keep a judgment book in which all judgments shall be entered.

Chap. 189. Senator Lexow's, relative to the service of summons to require the appearance of a judgment debtor in proceedings brought under the provisions of the Code.

#### THE PENALTY FOR ADULTERY.

Discussing the bill which has recently been introduced in the New York legislature, making adultery a criminal offence, the *New York Law Journal* has this to say:

"Before advocating the proposition to make adultery a penal offence in New York, due consideration should be given to the anomalous condition, theoretical and practical, of our matrimony."

law. Several recent cases in the courts have called renewed attention to the equivocal status here of persons obtaining divorces elsewhere. The law of New York permits the obtaining of a divorce by a plaintiff domiciled here, without personal service of process upon or appearance by the defendant. Yet, somewhat inconsistently, the New York courts refuse to recognize a divorce granted under similar circumstances in a sister State. It follows that a person who has procured a divorce in another State upon service by publication, and remarried on the faith of it, may be living in a state of lawful matrimony in other States of the Union, but in adulterous intercourse if he happens to come to New York. Cohabitation with the new partner will entitle the original defendant spouse to a divorce in New York. (*Bell v. Bell*, 4 App. Div. 527). Our courts have even gone so far as to allow a party to ignore a foreign divorce which he has himself obtained, and procure a new divorce in this State upon the ground of the cohabitation by the defendant with a person whom she had assumed to marry on the faith of the former judgment. (*Holmes v. Holmes*, 4 Lans. 388; S. C., Special Term, 57 Barb. 315.)

"In view of the hopelessly complicated condition of our law the policy of making adultery a criminal offense might have far-reaching consequences. In *People v. Baker* (76 N. Y., 78) a prosecution for bigamy was sustained by the Court of Appeals, founded upon a remarriage contracted in New York upon the faith of an Ohio divorce granted upon substituted service of process. Prosecutions for such offense are rare because it is a very easy matter to contract the second marriage in a State that recognizes the divorce. But, as above suggested, the cohabitation of a person so having remarried would be adulterous in New York, and as far as we can see, render him liable to punishment under a statute making adultery criminal. When we consider the very decided judicial controversy in different courts of the Union as to whether divorces granted upon substituted service should not be generally recognized, and also the vast number of remarriages that have been contracted upon the faith of such divorces, we think the conclusion quite plain that New York should not go to the extreme of subjecting such remarried persons, many of whom are living blameless lives in their new relation, to criminal prosecution."

#### LYNCH LAW.

THE ORIGIN OF THE NAME TRACED BACK TO  
JAMES LYNCH, OF GALWAY.

IN the course of a contribution to one of the Kansas City afternoon papers, Hon. John Speer, the veteran journalist and historian of

Kansas, undertakes to give the origin of the term "lynch law." He relates that when he was a young man, and a resident of Washington county, Pa., an atrocious murder was committed there, which was avenged by the execution of the murderer at the hands of a hastily-organized vigilance committee. The man who presided over the deliberations of this committee bore the name of Lynch, and ever after the meting out of justice in this manner was known as "lynch law."

While the local use of the term no doubt came about in the manner related by Mr. Speer, it is nevertheless true that it existed long before he was born, and its origin has been traced to half a dozen different sources by as many different authorities, says the *Kansas City Journal*. In the "Historical Collections of Virginia" it is related that when Col. Charles Lynch returned to his family seat in Staunton county at the close of the Revolutionary War, he found the region infested with bands of lawless Tories and desperadoes. The necessities of the situation involved desperate measures, and Col. Lynch had these desperadoes apprehended and executed without the formality of trial or the exercise of any superfluous religious or legal ceremony. Claverhouse, in his history of the frontier, declares that the term arose in America through the impartial, yet summary, justice which was meted out by a vigilance committee presided over by a man by the name of Lynch, who lived at Piedmont, on the western frontier of Virginia. Washington Irving, in his charming book of travels through Kansas and the Indian Territory, in 1835, declares that "lynch law" is the only law known on the frontier, and it is obvious that the term was then a common one.

However, it is probable that all of these American authorities are at fault, and that the term had its origin in England in the early part of the fifteenth century. In Prince Puckler Muskau's "Tour in England" will be found a thrilling account of the "Galway Tragedy"—when James Lynch, Mayor of Galway, condemned his son to death for murder, and, to prevent a rescue by the mob, executed him with his own hands.

#### THE ANTI-TRUST LAW DECISION.

IF the Anti-Trust law forbids all contracts and combinations in restraint of trade, how would the court treat a combination among workmen on an interstate railway, the parties to which should agree with each other to cripple the operation of the railway so far as possible unless it employed them at their own rates and on their own conditions? asks the *New York Times*. Would that be an unlawful restraint of trade? Would the combination be dissolved? For that purpose would an injunction issue? Would the reasonableness or unreasonableness of the rates and con-

ditions fixed by the combination have any weight? Would the actual effect on the workingmen's own fortunes be considered? Clearly, we are not yet at the end of the effects logically flowing from the recent decision of the Supreme Court.

### ANTIQUITY OF SHORTHAND WRITING.

THE OGHAM SYSTEM WAS IN VOGUE IN IRELAND  
MANY CENTURIES AGO.

A GOOD many are in error in thinking shorthand a modern invention, says "The Man of the Mountain" of the Freeman's Journal, of Dublin, Ireland. There are modern systems, indeed, but our Irish forefathers practiced shorthand, how many centuries ago? With them, at least, a knowledge of it preceded that of "longhand." The Ogham system of writing, that practiced in ancient Erin

Long, long ago, beyond the misty space  
Of twice a thousand years,

was purely a system of shorthand. Indeed, its constitution by lines and stems, and lines running right and left at various angles, bears a notable resemblance to modern shorthand systems. The Ogham was used in ancient Ireland from a very remote period. Its alphabet is made up of two double and thirteen single consonants, five vowels and five diphthong characters.

It is believed that a tree and its branches gave the first idea of the Ogham system. The trunk of a tree would represent a stem, and the branches an alphabet. Thus we find that each Ogham letter is named after a tree or shrub, and consists of lines of from two to four inches in length, marked perpendicularly, or at various angles, to the stem line. So, too, the angular edge of a long or high stone served as a stem line, and from it on each flat side the Ogham marks are drawn. A strip of bark, or the surface of a square rod or piece of wood was also used, any sharp-pointed weapon serving to inscribe the characters, so that often, with the ancient Irish, the "pen" was a knife or dagger—that was before people began to say that the "pen is mightier than the sword." It is recorded that the famous Ulster Cuchulinn used his dagger as a pen in writing Ogham.

The inventor of the Ogham system of writing was a Tuatha de Danaan king, who lived about 3,000 years ago, named Ogma, so that he gave his own name to the system he invented. Examples of the Ogham remain with us principally in inscriptions on sepulchral or commemorative stones. Some have been found in underground chambers (souterrains), in many parts of Ireland, principally in the counties Cork and Kerry. In the parish churchyard of Aghabologue, a few miles northeast of Macroom, in old Muskerry, "St. Olan's Cap" stands not far from St. Olan's Well. It is a square

stone, or rather clay slate, about nine feet high. It was discovered in a subterranean chamber in a rath in Coolinea, not far from where it now stands. Its Ogham inscription is perfect and legible, and reads: "No, the son of Deag." Some Ogham inscriptions have also been found on very old churches and abbeys, for it was in use even after the Roman (or Romano-Irish) alphabet came to be commonly used in Ireland. Cuchulinn, just mentioned, lived at the Christian era. The Ogham system was a most convenient form of writing when paper was still unknown. By the system messages could have been easily and expeditiously dispatched. And one cannot help asking if in our modern systems of shorthand we may not recognize the fulfilment, in this particular at least, of The O'Clery's prophecy:

Ollamh's skill and Ogma's lore  
Time to Banbha will restore.

### Legal Notes of Pertinence.

England has a troublesome clerical litigant in the person of Rev. Mr. Chaffers, whom the Court of Appeals has prohibited from bringing suit in English courts, without first obtaining the permission of a judge. The reverend gentleman has brought suit forty-eight times within a few years against persons by whom he felt that he had been aggrieved, including the Prince of Wales, the late Archbishop of Canterbury, the late and present Lord Chancellors, the late Speaker of the House of Commons, four of the Justices of the High Court of Judicature and the authorities of the British Museum.

What is believed to have been the first case involving the validity of permanent insurance ever taken before a tribunal of last resort was recently determined by the Supreme Court of Pennsylvania. The question was as to the rights of an assignee of the policy, which provided that the insurance company should be "forever" liable to the assured, his heirs and "assigns," and that any assignment should be brought to the company's office to be entered and "allowed." It was held that the allowance of an assignment was not discretionary with the company, but could be claimed by the assignee as a right.

The law firm of Myers & Anable, which, until March 1, did a general legal business under that name at No. 45 Wall street, New York, has dissolved, and Courtland V. Anable, the junior partner, has associated himself with ex-District Attorney De Lancey Nicoll, under the firm name of Nicoll & Anable, having offices at No. 32 Liberty street. Mr. Nicoll's high standing at the Bar is well recognized in the profession, and Mr. Anable, though a younger man, is a lawyer of distinguished talents and brilliant record. He is a graduate of

Union College, and for a few years after his graduation, in 1881, was a tutor in that institution.

The law of New York forbidding the use of stoves on cars on street railways for heating purposes has been affirmed by the Supreme Court of the United States. The case came up on appeal by the New York, New Haven and Hartford Company. In the failure of Congress to legislate on the subject, Justice Harlan said it was competent for the State to provide for the safety of passengers, both in cars running on railroads within the State or coming in the State from another State.

Lord Justice Lindley would like to add a new petition to the Litany: "From lady litigants good Lord deliver us!" But there may be worse things than lady litigants. Lord Norbury, of Irish fame, for instance, had in his court a monomaniac whose delusion was that he was the Chief Justice, and Lord Norbury an impostor. Long and good-naturedly did the Chief Justice tolerate the would-be usurper, till he threatened, and was proceeding, to depose the Chief Justice from the bench. Then at last he had to appeal to the usher: "Jackson, turn Lord Norbury out of court!" This reminds us of a story by Dean Ramsay of a Scotch minister, who, on going to preach, found the pulpit in the possession of the village idiot — so-called, but with a glimmering of mother wit. "Come down, sir, at once!" said the irate minister. "Na, na, minister," responded the droll; "just come up beside me. A faithless and perverse generation needs the baith of us."—*Law Journal*.

### Notes of Recent English Cases.

Copyright — Picture — Infringement. — The plaintiff owned the copyright in a picture and engraving entitled "Can You Talk?" of which a little child and a collie dog formed the central group and motive, the title being presumably suggested in part by the juxtaposition of, and in part by the contrast between the pair of sentient beings of whom one only was gifted with speech. The defendants owned a periodical in which appeared, as an illustration to the letterpress, a woodcut, depicting a collie dog in attitude and expression similar to the one in "Can You Talk?" — namely, seated, and looking downward with, as the court said, a sagacious expression in his face: only whereas in the picture he was contemplating the child, in the woodcut the place of the child was occupied by a tortoise, around which were grouped other domestic animals with looks either of astonishment or of alarm. The woodcut was entitled "A Strange Visitor." The plaintiff claimed to restrain the sale of the woodcut as an infringement of his copyright. Romer, J., held that infringement had taken place. The dog — a principal figure in the picture — had been

copied, and, besides that, the artistic feeling and character of the work had been taken. In substance, the plaintiff's design had been followed, with the substitution of other animals for the child. Where a substantial part of a picture was taken, *qua* picture, then there was infringement: as, for instance, if from an historical picture the principal figure were reproduced, although alone. An injunction was accordingly granted. (*Brooks v. The Religious Tract Society*, H. C. of J., Chan. Div.)

### LEGAL LAUGHS.

In an action for breach of promise, the fair plaintiff's attorney proposed to read to the jury the proposal of marriage, which happened to have been written on an ordinary telegraph blank. When he started to read he began with the words, "My dear Louisa." The counsel for defendant interrupted him and said: "If it please the court, this is an instrument partly printed, and part'y in writing; by all the rules that were ever held by all the courts, if the party offers part of that instrument he must read it all; he can't read part of that and not read it all." The lady's attorney protested that the fact that the matter had been written on a telegraph blank was a mere accident only, and that the printed matter on the telegraph blank had nothing to do with the case; but the plaintiff's counsel insisted on having it read, and was sustained by the court. Thereupon very reluctantly the gentleman began to read at the top of the message: "There is no liability on account of this message unless the same is repeated, and then only on condition that the claim is made within thirty days in writing." And then, after the signature of "Yours lovingly, John," he was compelled still more reluctantly to read: "N. B.— Read carefully the conditions at the top."

The woman lawyer sat at a table which was not dusty enough nor littered enough to be that of a prosperous attorney. A feminine client came in.

"Can I get a divorce from my husband?" asked the client.

"What is wrong with him?"

"He is keeping something from me, and I don't know what it is. But it's killing me."

"My husband," said the woman lawyer gravely, "is keeping something from me, and I know what it is. But it isn't killing me."

"What is he keeping from you?"

"Money," said the woman lawyer, and tried not to smile.

Speaking of curious verdicts, that was not half bad which a jury in Judge Ball's court returned Sunday. John S. Welhaven had been on trial all last week, charged with perjury. The jury went

out at three o'clock Saturday, and at 12:30 Sunday it was ready with the following opinion:

"We, the jury, find the defendant guilty, but not in the manner and form as charged in the indictment, owing to the many mistakes proved there, the uncertain testimonies as to the exact date said John S. Welhaven swore, the incorrectness even of his and her real names in the complaint, for which alone he is entitled to a verdict of not guilty; and the assumed name of one of the prosecutors. We therefore ask the extreme clemency of the court in his, John S. Welhaven's, behalf."

As nothing seems to be settled, Assistant State's Attorney Walters will try the case again next week. Samuel H. Peck and John F. Geeting defend. -- Chicago Post.

### ENGLISH NOTES.

[From the London Law Times.]

The retirement, after many years' service, is announced of Mr. Peter Paget, the official assignee, and Mr. J. C. Austin, two of the oldest officials of the London Bankruptcy Court. They were held in high esteem, not only for their personal qualities, but for the ability and assiduity with which they discharged the duties appertaining to their offices.

The benchers of the Inner Temple have hit upon a happy notion for keeping alive the memory of the diamond jubilee year, and, at the same time, paying a graceful compliment to the houses of parliament through their respective speakers. It happens that both the lord chancellor and Mr. Gully, Q. C., are members of the Inner Temple, so that, in commissioning the Hon. John Collier to paint their portraits to adorn the Inner Temple hall, the benchers are adhering strictly to the traditions of the place.

Mr. John Cranch, high bailiff of Kingsbridge County Court, committed suicide on Tuesday. As he did not return home at his usual time, his daughter went to his business premises, in Fore street, and found him lying on the floor with his throat cut. Deceased had filled the office of high bailiff for nearly forty years.

Lord Russell, of Killowen, continues to make good progress towards recovery. Delightful weather has prevailed at Torquay, and the lord chief justice is able to spend a considerable portion of each afternoon in the open air. It is not anticipated that his lordship will be sufficiently well to resume his duties during the present sittings.

The late Lord Justice Kay has left £1,000, free of legacy duty, to his "faithful clerk," Mr. George V. Wood, in addition to having presented

him with a check for a substantial amount when he retired from the bench. This recalls other instances of the generosity of judges and barristers towards their clerks. The following judges left their clerks these legacies: Mr. Justice Quain, £1,300, but also appointed him an executor of his Manisty, £2,500; and Lord Justice Thesiger, £1,000. Of the members of the bar who have provided generously for their clerks, Sir John Karslake, Q. C., left his clerk £2,000, and Mr. Ddweswell, Q. C., not only gave his clerk a legacy of £1,300, but also appointed him an executor of his will. Each of the following members of the bar left their clerks £1,000: Mr. McIntyre, Q. C., Mr. Crompton, Q. C., Mr. Southgate, Q. C., Mr. Aspland, Q. C., and Mr. Levy; while Mr. Samuel Joyce left his clerk an annuity of £60, and Mr. Lyon gave his clerk £500.

### Notes of Recent American Decisions.

**Bank — Deposits — Payment.**— However careless and uncommon may be the payment of money by a bank to a depositor, who had authority to draw the money, without any written order or receipt, if such payment of the money of the firm was actually so made by the bank, it would be a good payment, and the bank would not be further liable. (*Rice v. Bank of Camas Prairie [Idaho]*, 47 Pac. Rep. 856.)

**Banks and Banking — Officers.**— A check was sent to defendant bank to indemnify it for furnishing a bond for plaintiff. The president and the cashier became sureties, and the check was deposited to their credit, and afterwards paid. *Held*, that the execution of a receipt by those officers individually did not constitute a contract between them, as individuals, and plaintiff, which extinguished the bank's liability to account for the check. (*Merchants' Nat. Bank of Ft. Worth v. Phillip & Wiggs Machinery Co. [Tex.]*, 39 S. W. Rep. 217.)

**Carriers — Passenger — Insult — Damages.**— A woman who enters a railroad station with the intention of becoming a passenger may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference. (*Texas & P. Ry. Co. v. Jones [Tex.]*, 39 S. W. Rep. 124.)

**Carriers of Passenger — Contract — Packages.**— A person entitled by the terms of his ticket to "personal passage" on a railroad car has not the right to carry with him packages of groceries for the use of his family. (*Delaware, L. & W. R. Co. v. Bullock [N. J.]*, 36 Atl. Rep. 773.)

**Chattel Mortgages — Release.**— A chattel mortgagee of property exceeding the value of his debt



cannot release a portion thereof for the debtor's benefit, and assert his lien thereon against a subsequent attaching creditor. (*Andrews v. Dun* [Tex.], 39 S. W. Rep. 209.)

**Chattel Mortgage of Sheep.**—A mortgage of sheep does not extend the lien thereof to wool thereafter growing on them, or lambs in gestation at its date. (*First Nat. Bank of Santa Ana v. Erreca* [Cal.], 47 Pac. Rep. 926.)

**Ejectment — Title.**—The fact that defendant in ejectment lived on the land with her husband for seventeen years, and in the meantime recognized his title by renouncing dower in three mortgages executed by him, including the one under which plaintiff claimed, and that, after the husband left for parts unknown, she remained on the land, and endeavored to pay the mortgages, and, in fact, made a payment on one, tended to show that she claimed the land under the husband. The title of plaintiff in ejectment is not speculative because his deed contains a covenant of warranty which he intends to enforce if he fails in the suit. (*Bradley v. Drayton* [S. Car.], 26 S. E. Rep. 613.)

**Ejectment — Title.**—A grantee who took possession under a void deed may maintain ejectment against one subsequently taking possession under a valid deed from the same grantor, where such deed was offered and admitted in evidence merely as color of title, and there was no evidence of ten years' adverse possession by defendant. (*Branch v. Smith* [Ala.], 21 South. Rep. 423.)

**Insurance — Stock of Goods — Warranties.**—Policies of insurance on a stock of goods consisted of a printed sheet containing the formal printed parts, and, attached thereto, a paper containing a description of the insured property, together with a "covenant and warranty" by the assured to keep, in a fireproof safe, or in some place not exposed to a fire which would destroy the building containing the goods, an inventory and account books containing a complete record of all business transacted. *Held*, that the covenant as to the keeping and method of preserving the inventory and books was a part of the policy, and constituted a warranty, the breach whereof prevented any recovery. (*Lozano v. Palatine Ins. Co.* [U. S. C. C. of App., Fifth Circuit], 78 Fed. Rep. 278.)

**Landlord and Tenant — Damages from Defective Water Fixtures.**—In the absence of a covenant to repair, a landlord who rents the upper story of a building containing water fixtures, which are in good condition at the time of the lease, and gives the tenant the exclusive possession and control thereof, is not liable to a tenant of the lower story for damages accruing during the lease by reason of an overflow caused by the defective condition of such water fixtures. (*Haizlip v. Rosenberg* [Ark.], 39 S. W. Rep. 60.)

**Master and Servant — Assumption of Risks.**—Under the employers' liability act, an employee on a handcar, acting under the orders of a superior, does not assume the risks incident to the negligence of such superior in propelling the car. (*Woodward Iron Co. v. Andrews* [Ala.], 21 South. Rep. 440.)

**Municipal Corporation — Street Railways — Damage to Franchise.**—The franchise of a street railway company is subordinate to the right conferred on the city by its charter to control the streets, construct sewers, etc.; and the city may, in the honest exercise of its discretion, locate a sewer in the center of a street, so as to suspend the operation of a street railway, without paying compensation for consequent pecuniary loss to the company. (*City of San Antonio v. San Antonio St. Ry. Co.* [Tex.], 29 S. W. Rep. 136.)

**Negligence — Highways — Contributory Negligence.**—It is contributory negligence for a horseman, apprised of an obstruction in the highway at the time his horse first took fright and turned back, to voluntarily ride up to the obstruction again. (*Town of Salem v. Walker* [Ind.], 46 N. E. Rep. 90.)

**Partnership — Dissolution — Retiring Partner.**—A dissolution agreement contained an assignment by the retiring partner to the other of all his interest in the business, and provided that each partner was to pay one-half of the firm debts, and that the continuing partner should collect moneys due, and pay the retiring member one-half thereof. *Held*, not an assignment by the retiring partner of his interest in commissions earned by the firm before dissolution. (*Riggen v. Investment Co.* [Oreg.], 47 Pac. Rep. 923.)

**Sale — Damages — Measure.**—Where a purchaser refuses to accept and pay for goods contracted for, the measure of the damages is the difference between the contract price and the market value of the goods at the time fixed for delivery. (*Browning v. Simons* [Ind.], 46 N. E. Rep. 86.)

**Trust — Evidence — Declarations.**—The declarations of the grantor made after the conveyance are not admissible, as against the grantee, to show that the land was impressed with a trust, unless made in the presence of the grantee. (*Phillips v. Sherman* [Tex.], 39 S. W. Rep. 187.)

**Vendor's Lien — Homestead.**—Where a husband, representing the community, purchases and pays for property for a homestead, and converts it to that use, fictitious vendor's lien notes created by him, though without the wife's consent, at the time of the purchase, and recited in the deed as being such, are enforceable in favor of a *bona fide* holder. (*New England Safe Deposit & Trust Co. v. Harrell* [Tex.], 39 S. W. Rep. 142.)

## The Albany Law Journal.

ALBANY, APRIL 24, 1897.

### Current Topics.

THE Anti-Cartoon bill has had a "rocky road to travel" in the New York legislature, and if it is finally placed on the statute books is likely to be so emasculated that its best friends will hardly know it. In its original form the bill was not only out of keeping with American institutions, but clearly in contravention of the Constitution. Aimed at certain abuses practiced by "yellow journalism," it struck a blow at an entirely legitimate part of the newspaper and publishing business. To prohibit the publication of portraits of persons without their written consent, under heavy penalties, or any penalties at all, would be despotic as well as absurd. While the senate gave its approval to the measure, the assembly insisted on further modifying it by inserting a provision permitting the publication of political cartoons and portraits of public officials. In this form it would be less objectionable; but a much better plan would have been to eliminate the enacting clause. No legislation on the subject is necessary.

In Colorado, where woman suffrage prevails, the legislature has just decided that women may serve in the National Guard of the State. This was in obedience to the demand of the fair citizens, who were not content merely with the right to vote, and to serve on juries, but also insisted on being represented in the militia. This is just what some of the anti-female suffragists have been predicting; and in going the whole length, it must be conceded that Colorado is entirely consistent. If women are given the rights of citizenship, its duties must also be borne by them. There will be much curiosity in other parts of the Union to see how the Colorado plan works in practice, though it is to be hoped no occasion will speedily arise to

test the courage of the young amazons "under fire."

The bills pending in congress to raise the salary of the district judges to \$6,000, and to reimburse them for their expenses when traveling and holding District or Circuit Courts other than their own, ought to be speedily passed. It is well known and generally conceded that our Federal judges are under-paid for the important and exacting public services they render to the people and the country. The salary of \$5,000 is entirely insufficient for the ability, learning and labor required of them. Under the present system these judges are subject to judicial service in three different courts, viz.: The District Court, the Circuit Court, and the Circuit Court of Appeals. The circuit judges now receive \$6,000, and there is no apparent reason why the district judges should not get as much. It is a matter of surprise that so many lawyers of eminent ability are willing to give up more lucrative practice to accept positions on the bench. Probably no country of any importance in the world pays its judges such niggardly salaries as the United States.

The question whether it is a defense to an action on a fire insurance policy to allege and prove that the building was burned by the insured while insane, was recently decided in Pennsylvania, in *Showalter, Committee of Eaby v. Mutual Fire Ins. Co. of Chester county*. The Superior Court, Rice, P. J., held that while the direct burning of the building by the wilful act of the insured was not one of the risks within the contemplation of the parties to the contract, it is equally well settled that mere carelessness and negligence of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy, unless specially excepted. It must not be assumed that what would be a fraudulent act if committed by a sane person is so in a person incapable of fraudulent intent, and of resisting insane impulse. The court adds: "When an insane person burns his

own building, what legal wrong does he commit? Certainly none for which he is punishable criminally, and none for which he is responsible civilly, unless it be a breach of duty arising out of a contract. But as well might you say that negligence of the insured is a breach of duty owed to the insurer, as that an insane act is. No rule or principle of public policy forbids one to covenant for indemnity against loss by fire consequent upon either; and why a condition should be implied excepting one, and not the other, from risk, is not plain. The general rule is that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy, and such as are caused by the voluntary act, assent, procurement or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance. \* \* \* As in life insurance, if not expressly provided otherwise, the policy covers death by suicide when insane, so also for similar reasons loss by fire occasioned by the negligent or insane act of the insured is one of the risks assumed, unless expressly excepted." The court points out that the act of burning one's own property does not necessarily injure an insurance company. Whether it does or not depends upon whether the company has, for the time being, assumed the risk of such burning.

In another case the same court lays down the doctrine that a lunatic is civilly liable for loss occasioned by his perpetration of what in a sane person would be a tort or trespass in which wrongful or malicious intent is not an essential element. Accordingly, it was held that where a lunatic intentionally sets fire to the property of another, which is insured, the insurer having paid the loss, may recover the amount of the same from the lunatic. The learned judge, in closing his opinion, says:

"We have not undertaken to cite all the cases bearing upon the question, but, after a somewhat thorough research, we have been able to find no case in which it has been held that the lunacy of the defendant is a defense to an action for the recovery of compensa-

tory damages for a tort in which wrongful or malicious intent is not an essential element. It has been asserted that the rule is, at least in this country, a universal one, that no one can be made liable for injuries to the person or property of another, without some fault or negligence on his part. It is undoubtedly true that the tendency of modern decisions is in that direction, but it is unsafe to say that the rule has no exceptions nor limitations. There are many injuries to which, upon sound principles of public policy, the rule is applicable, that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. Belonging to these classes is the injury to the person or property of another by an insane person, by an act which in a sane person would be a trespass. To apply the last mentioned rule to such a case does not, in the slightest degree, imply punishment of a person who is incapable of wrongful intent; it simply gives compensation to him who has been damaged; it places the loss where the burden more justly belongs."

A case of particular interest to wheelmen was decided by the Maine Supreme Court recently. It was that of *Charles B. Eaton v. Atlas Accident Insurance Company*, and was an action of assumpsit upon a policy of insurance issued by the defendants to the plaintiff, insuring him against accidental injuries, to recover \$25 per week for an injury which wholly and continuously disabled him from transacting any and all of the duties pertaining to his occupation, that of a letter-carrier. The plaintiff, it appeared, was thrown from his bicycle while returning to his home in Belfast, from Waldo, where he had been to attend the funeral of a friend, Sunday, October 28, 1894. It also appeared that he returned by another road four miles longer than the direct road to his home. The defendants pleaded the general issue, and contended that they were not liable for anything, because the plaintiff, at the time he was injured, was traveling on Sunday in violation of law; and that if they were liable, the amount for which they were liable should

not exceed \$12.50 per week, because when the plaintiff was injured he was doing an act or thing pertaining to an occupation classed as more hazardous than that under which he was insured. The court held that the riding of a bicycle on Sunday was not prohibited by R. S. c. 124, § 20, relating to the Lord's day; also, held that the returning from Waldo by a circuitous route brought the claim for compensation within the marginal clause of the policy, which provides that, "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting), yachting, fishing or gunning, indemnity will be paid at fifth-class rates as given in the company's latest manual." Judgment was ordered for the plaintiff for \$50, and interest from date of the event.

An interesting decision as to what constitutes negligence sufficient to create liability for the death or injury of an employe was recently rendered by the New York Supreme Court, Appellate Division, First Department, in *Louise Sann, as administratrix, etc., appellant, v. H. W. Johns Manufacturing Co., respondent*. The action was brought to recover damages alleged to have been sustained by the widow and next of kin of William Sann, deceased, through the negligence of the defendant. The deceased, it appears, was at work in the defendant's factory for the manufacture of asbestos, in Brooklyn, trying to put the belt on a pulley of a certain felt washing machine; that while one of the employes was assisting the deceased to adjust the belt, the said employe was caught in the belt and carried around the shaft; that the deceased endeavored to rescue his co-employe from danger, and in attempting to extricate him was caught in the belt and was carried up over the shaft, receiving injuries from which he died. The negligence complained of was in omitting to furnish proper and suitable appliances to adjust the belt on the shaft, and in failing to have a proper pulley on the felt-washing machine, and guards in and about the machinery; and also that the belt was in a defective, improper and

negligent condition. The trial judge did not permit the case to go to the jury, the complaint being dismissed, and judgment entered, from which appeal was taken. The court held that even if there was prior negligence on the part of the defendants in allowing the machinery to get out of order, or in not complying with the requirements of the Factory law, such negligence was not the direct and proximate cause of the accident, but only the remote cause. "This," the court said, "is not enough. Negligence to be actionable must be the direct and natural and proximate cause of the injury." In this view the Appellate Division concurs, adding that if the proximate cause of the perilous position in which the deceased's co-employe, O'Dea, was placed when caught by the belt was the defendant's negligence, then the fact that O'Dea himself might have been guilty of contributory negligence (which would prevent recovery in a suit brought by him) would not prevent a recovery by the plaintiff. The court, citing *Eckert v. Long Island Railroad Co.* (43 N. Y. 502); *Spooner v. D., L. & W. R. R. Co.* (115 N. Y. 22), and *Gibney v. State* (137 N. Y. 1), say that these cases, recognizing the natural instinct in man to go to the rescue of his fellow-men in a situation of imminent peril, hold that it is not negligence *per se* for one to voluntarily risk his own safety and life in attempting to rescue another from impending danger. The law has so high a regard for human life that it will not include negligence in an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. The court, in conclusion, say: "These cases, therefore, support the view that if the negligence of the defendant had placed O'Dea in the perilous position from which he was rescued by Sann, and, actuated by the common impulse of humanity, Sann had gone to his rescue, and in that effort had met his death, a recovery for such death would not be affected *per se* either by a consideration of contributory negligence or by the argument that there was no negligence towards Sann himself. We fail to see, however, how a recovery can be sustained

against the defendant upon the theory of negligence, when no evidence is presented from which the inference can be deduced that O'Dea's position was in any way proximately caused by the defendant's negligence. However humane and meritorious the conduct of Sann in going to the rescue of O'Dea, it is not a sufficient ground upon which to predicate liability as against the defendant for the resulting injuries, where the latter's negligence was in no way the proximate cause."

The international rules to prevent collisions at sea, prepared at Washington by the delegates to the International Marine Conference of 1889, are likely to go into effect on the first of next July. These rules were to have gone into effect on March 1, 1895, but owing to the refusal of Great Britain to give her consent, their promulgation was postponed. Since then Great Britain has agreed to the rules, and is now actively co-operating with the United States in securing the assent of the few remaining nations which have not yet accepted the new rules. The following nations have agreed to adopt the rules and enforce them after July 1st: Great Britain, United States, Germany, France, Denmark, Russia, Italy, Portugal, Austria, Belgium, Spain, Hawaii, Japan, Mexico, Guatemala, Chili, Honduras. These nations, it is said, control 22,000,000 tons, or more than five-sixths, of the world's shipping. The important nations whose consent has not yet been received are: Norway, Sweden, the Netherlands, Brazil and Turkey, controlling about 3,000,000 tons of shipping. The adoption of these rules, with the result of greatly lessening the danger of collisions at sea, and consequent loss of life and property, will work an epoch in the history of the maritime relations of the world.

According to a recent decision of the Court of Queen's Bench, sitting in banc, the police in England are not to be permitted to enter at will any part of premises covered by a liquor license. The facts of the case in point appear to be that on April 23, 1895,

two policemen passing by the Brandy Cock tavern, in the city of Bristol, heard sounds of revelry proceeding from one of the rooms. The policemen entered the house and tried to enter the room from which the sounds came, but were refused admittance. They ordered the landlord to let them into the room; the latter refused, explaining that it was occupied by the Royal Antedeluvian Order of Buffaloes, a secret society meeting there at regular intervals, and that he, the landlord, had no rights over the premises, which he had let to others. The landlord was tried before the city police justices on the charge of violating the license laws by refusing to admit the officers, who said they wished to find out whether he had a music and dancing license, and to prevent excessive drinking. There was no allegation of disorder of any kind beyond the landlord's refusal to let the officers into that particular room. He was convicted, and the conviction affirmed, on appeal to the recorder, but the High Court of Justice reversed the finding. Mr. Justice Cave delivered the interesting opinion, in the course of which he said: "That the power of entry of licensed premises for the enforcement of the licensing acts includes the right of admission to any room which is part of the premises covered by the license at any time and under all circumstances, is a great deal more than I am prepared to hold. To say that in a room which is occupied by a gentleman, his wife, and daughter, because the latter is asked to sing in the evening, with a view of beguiling the monotony of staying at such a place, that, therefore, any constable who might be about is entitled to demand admission to that room to see what they are doing, seems to me a very monstrous thing indeed. \* \* \* There is nothing to prevent a constable going over the public part of licensed premises, but he should not hold that he is at liberty to go all over the house, including rooms not actually in the occupation of the landlord, but of guests, solely because he chooses to say he is there for the purpose of detecting or preventing some offence against the law. Surely such a delicate mission as

that is not to be intrusted to a constable without some control over him."

In *Kratzenstein*, plaintiff and respondent, v. *Charles Lehman*, imp. with *Sigmund B. Kahn*, defendant and appellant, the Appellate Term of the New York Supreme Court, First Department, holds that an insured's interest in an endowment life insurance policy, which has an unconditional value, either immediate or certain to accrue from mere efflux of time, is attachable; but it is not necessary, where the insured is still bound to the performance of certain conditions under the policy, to seize the policy itself, as it is not, under such circumstances, an instrument for the payment of money only, like a bond or a promissory note. The court is unable to see how any one is injured by failure to attach the policy itself, and by leaving it outstanding in the possession of the insured or of any other person. If the company subsequently consents to an assignment, having knowledge of the attachment, it does so at its own risk, though, of course, the case would be different if the policy were a negotiable instrument, as a bond.

The Hamilton county (Ohio) Circuit Court, in *Peterson v. Schmidt*, decided January, 1897, holds that the vendor of a bakery, who agreed not to go into business again within four squares of the old stand, might be enjoined from carrying on such a business in his wife's name a few feet more than four squares distant. The court takes the position that the contract entered into should be construed so as to give effect to the instrument, and that in doing this it should have a reasonable construction. Taking the most favorable view of the defendant's claim, he would be engaged in the bakery business within a few feet of the four squares mentioned in the contract. This fact, taken together with the further fact that the business was claimed to be in his wife's name, while he himself was working for his wife, indicated that he was endeavoring to avoid the terms of his contract, and showed bad faith on his part. Such conduct did not commend

itself to a court of equity. The court further held that the contract in question was not against public policy, the limitation being reasonable, there being nothing to prevent the defendant from engaging in business at any place which in all reason was beyond the limitations to which he had agreed in his contract, and for which he had secured plaintiff's money.

THE ALBANY LAW JOURNAL has heretofore had something to say upon the important question of enacting just libel laws in the various States, and it is with gratification that we see judges endorsing the views expressed in these columns. For example, Judge Gordon, of Philadelphia, in a recent charge to a jury in a libel case, had these true and wise words to say:

"It is of the very first importance to the community that a malicious publication, intended to injure, repeated, avowed, not retracted, should be punished, and punished with the utmost severity of the law. But if verdicts of that character are demanded under such a state of facts, it is equally true that for a libel not malicious, but accidental, for the publication of a false article which occurred in a manner almost natural and excusable, the verdict should not represent more as compensation than the facts proven justify. There should be in such cases no element of punishment, because, important as it is that the reckless and malicious press should be punished, it is equally important that a careful, reputable and honorable press should be defended in every right, because while one is an agency of oppression, the other is a safeguard to liberty, civilization and happiness."

It would be difficult to put the case more forcibly or truly.

An important decision with regard to the protection of fish and game has been rendered in Michigan in a decree which holds that an absolute prohibition of the sale of game within a State during a closed season or during the entire year, although the effect of it is to prohibit the sale of game or fish imported from other States, is held to be valid.

# NEGLIGENCE IN DELIVERY OF TELEGRAPHIC MESSAGE.

DAMAGES NOT RECOVERABLE BY ADDRESSEE OF DISPATCH FOR MENTAL DISTRESS, ALTHOUGH CAUSING OR CLAIMED TO HAVE CAUSED PHYSICAL SUFFERING AND INCIDENTAL PECUNIARY LOSS.

NEW YORK SUPREME COURT — APPELLATE DIVISION — FIRST DEPARTMENT.

January, 1897.

Present: HON. CHARLES H. VAN BRUNT, P. J.; GEORGE C. BARRETT, WILLIAM RUMSEY, MORGAN J. O'BRIEN and GEORGE L. INGRAHAM, JJ.  
MAGGIE CURTIN, Respondent, v. THE WESTERN UNION TELEGRAPH Co., Appellant.

Appeal by the defendants from an order of the Appellate Term reversing an order of the General Term of the City Court of the city of New York, which reversed a judgment of the Trial Term of that court in favor of the plaintiff, and directed a new trial, and affirming the judgment of such Trial Term. Upon the 25th day of May, 1896, an order was made by the Appellate Term granting leave to the defendants to appeal to this court.

BARRETT, J. — Several important questions are presented upon this appeal. We need, however, consider but one of them, namely, whether the plaintiff can recover damages for mental distress, causing, as she claims, physical suffering. This question is a crucial one, for if disposed of adversely to the plaintiff's contention, her action wholly fails. We think it must be thus disposed of, both upon principle and authority. A late case in our Court of Appeals (*Mitchell v. Rochester R. Co.*, 151 N. Y. 107) settles the rule in this State, as applicable to actions for personal injuries occasioned by negligence. It was there held that although a miscarriage and consequent illness resulted from fright occasioned by the negligent management of the defendant's car and horses, yet the plaintiff could not recover, for the reason that there was no immediate personal injury. The horses' heads in that case, though in close proximity to the plaintiff's person, did not actually touch it. The principle of this case is *a fortiori* applicable here. The plaintiff's recovery rests solely upon the defendant's negligence in the performance of a duty which it owed to her as the "addressee" of the telegram. There was no contractual relation between the parties. The contract was made in St. Louis, Mo., with the plaintiff's brother. He was the sender of the dispatch, and he there paid for the service. There certainly could be no recovery for mental distress occasioned by a breach of that contract. The only contract for the breach of which a *solatium* may be

allowed is a contract to marry. Even the latter is but nominally an exception to the rule. Though in form an action for breach of promise of marriage is upon contract, it essentially sounds in tort. We are aware that in Texas, and some other States of the Union, the general rule of damages in actions upon contract has been extended in the present class of cases; and compensatory damages are allowed in these States for mental suffering caused by a telegraph company's breach of its contract to deliver promptly a message intrusted to it (*So Relle v. Western Union T. Co.*, 55 Texas, 308; *Chapman v. Western Union T. Co.*, 90 Ky. 265; *Wadsworth v. Same*, 86 Tenn. 695; *Reese v. Same*, 123 Ind. 294; *W. U. T. Co. v. Stratemeier*, 32 N. E. Rep. 871; *Same v. Henderson*, 89 Ala. 510). The same rule was formerly adopted in the Federal Court in Texas (*Beaseley v. W. U. T. Co.*, 39 Fed. 182), but the contrary doctrine was ultimately held by the Circuit Court of Appeals for that circuit (*W. U. T. Co. v. Wood*, 13 U. S. App. 317). The reasoning of these southern and western cases concedes that a party is only liable for damages proximately resulting from the breach. They hold, however, that where the telegraphic message indicates upon its face that it is not of a business or commercial character, where, in fact, it points solely to matters of sentiment or feeling, the parties contemplate compensation for such mental suffering in case of a breach. Otherwise they say there could be no redress therefor. The fallacy of this reasoning lies in the premise. The parties contemplate nothing of the kind. The courts that lay down the rule contemplate it for them. The parties know that a contract is a bargain for the breach of which the law affords exact pecuniary redress; that such redress is not uncertain; that it implies damages which must be proved and which are never left even to the reasonable discretion of a court or jury. They thus know when they send a message pointing solely to sentiment or feeling that they are entering into a contract which has no pecuniary value, and that the law affords no redress in damages for the breach of such a contract. This and this alone is what they contemplate. As was said in *Frances v. W. U. T. Co.* (59 Fed. Rep. 1078): "The law looks only to the pecuniary value of a contract and for its breach awards only pecuniary damages."

In some of the cases above cited the recovery was placed upon the ground of the defendant's negligent breach of duty. But whether the damages are given for breach of contract or for negligence, the rule is the same with regard to mental suffering. The wrongdoer is liable only for the natural and proximate consequences of his negligent act (*Lowery v. W. U. T. Co.*, 60 N. Y. 201). But an injury to the feelings, independently and alone, that is, apart from corporal or personal injury, is not, in any legitimate or juridical sense, a

natural and proximate consequence of the negligent act. It may be the natural and proximate consequence of a physical injury. *There* it may be interwoven with the corporal injury, which is definite and certain, and it can be measured as a part and parcel of the totality of physical suffering. The law looks upon the direct physical injury alone, and the proximate consequence of the negligent act, not upon the secondary ailment resulting from the primary mental suffering. An injury to the feelings, independently and alone, is something too vague to enter into the domain of pecuniary damages; too elusive to be left, in assessing compensation therefor, to the discretion of a jury. The extent and intensity of such injuries depend largely upon individual temperament and physical, mental and nervous conditions. These conditions are shadowy, unequal and uncertain in the extreme. When they exist in connection with physical injuries they can be examined and tested. Existing alone and independently, they are easily simulated, and the simulation is hard to detect. There is, in fact, no genuine congruity between pecuniary loss and isolated mental pain. And if there were, there is no certain means whereby such mental pain can be fairly and accurately compensated. The true rule upon this head is well put in the American and English Encyclopedia of Law (p. 862 of vol. xxvii.), as follows: "A rule that is more consistent with recognized legal principles, and that is supported by better authority, is that mental suffering, alone and unaccompanied by other injury, cannot sustain an action for damages or be considered as an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of pecuniary compensation in damages, except where, as in case of personal injury, they are so inseparably connected with the physical pain that they cannot be distinguished from it, and are therefore considered a part of it."

Many cases in support of this reasonable doctrine are there cited in the notes.

The present case aptly characterizes the looseness which usually attends sympathetic departure from settled principles. The action was tried upon a stipulation as to the facts. All that the trial judge knew about the plaintiff's injuries was embodied in this stipulation, which read as follows:

"(9) That the plaintiff, after she learned from the said Thomas O'Connor, on the 15th day of July, of the death of Cornelius Curtin, on the 12th of July, in St. Louis, and of his burial there on the 14th, became sick in consequence thereof, and because she was not able to be present at his death and burial, and in said sickness expended the sum of twenty dollars for medical services, and of five dollars for medicine, and had also expended the sum of sixty dollars for clothing, as alleged in said amended complaint, which she otherwise

would not have expended if she had known that she could not be present at the funeral of her said brother."

Upon these facts the trial judge made this finding: "13. That the plaintiff was damaged to the amount of one hundred and twenty-five dollars."

Now, it may be asked, did he arrive at this sum? What, for instance, has become of the clothing? Was it entirely lost to the plaintiff? The stipulation is silent. As to the illness, it read that she became sick in consequence of her brother's death and burial, and because she was not able to be present at his death and burial. The defendant was certainly not responsible for her brother's death, nor for her inability to be present at his death-bed. For it appears that the telegram was sent after his death, and, indeed, announced that fact. Was her illness then caused exclusively by inability to be present at the funeral? If not, how much of her suffering was due to the fact of death, and how much to the inability to be present at the funeral? These inquiries are logically pertinent. They illustrate the purely arbitrary character of the award. It was small, it is true, but it might just as well have been smaller or larger. What is clear is that it was hopelessly uncertain and devoid of substantial foundation. It was simply—in part at least—a *solatium*, where a *solatium* is inadmissible.

We think the General Term of the City Court was fully warranted in granting, as it did, a new trial because of the trial judge's error with regard to the damages.

The order of the Appellate Term should therefore be reversed, and the order of the General Term of the City Court affirmed and judgment absolute ordered for the defendants, with costs in this court and in the Appellate Term, and also in the Trial and General Terms of the City Court.

All concur.

#### JUDGMENT FOR DEFENDANT IN ACTION FOR DIVORCE.

ADULTERY OF DEFENDANT COMMITTED WITH CONIVANCE OF PLAINTIFF—OFFENSE ALSO CONDONED BY VOLUNTARY COHABITATION, WITH KNOWLEDGE OF DEFENDANT'S GUILT.

NEW YORK SUPREME COURT—SPECIAL TERM,  
PART V.

January, 1897.

ROBERT KARGER V. HEDWIG KARGER.

PRYOR, J.—Upon the evidence the adultery of the defendant is an inevitable conclusion. Still the plaintiff is not entitled to a divorce if the offense was committed by his procurement or with his connivance (Code of Civ. Pro., § 1758).

Suspecting a criminal connection between his wife and one Stein, the plaintiff concerted with the witness Wolf a scheme for detecting the defend-



ant in the act. She was in the habit of visiting Stein at his room in Wolf's house, and the arrangement was that the plaintiff should go to the house, and Wolf "would show it to him." He went to the house and was so situated that, though himself concealed, he could observe the approach of his wife. She entered the house and met Stein. Meanwhile Wolf, with plaintiff's privity, had so disposed the company and fastened the doors as apparently to assure the defendant of security in the illicit intercourse. From the ambush in which they lay, Wolf, in company with the plaintiff, heard Stein invite the woman to his embraces and saw them go to bed together. Then, after waiting "two or three minutes," the husband and witness rushed into the room and surprised the parties in the act. This is the adultery of which I am constrained to find the defendant guilty.

But was not the offense committed with plaintiff's connivance? Not only did he permit it to be done when a look or a word from him would have prevented it; not only did he suffer it to proceed in his presence and delay interruption until he supposed it consummated, but through the agency of Wolf he promoted and facilitated the adultery. The inference is irresistible that the plaintiff was willing that the defendant should commit the act in order that he might obtain a divorce (*Morrison v. Morrison*, 136 Mass. 310). "The connivance may be a passive permitting of the adultery, as well as an active procuring of its commission" (2 Bish. on Mar. and Div., § 6). "If the husband receives a caution concerning the conduct of his wife, or if he sees what a reasonable man could not see without alarm, \* \* \* he is called on to exercise a peculiar vigilance and care over her; and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he will be presumed to see and mean the consequences" (2 Bish. on Mar. and Div., § 21). "This corrupt consent will be presumed from passive as well as active encouragement of the offense" (*Schouler's Hus. and Wife*, § 540). "Mere passive connivance is as much a bar as active conspiracy" (*Lord Stowell in Morrison v. Morrison*, 3 Hagg. Ecc. 105). "The plaintiff had the power, and it was his duty to prevent the debauchment of his wife" (*Gilbert, J., in Bunnell v. Greathead*, 49 Barb. 106). "It would be a dangerous principle to establish that a husband who has suspicions of the infidelity of his wife shall be allowed to lay a train which may lead her to the commission of adultery, in order that he may take advantage of it to obtain a divorce" (*Pierce v. Pierce*, 15 Am. Dec. 210, 3 Pick. 299). I am aware of the decision in *Robbins v. Robbins* (140 Mass. 528), but cannot recognize it as an authority (33 Alb. Law Journal, 401).

A divorce, again, is not to be allowed "where the offense charged has been forgiven by the plain-

tiff;" and "voluntary cohabitation, with knowledge of the fact," is proof of condonation (Code, § 1758). The plaintiff denies intercourse with the defendant after knowledge of her guilt; but she affirms such intercourse with particulars of time, place and circumstance. True, the defendant swears falsely as to the fact of adultery; nevertheless she may speak the truth as to the forgiveness (*Dunn v. People*, 29 N. Y. 523). I should disbelieve her, however, were she not corroborated by uncontroverted proof. From the discovery of the adultery down to the day of the trial, the plaintiff and defendant have lived together in the same apartment occupying connecting sleeping-rooms and eating at the same table—have reciprocated conjugal kindnesses, she cooking for him and he tending and caressing her in sickness; he providing for the family and she discharging the household duties. Such relations between the parties since the adultery constitute in themselves proof of cohabitation and forgiveness. "Married persons living in the same house are presumed to have matrimonial intercourse," unless the contrary fact be shown (2 Bish. on Mar. and Div., § 46). "Cohabitation will be inferred, nothing appearing to the contrary, from the fact of the living together of husband and wife" (*Burns v. Burns*, 60 Ind. 259, 260). Upon the question of condonation, the weight of evidence is, in my judgment, with the defendant.

The proof of connivance and forgiveness is not to be disregarded because the defenses were not pleaded (*Smith v. Smith*, 4 Paige, 432).

These people, married now nineteen years, have two minor children, of whom the custody and control the father still entrusts to the mother. Thus, by the most emphatic demonstration, he avows that he does not deem her society hurtful to his offspring; as by his continued connection he shows that he does not consider her an unworthy companion for himself. Should she be discarded and cast penniless upon the world, her ruin would be inevitable and complete. In the interest, therefore, of the parties concerned, and of the State, which cherishes the stability of the marriage relation, I am happy to find legal ground for denying the divorce.

Judgment for defendant, with costs.

#### SELF-DEFENSE.

THE opinion of the Supreme Court of the United States in *Bowe v. United States* (17 Sup. Ct. Rep. 172), by Mr. Justice Harlan, in our judgment defines and administers the right of self-defense in a manner not only sound in principle, but agreeable to common sense and substantial justice. There was evidence that defendant, while in an hotel office with deceased, being provoked by insulting words of the latter, kicked him lightly, and then stepped back and leaned against the counter,

whereupon he was assaulted by deceased with a knife. It was held, reversing a judgment of conviction of manslaughter, that it should have been left to the jury to say whether the conduct of the defendant, after kicking the deceased, was a withdrawal in good faith from further contest; and that it was error to charge to the effect that if defendant kicked deceased, however lightly, he could not justify on the ground of self-defense the killing of deceased in resisting an assault, though such killing may have been necessary to save defendant's own life. The court said in part:

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation of law, pursues him with a deadly weapon, and seeks to take his life, or do him great bodily harm. In *Parker v. State* (88 Ala. 4, 6, 7, South. 98, 99), the court, after adverting to the general rule that the aggressor cannot be heard to urge in his justification a necessity for the killing which was produced by his own wrongful act, said: "This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, he withdraws from it in good faith, and clearly announces his desire for peace. If he be pursued after this, his right of self-defense, though once lost, revives. 'Of course,' says Mr. Wharton, in referring to this modification of the rule, 'there must be a real and *bona fide* surrender and withdrawal on his part; for, if there be not, then he will continue to be regarded as the aggressor' (1 Whart. Cr. Law, 9th ed., § 486). The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent before he takes the life of his adversary (Bish. Cr. Law, 7th ed., § 871)." Recognizing this exception to be a just one, the court properly said, in addition: "Due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury, in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence." Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat. But, as said by the Supreme Court of Iowa, in *State v. Dillon* (74 Iowa, 653, 658; 38 N. W. 525, 528), if one "actually and in good faith withdraws from the combat, he ceases to be a wrongdoer; and if his adversary

have reasonable ground for holding that he has so withdrawn, it is sufficient, even though the fact is not clearly evinced" (see also 1 Bish. Cr. Law, § 702; *People v. Robertson*, 67 Cal. 646, 650, 8 Pac. 600, 604; *Stoffer's Case*, 15 Ohio St. 47). In Whart. Hom. (§ 483), the author says that "though the defendant may have thus provoked the conflict, yet, if he withdrew from it in good faith, and clearly announced his desire for peace, then, if he be pursued, his rights of self-defense revive."

We do not mean to say that the jury ought to have found that the accused, after kicking the deceased lightly, withdrew in good faith from further contest, and that his conduct should have been so interpreted. It was for the jury to say whether the withdrawal was in good faith, or was a mere device by the accused to obtain some advantage of his adversary. But we are of opinion that, under the circumstances, they might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter, with knife in hand, in any sense that would deprive him altogether of the right of self-defense against such attack. If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused, or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard v. U. S.* (158 U. S. 550, 564, 15 Sup. Ct. 962, 967), in which case it was said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and, if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The evidence in the principal case certainly does not conclusively establish as matter of law the hypothesis that the defendant in good faith withdrew from a contest after he had been provoked to make a personal assault by insulting words of the deceased. Indeed, there was evidence tending to show that the defendant was the original and a wanton aggressor in the altercation. It may have been a consideration of the probable general merits of the case, to be gathered from a printed record, that induced Justices Brown and Peckham to dis-

sent from the conclusion of the court. But there was evidence to support the view above indicated, and the Beard case and the Rowe case consistently unite in expressing a judicial policy on the subject of self-defense which is not only logical in principle, but commends itself to the practical sense of justice. To the same substantial effect are some recent cases in State courts—*State v. Evans* ([Missouri], 28 S. W. R. 8); *Page v. State* ([Indiana], 40 N. E. R. 745).—*New York Law Journal*.

#### INFRINGEMENT OF COPYRIGHT BY REVIEWS.

THE action brought by Messrs. Smith, Elder & Co. against Mr. Stead raised two important and interesting questions in copyright law, on which a judicial opinion would have been useful. 1. How far may extracts from copyright books be made for purposes of review? 2. Are abridgments of copyright books allowable? The first is, perhaps, a more difficult question than the second, and has often caused the courts considerable trouble in arriving at a decision which, while preserving the rights of the copyright owner, shall not unduly interfere with the making of necessary extracts in the way of legitimate criticism. It may be stated at once that the exact limits of lawful quotation can only be determined according to the particular circumstances of each case; and, therefore, in a sense, the question suggested is one of fact rather than of law. If any criterion can be laid down by which to arrive at a correct decision on the facts of each case, it appears to resolve itself into the somewhat vague rule that the reviewer may make extracts sufficient to show the merits and demerits of the work, but not so as to make the review a substitute for the former (see *Copinger on Copyright*, p. 214). The quantity taken is not an absolute test, nor the fact that the extracts are *ex necessitate rei* quotations. In the words of Lord Cottenham: "When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, which is looked at. It is useless to look to any particular case about quantity." In illustration of this may be cited *Cobbett v. Woodward* (27 L. T. Rep. 260; L. Rep. 14 Eq. 402), where eight lines, forming a mere fractional part both of plaintiff's and defendant's publications, were copied, but the plaintiff was held entitled to an injunction; and *Sweet v. Benning* (25 L. T. Rep. O. S. 180; 14 C. B. 459), where the fact that only one-twentieth part of the defendant's work was taken from the plaintiff's was considered to be an actionable piracy. "The question is," said the same learned judge (Lord Cottenham), in *Bell v. Whitehead* (8 L. J. Ch. 141), "whether the extracts were inserted for

purposes of criticism and for the purpose of supporting such observations as the editor thought fit to make. \* \* \* This is the ground acted on in such publications as the *Edinburgh and Quarterly Reviews*, and when fairly acted upon the result most probable is, that the sale is extended by the notice, when not given for the purpose of superseding the work itself." Then, as to the fact of the extracts being published merely as quotations, Lord Eldon said: "There is no doubt that a man cannot, under pretense of quotation, publish either the whole or part of another's book, although he may use, what in all cases it is difficult to define, fair quotation" (*Wilkins v. Aikin*, 17 Ves. 422). This is really as near as it is possible to go to a precise rule of action. But, applying this test to Mr. Stead's case, it is obvious that, as regards the extracts from "Sir George Tressady" in the *Review of Reviews*, Mr. Stead could not have resisted an injunction, as he had "taken out all the plums" of the original, the effect of which would undoubtedly be that many people would buy Mr. Stead's review instead of Mrs. Ward's book.

The second question raised by this case is the right to publish abridgments of copyright works. The older view was that abridgments are not piracies, but perfectly allowable, as being really original productions, inasmuch as they involve both invention and judgment, and frequently show considerable learning. If, for instance, the principle laid down in *Newbery's Case* (Lofft. 775) be taken as expressing the present law, even Mr. Stead's abridgment of "Sir George Tressady" in the *Masterpiece Library* might escape censure; but the trend of judicial and professional opinion has been steadily in the direction of holding abridgments of copyright works to be virtually piracies, equally with unlawful extracts or quotations; though it would be, perhaps, going too far to say generally that abridgments are no longer lawful. Here again it is not quantity so much as quality, the appropriation of which may work the real mischief, and, in particular, the use of the original author's name, and the title of his book. The general consensus of opinion against the free use of abridgments finds appropriate expression in the following report of the royal commission on copyright: "At present an abridgment may or may not be an infringement, according to the use made of the original work, and the extent to which the latter is merely copied into the abridgment; but, even though an abridgment may be so framed as to escape being a piracy, still it is capable of doing great harm to the author of the original work by interfering with his market; and it is the more likely to interfere with that market and injure the sale of the original work if, as is frequently the case, it bears in its title the name of the original author. We think this should be prevented, and,

upon the whole, we recommend that no abridgment of copyright works should be allowed during the term of copyright without the consent of the owner of the copyright."

There have been no recent reported decisions on either of the points raised by Mr. Stead's case, and it is from a public point of view regrettable that no authoritative ruling was given which would, perhaps, have rendered unnecessary any legislative sanction to these recommendations of the commissioners. — *Law Times*, London.

### ROBERT G. INGERSOLL.

HOW THE COLONEL ROSE TO EMINENCE AS A LAWYER AT NEW YORK.

THE story of Col. Robert G. Ingersoll's retirement from the active practice of law has been expected for some time. When he removed from his Peoria home some years ago to New York he signalized his advent into the eastern metropolis by entering the court-rooms of Manhattan Island and Brooklyn with the exuberance of a boy fresh from college, says the *Chicago Times-Herald*. He arose early in the mornings, and long before wagons began drowning other noises along William street he could be found in his office. Often did he burn the midnight oil so late as to give the slanting shadows of the early morning sun a chance to take its place. His great reputation as an orator had preceded him, and his residence in New York was of less duration than two months before his fees grew apace with those of Rufus N. Choate, Elihu Root and William M. Evarts. At first he enjoyed his new surroundings. The change of scenery so different from the agrestic prairies of Peoria seemed charming. New friends sprang up around him as quickly as do the buds of dogwood trees give birth to blooms when an April shower falls upon them. Lawyers bade him welcome everywhere, and sedate judges lent him listening ears.

He was soon the guest of millionaires; then he joined downtown clubs, and so on. Before he had been in New York a year he was a well-known figure in the Wall street cafés, clubs and all the big court-rooms of the island. Then, in an ecstatic moment, he sold his Illinois home and bought a residence in Harlem. His house became a resort for the merry and the light of heart. Money fairly leaped into his lap. His law offices at 58 William street were thronged with clerks and assistant attorneys. The newspapers had something to say about him every day, and for a while he swept things before him — became the leading lion, as it were — just as a French actress becomes the only real star as soon as the ship bearing her towards American soil passes Fire Island. But the real big lawyers "snubbed" him, for some reason or other, saying that he was superficial, lacked judgment and

that his only virtue lay in the fact that he possessed a musical voice; that his gestures were graceful and his rhetoric and diction superbly elegant. That, and nothing else. Col. Ingersoll soon had a "neutrality" case to try. It came up for argument before the Supreme Court at Washington, and two of the New York attorneys who had failed to receive the colonel with that warmth of cordiality that makes a man feel welcome were in the courtroom at the time of the trial. It was Col. Ingersoll's first "neutrality" case, and as he arose to address the court he appeared ill at ease. He had talked for an hour, perhaps, when he said:

"May it please the court to correct me if I proceed wrongly in this case. It is my first one of such character, and if my procedure be not in line with the way such cases are usually presented, I beg the court to inform me."

Without a moment's hesitation Chief Justice Waite said to him: "Proceed, sir, proceed. The court is learning from you."

From that moment his ability as a lawyer needed no further proof for the two New York gentlemen who were listeners to his argument.

Millionaires and corporations gave him the most of his employment, but occasionally he drifted into criminal practice. He disliked criminal law and has always entertained a contempt for the usual jury that was elected to pass upon a man's liberty, and it was this feature of the practice that made it odious to him. Still, he oftentimes appeared for defendants; never, however, for the prosecution. Years ago he appeared as an attorney for the State in a murder case. The accused was convicted mainly because of Col. Ingersoll's appeal to the jury. The man was hanged. Subsequent events proved that he was innocent. Since then the great atheist has been averse to participating on the side of the prosecution.

### THE CHIEF JUSTICE.

ONLY SEVEN MEN HAVE FILLED THE HIGH OFFICE IN THIS COUNTRY.

THE office of chief justice of the Supreme Court of the United States was established by the Constitution concurrently with the office of president, but while the presidency has been open to all native-born citizens above the age of 35, the office of chief justice of the Supreme Court, bestowed usually upon men of mature, if not advanced, years, has been held in fact by seven persons only since the foundation of the government. There has been more than three times as many presidents, says the *New York Sun*.

John Jay, of New York, was the first chief justice of the Supreme Court. He was appointed by Washington, in 1789. Judge Jay was at that time only 44 years of age. When he attained the age of 50 he resigned and retired to private life.

He died thirty-four years later—in 1829. The second of the Supreme Court justices was John Ellsworth, of Connecticut. He was 54 years of age when appointed, and served until 1801, when he resigned, resignation from public office being somewhat more frequent at that time than now. His successor was John Marshall, of Virginia, who was 46 years of age when he assumed the post by appointment of President John Adams. He held it uninterruptedly for thirty-four years, until his death in 1835.

Andrew Jackson appointed his successor, Roger B. Taney, of Maryland, who held the office until his death, in 1864. Judge Taney was 59 years of age when appointed and 87 at the time of his death. No chief justice of the Supreme Court, perhaps, had more intricate questions to determine or to vote upon in that tribunal than did Judge Taney, and his tenure and that of Chief Justice Marshall stretch over nearly one-half of the history of the United States as a nation. Chief Justice Taney's successor was Salmon P. Chase, of Ohio, who had previously been secretary of the treasury, and was 56 years of age when appointed. He served for nine years, dying in 1873. Mr. Chase was himself a candidate for the presidency, and had hoped to defeat Mr. Lincoln for renomination and to succeed him, and later, in 1868, it is known that Mr. Chase was a candidate for the democratic nomination for the presidency, though he had been one of the founders of the Republican party. Chief Justice Chase was succeeded in 1873 by President Grant's appointment of another Ohio man, Morrison R. Waite, who was 57 years of age when appointed, and served until 1888, when he was succeeded by the present chief justice, Melville W. Fuller, appointed by President Cleveland. Mr. Fuller is a native of Maine. He was, when appointed, 55 years of age, and was 64 on February 11, 1897. He is the seventh of the chief justices of the Supreme Court, and has served thus far a briefer term than any of his predecessors since Chief Justice Ellsworth.

#### QUEER BEQUESTS.

MANY of the old residents of Germantown remember Martin Allen, the soap-maker, who died about ten years ago, leaving many queer articles to his relatives, says the Philadelphia Record. On account of his economical habits, Mr. Allen was thought by many to be a miser, but his many bequests to charity while living prove that such opinions were far from right. Horace Mann, a nephew of the eccentric soap-maker, was left an old keg, the contents of which were unknown until the mystified Horace opened the top and discovered it to be filled with pennies. It was no wonder that the storekeepers in Germantown disliked to have his custom, as the nephew made

purchases as high as \$10, for which he paid with the "copper chicken feed." The strangest bequest of all was that of a box of soap which was left to Martin Mann, a brother of Horace. It was only a few days ago that Martin became of age, and as the will stated that he should not use the soap until he was twenty-one, the box had never been opened. Martin discovered that the first cake he used contained a five-dollar gold piece. On examining the other cakes he discovered a similar coin in each; and as the box contained 180 cakes, the fortunate Martin is now worth \$900.

#### LIABILITY OF COMMON CARRIER.

SOME very interesting points as to the liability of common carriers were settled by the Supreme Court of Ohio, in the case of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Harry D. Sheppard. The latter delivered to the Terre Haute, Indianapolis Railroad, at Lovington, in the State of Illinois, a car load of horses, which that company agreed to transport over its line to Indianapolis, Ind., and there deliver them to plaintiff in error for carriage to the city of Columbus, Ohio. The contract with the former company is in writing, and contains the stipulation that "in case of any loss or damage, the liability of said company and of any connecting line shall not exceed \$100 per head." The horses were safely delivered to the plaintiff in error, at Indianapolis, and received by it in good condition, but while being transported over its line in this State, a defective wheel of one of the cars in the train gave way, in consequence of which one of the horses was killed and the others were injured. Sheppard brought suit in the Court of Common Pleas of Franklin county against the plaintiff in error for damages, alleging that his loss was occasioned by the company's negligence. The company denied negligence on its part and pleaded the stipulation in the contract, above set forth, as a limitation on its liability, averring that the contract was made in the State of Illinois, where, under the law of that State, such stipulation is valid. Issue was joined on the allegations of the answer, and on the trial evidence was given by both sides, tending to prove what the law of Illinois on the subject was when the contract was made. The plaintiff recovered more than the amount limited by the contract, and that judgment was affirmed by the Circuit Court. The railway company prosecuted error to obtain the reversal of both judgments. The court says the well-settled law of the State is that a common carrier cannot, by special agreement, relieve himself of responsibility for his own negligence, nor limit his liability for losses resulting therefrom. A contract made in one State or county to be performed in another is governed by the laws of the latter, which determine its validity, obligation and effect.

When such record is published by authority of a recognized trotting association, and the publication is accepted and acted upon by those interested in and conversant with such matters, as authentic and official, it is not error to admit evidence of the speed as shown by that record; but the testimony of a witness to information he claims to have obtained from the record is incompetent.

One who for ten years has made car-building his business, and given special attention to car-wheels and their construction, is competent to give an opinion of the value of the hammer test as a means of discovering defects in car-wheels.

Where a railroad company receives live stock in another State, under a contract there made to transport it to a designated place in this State, and while the stock is being carried in this State it is injured by the company's negligence, the rights of the parties, in an action for damages for the loss, are governed by the laws of this State, and not by those of the State where the contract was made. In an action to recover the value of a trotting horse, evidence of his pedigree and that some of his blood relations have a record for speed, is competent as affecting his value.

#### BEFORE THE FINAL BAR.

**J. J. STORROW**, of Boston, the great patent lawyer, who recently represented the Venezuelan government before the commission appointed by President Cleveland to determine the boundary between Venezuela and British Guiana, died suddenly, on April 15, in the new congressional library at Washington. Mr. Storrow was on his way from Florida, with his family, whom he left at Fort Monroe, and went to Washington on business before the Supreme Court. James J. Storrow was born in Boston in July, 1837, and was graduated from Harvard University in the class of '57. He finished a three years' course in the Harvard Law School, and was admitted to the Suffolk bar in 1860. Since that his career has been peculiarly that of a busy, laborious and successful lawyer. The attractions of politics, or a public career in any sense of the term, did not for a day swerve him from the practice of his profession, and he rose by steady steps to a foremost place at the bar.

#### DAMAGES IN DIVORCE SUITS.

**W**HEN a co-respondent in a divorce suit has to pay damages, are such damages the aggrieved husband's or not? We are inclined to exclaim off-hand: "Why, yes! Whose should they be but the person's who has sustained the injury?" But we should be wrong. The damages are meant to serve two purposes — to punish the co-respondent

and to repair the domestic ruin which his misconduct has wrought. The husband does not always have them paid out to him, or assign them, or present a bankruptcy petition against the co-respondent in respect of them. The question turned up in a rather novel form before Mr. Justice Williams — the bankruptcy forum — where the trustee in bankruptcy of the husband appeared to set aside a settlement of the damages made by him (the husband) as a fraud on his creditors. The settlement was made with the sanction of the Divorce Court, and was for the benefit of the erring wife and of the children as well of the husband, and Mr. Justice Williams had no difficulty in finding that it was not within the mischief of 13 Eliz. c. 5, or the principle of *Higginbottom v. Holme*, 19 Ves. 88. The court has in such a case the dominion of the fund, and might settle the whole of it if it liked on the wife and children. — *Law Journal, London.*

#### A SAD ACCIDENT.

THE LYNCHING PARTY HAD NOT CONSIDERED THE SHRINKING PROCESS.

**WESTERN JUDGE** — "You are charged, sir, with being the leader of a party which hunted down and lynched a horse thief. The days have gone by when citizens of this great commonwealth can thus take the law into their own hands, hence your arrest. What have you to say?"

Prominent citizen — "I ain't guilty, jedge. I'll tell you how it was. We caught the feller and tied his hands and feet. Nothin' wrong in that, was there, jedge?"

"No; that was no doubt necessary."

"Wal, jedge, there was a storm comin' up, and we couldn't spare him an umbrella, so we stood him under a tree. That was all right, wasn't it?"

"Certainly."

"Wal, the clouds kept gatherin' an' the wind was blowin' pretty high, an' we didn't want him blown away, so we tied a rope around his neck an' fastened the other end to the limb above — not tight, jedge, jest so as to hold him — an' we left him standin' solid on his feet. Nothin' wrong about that, was there?"

"Nothing at all."

"Then I kin be excused, can't I?"

"But the man was found suspended from that tree and stone dead the next morning."

"None of us had anything to do with that, jedge. You see, we left him standin' there in good health and spirits, for we give him all he could drink when he said 'good-by;' but, you see, during the night rain came up an' I s'pose the rope got purty wet and shrunk a couple o' feet. That's how the sad accident happened, jedge." — *New York Weekly.*

CONDITIONS IN RESTRAINT OF MARRIAGE.

AN interesting legal decision has recently been rendered in France, in the case of a young widow whose husband left her all his property on condition that she should forfeit the whole, except dower, if she married again. After a time she was inclined to contract a new marriage, and prudently went to the local court to see if there were any escape. It upheld the will, but a higher court, to which the question was taken, then reversed the decision on novel grounds. The judges there said that celibacy, being contrary to nature, was something which no man, alive or dead, had a right to impose, and that such an act, particularly in a country like France, where the population is stationary or waning, was contrary to public policy. Upon this the widow married, but it seems she was too hasty after all, for relatives carried the case up to the Supreme Court, which ungallantly reaffirmed the original opinion. The woman has gained a husband, but lost the estate.

This French decision agrees with the law in this country, and, we believe, in England. Conditions in restraint of marriage are generally held to be void, but there are exceptions to the rule, and one of these exceptions is in the case of a second marriage. It used to be held that this exception was confined to the case of the testator being the husband of the widow, but it has been extended to the case of a son making a will in favor of his mother, and to the case of a father making a will in favor of his daughter. A recent case in point is that of *Herd v. Catron*, decided last November by the Supreme Court of Tennessee, where it was held that a condition in a will that if testator's widowed daughter marry again, the share bequeathed to her shall go to her son, is valid, as the rule forbidding conditions in general restraint of marriage does not extend to second marriages. Let the widows beware! — Albany Argus.

A GOOD HINT FOR ALL LEGISLATORS.

A STATE legislature should not waste any time in consideration of national questions, and still less of international, says the Indianapolis Journal. There may be times and emergencies when the assertion of national rights or the preservation of national honor calls for such expression, but they are rare and exceptional. As a general rule, State legislatures should refrain from interfering in national or international questions as carefully as congress should from interfering in matters of State concern. There is more than enough legislation of a strictly State character demanding the attention of the legislature to occupy its entire time during the session.

Humors of the Law.

This happened in a police court in San Francisco recently; and the orthographical judgment then delivered will doubtless be of interest to those who are learning how to spell, as well as to lexicographers.

There is an ordinance of the city of San Francisco, it appears, which provides that when any householder shall conspicuously display a sign in the English language, on the front steps of his house, indicating that no peddlers are wanted inside, it shall be an offense, punishable by a fine of not less than \$5, for a peddler to ring the door-bell or otherwise disturb the occupants.

Conspicuously displayed on the front steps of a boarding-school for girls in Vallejo street, in that city, was lately the sign:

.....  
: NO PEDDLARS. :  
.....

A Russian peddler paid no attention to this notice, and rang the bell. It happened that the mistress of the school herself answered the call. She was very angry when she saw the peddler, and called a policeman, who happened to be in sight. The peddler was taken to the police station, and was prosecuted under the ordinance.

He belonged to the Peddlers' Benevolent and Protective Association, and his case was defended by a smart lawyer employed by that society, who contended that the notice on the door being spelled "peddlars" was not in the English language, and consequently was not a lawful warning.

The court took this point into consideration at once. Dictionaries were sent for and examined. Then the court announced its judgment.

The question was, said the justice, "Did the prosecuting witness indicate by a notice in the English language that no peddlers were wanted?" He had consulted all the authorities, and he found no English word spelled "peddlar." Webster says the word is spelled "peddler," but that it is also written "pedler" and "pedlar." Worcester gives his first choice to "pedler," with "peddler" for second choice and "pedlar" for third. The Century Dictionary gives the real spelling as "peddler," though "pedlar" is also found; but no "peddlar" appears anywhere.

Of course, the court said, the defendant might reasonably have gathered from the sign that no peddlers were wanted, but statutes in restraint of personal liberty are to be construed strictly. The prosecuting witness had not complied strictly with the ordinance, and the defendant was therefore discharged.

The keeper of the boarding school was greatly astonished at this judgment, but it is to be presumed that she took steps at once to correct the spelling of the placard.

**Legal Notes of Pertinence.**

In St. Louis, Judge Klein refused a divorce for a couple who had been married twenty-six years and had fourteen children. "Reasonable forbearance," said Judge Klein, "will enable you to live together during your few remaining years, thereby setting a good example to your children to lead them in the paths of virtue and rectitude." It is too bad that there are not more Judge Kleins on the bench.

A by-law of a savings bank organized under the general banking law, and the profits of which belong to stockholders and not to depositors, is held, in *Ackenhausen v. People's Sav. Bank*, ([Mich.] 33 L. R. A. 408), to require the express or implied assent of a depositor before it can operate to relieve the bank from liability to pay him his deposit because of payment to another person who has forged his name and presented his book.

An event of national importance will shortly take place in France. It is the retirement of M. Diebler, the executioner, who, now that he has guillotined 502 criminals, thinks it high time his successor was appointed. He is 63 years of age, and has been forty years in his country's service. He served his apprenticeship with Roch, his predecessor, assisting in eighty-two executions.—*London Globe*.

Ex-Secretary Olney has declined the invitation to become professor of international law at Harvard, according to the *Boston Transcript*, which says that though President Eliot offered a liberal salary, Secretary Olney proposes to return to active law practice.

An attorney who holds a claim for collection is held, in *Havemeyer v. Dahn* ([Neb.] 33 L. R. A. 332), not to be disqualified from taking an acknowledgment as notary public of a mortgage made to secure the claim. The somewhat similar case of *Cooper v. Hamilton Perpet. B. & L. Asso.* ([Tenn.] 33 L. R. A. 338), holds that a stockholder and director of a corporation is not disqualified to take an acknowledgment of a deed of trust to the corporation. With these cases is a note in which the authorities are found on the general question of the right of interested persons to take an acknowledgment.

The jury in a divorce case in South Dakota was composed of six men and six women.

How far the officers of militia organizations may go in punishing offending members is a question which has recently come before the Supreme Court of Minnesota. That tribunal has decided that the captain of a company of the National Guard of the State, when it is not acting as a military force, has no authority summarily to punish a member of his company by imprisonment for refusal to obey his orders.

Two very simple legal terms are frequently confused by newspaper writers. These are the words "bequeath" and "devise," as applied to gift by will. The former term properly applies to personal property only, the latter to real estate only. This error is made boldly prominent in the form of testamentary clause printed on the last page of a prominent charitable institution here in New York, as a reminder to the generously disposed: "I hereby bequeath and devise unto the trustees of the — — — the sum of — dollars." "Libel" and "slander" are also frequently confused. The former is written, the latter spoken defamation.

A decision which sharply defines the responsibilities of political nominees has been rendered in Kansas, in which it is held that a candidate for vice-president cannot withdraw his name from a certain electoral ticket nominated by his party in a certain State, where his name, with that of the presidential candidate, has been certified by a State convention of his party, and he has not declined the national nomination nor attempted to withdraw as a candidate in the State.

A man can have revelations from God if he wishes, and not thereby give any one a right to call him crazy, the Supreme Court of Iowa rules. The decision was rendered in an action to recover for libel. Plaintiff had instituted proceedings to compel a creamery to cease operations on Sunday, announcing that he took this action in obedience to a revelation from God. One of the proprietors of the creamery, therefore, circulated a report that the plaintiff was insane. The sanity of the man favored with revelations was established to the satisfaction of the court by medical testimony, and the injurious report was adjudged to be malicious as well as unfounded and not privileged.

The Texas Court of Civil Appeals has affirmed the decision of the lower court in the case of *Thomas W. Cain*, a negro minister, who purchased a first-class ticket from St. Louis to Galveston, but was compelled to ride in a "negro" car. The Appellate Court held that where a ticket is sold for a separate coach, like a Pullman, a negro is entitled to passage in that kind of a car, or the company is liable for damages.

A jury recently rendered a verdict of \$1,175 in an eviction case against the Georgia Central Railroad at Atlanta. At Camilla the plaintiff purchased a coupon ticket to Atlanta and return. At Atlanta he had to sign the coupon for his return, which was to be identified in turn before the conductor. The plaintiff used printed letters in writing, and thus signed his name. When he presented the pass thus signed to the conductor that official refused to accept it, believing that it was an attempt to evade, stopped the train and ejected him. He sued for damages, and won as indicated.



### Notes of Recent American Decisions.

**Action on Separate Contracts — Parties.**—Two attorneys, not partners, employed by the same client under separate contracts, cannot jointly sue for their services. (*Starrett v. Gault* [Ill.], 46 N. E. Rep. 220.)

**Assignment — Claim of Damages for Fraud.**—A claim for damages alleged to have been sustained by reason of a conspiracy to defraud is not assignable as a claim for injury to personal property. (*John V. Farwell Co. v. Wolf* [Wis.], 70 N. W. Rep. 289.)

**Attachment — Fraud.**—In the absence of fraud on the part of a vendee in obtaining goods, the vendor who has taken the notes of the vendee cannot maintain attachment against the vendee after the notes have been assigned to and while they remain with another, even if the assignee, in purchasing the notes, relied upon the vendor's indorsement. (*Landauer v. Espenhain* [Wis.], 70 N. W. Rep. 287.)

**Attachment — Garnishment.**—A debt due by a resident of Vermont, which is represented by a note payable to a resident of New York, who has it in possession, cannot be attached in Vermont on trustee process, so as to preclude a subsequent recovery on it by the payee in New York. (*Ward v. Boyce* [N. Y.], 46 N. E. Rep. 180.)

**Bills and Notes — Collateral Attack.**—Where a note is transferred to a trust company as collateral security for certain interest payments which the owner of the note has guaranteed, the owner cannot, without the consent of the trust company, sue on the note in his own name, since he is not the party really interested, within Code, § 2594. (*Alabama Terminal & Improvement Co. v. Knox* [Ala.], 21 South. Rep. 495.)

**Chattel Mortgage — Satisfaction.**—Where a chattel mortgagor performs labor for the mortgagee sufficient in value to pay the mortgage debt, under an agreement that it shall be so applied, the law will make the application as the labor is performed, and the mortgage will be discharged, and the title to the property vested in the mortgagor, whether the application is in fact made by the holder or not. (*McCullars v. Harkness* [Ala.], 21 South Rep. 473.)

**Constitutional Law — Reviewing His Own Decisions.**—Const. 1889, art. 6, § 8 (Const. 1895, art. 6, § 3), providing that "no judge shall sit in review of a decision made by him," requires the reversal of a judgment of the General Term affirming an order of the Special Term made by one of the judges who sat in the General Term, though he had forgotten his former connection with the case. (*Van Arsdale v. King* [N. Y.], 46 N. E. Rep. 179.)

**Contract — Construction — Payment in Installments.**—A contract for grading which provides for a payment of an installment on the price as each successive one-fourth of the work was finished is severable, so that the contractor for default in payment of one installment may, without finishing the work, sue for the contract-price of the part finished, though he was not actually prevented by the other party from completing the work. (*Keeler v. Clifford* [Ill.], 46 N. E. Rep. 248.)

**Conveyance — Expectant Interest — Validity — Ancestor's Assent.**—The Supreme Court of Texas decided in February, 1897, in *Hale v. Holton*, that a conveyance of an expectant interest in an estate may be valid in equity, and that the ancestor's assent is not essential to the validity of his heir's conveyance of an expectant interest in his estate, particularly where he is *non compos mentis*.

**Criminal Law — Venue — Abortion.**—Where an instrument to procure abortion is used in one county, and the woman dies in another, either county, has jurisdiction, under Rev. St. 1894, § 1649 (Rev. St. 1881, § 1580), providing that, where a public offense is committed partly in one county and partly in another, jurisdiction is in either. (*Hauk v. State* [Ind.], 46 N. E. Rep. 127.)

**Landlord and Tenant — Alteration of Premises — Injury to Tenant.**—It is decided by the Supreme Court of Illinois, in *Jefferson v. Jameson & Morse Co.*, reversing the Appellate Court, that an owner, who lets the work of altering a building to a competent mechanic, and surrenders entire control of the premises and supervision of the work to him, is not liable for an injury done by the contractor to a tenant who, for a valuable consideration, agreed to the making of the repairs.

**Payment — Mistake.**—An installment of interest paid twice by mistake, because not indorsed on the note when first paid, can be recovered back at law. (*Hummel v. Flores* [Tex.], 39 S. W. Rep. 309.)

**Pledge — Collateral Security — Appropriation of Payment.**—In *Blackmore v. Granberry* (39 S. W. Rep. 229), decided by the Supreme Court of Tennessee, it was held that where parties have made no application of the proceeds of collateral security, pledged for the indebtedness of the pledgor generally, and the oldest debt is also one on which there is a surety, a court of equity will make an application to such debt in relief of the surety.

**Warehousemen — Conversion.**—The Supreme Court of Alabama, in *Davis v. Hurt*, decide that the mere failure of a warehouseman to deliver on demand goods which have been intrusted to him does not support an action of conversion, where the failure is solely because of the goods having unaccountably disappeared; the remedy of the owner being *assumpsit* for breach of contract, or case for negligence.

## The Albany Law Journal.

ALBANY, MAY 1, 1897.

### Current Topics.

WITH this issue THE ALBANY LAW JOURNAL greets its readers in an improved form, with tinted cover, enlarged in size, and in other respects notably altered for the better. This progress, gratifying as it is to its publishers, is but a beginning in the work of betterment. Proud, as it has a right to be, of its past, the JOURNAL will not be content with achievements already secured. It will press earnestly forward, with high aim and unflagging industry.

This issue will go to thousands of lawyers throughout the United States who are not now regular readers or subscribers. It is commended to their critical attention in the belief that they will recognize in it an indispensable aid to the practice of an ancient and honorable profession — a counselor, helper, friend, companion. Already circulating in every State in the Union and in Canada, this journal sees a practically limitless field for widening its influence and extending its usefulness. Under new editorial and business management, no effort will be spared to make each issue brighter and better than the preceding one. That the improvements already made are meeting with appreciation is attested by the rapidly growing circulation, while the attractive advertising columns of the present issue, larger than ever before in the history of the paper, show that live merchants and manufacturers who have something to sell recognize in THE ALBANY LAW JOURNAL an unexcelled medium for reaching, not only lawyers, but men of culture and high standing generally.

The history of the Court of Appeals of the State of New York is a most creditable one. Since its organization, in 1870, its career has been on an exalted plane. It possesses public confidence. Patience and attention during arguments, and fairness in considering

and disposing of causes submitted to it, have been among its leading and most satisfactory characteristics. Its determinations are generally accepted as sound. To the profession its decisions and opinions are of the greatest consequence, and to the public at large it is of the utmost importance that the court should continue, generally, in the path thus far followed. It is important for its continued success that, so far as is consistent with changes naturally to come, changes in its membership should be as few as possible.

We are led to these remarks by reason of the fact that a regrettable change is soon to take place. The inexorable age limit is, this year, to deprive the court of the further services of Chief Judge Andrews. In him the sole survivor of the original members of this tribunal will retire, and a new chief judge is to be elected. It is to be regretted that this selection is to be made through political nominating machinery. It is not the custom of this journal to take part in politics, but the selection of a person to fill so important a judicial position is one of the greatest public interest, especially to lawyers.

Originally, in 1870, Chief Judge Church was elected with the associates, and since then the chief judgeship has been vacant five times. With the exception of Chief Judge Ruger, the chief judges were all selected from among the associate judges. Judge Folger, in 1880, was appointed chief to succeed Judge Church, deceased; Judge Andrews was, in 1881, appointed chief to succeed Chief Judge Folger, who resigned to become secretary of the United States treasury; Judge Earle, in 1892, was appointed chief to succeed Chief Judge Ruger; and Judge Andrews again became chief upon his unanimous election in November, 1892. It seems to us that the same motives which have generally led to the appointment of a chief judge from the associates might well, at this time, be followed in the nomination and election of a chief. Indeed, there is much to be said in favor of such a court selecting its own presiding officer — or that provision be made that the senior judge for the time being shall act as chief. It has

never seemed quite right that a stranger should be selected chief judge of this tribunal. We are aware that in the Supreme Court of the United States the chief judge has never been selected from the associates, and that in our own State Chief Judge Ruger was elected, though without any previous judicial experience.

Notwithstanding these precedents, it does not seem to us to be the wisest action. The selection of a chief, other than a member of this court, is exceptional, and the exception does not demonstrate the wisdom of the act. While such a thing as an active canvass for such a position by any one is not regarded as proper, the judges themselves are wholly debarred from participation in political proceedings; the longer they have been on the bench the further removed are they from the political influences which appoint or nominate — one of the best reasons, therefore, for appointment or nomination tends to prevent either — and this applies as well to Washington as to Albany.

In line with these views, it seems to us that the senior judge of the court should now be selected as chief judge. There is no other State officer to be elected at the November election, and there are to be no State conventions. The State committee of each party have the power to nominate. Judge Gray is, we believe, the judge next in seniority after Judge Andrews. His nine years of service have abundantly qualified him for the position of chief judge. The fact that he was elected as a Democrat should not prevent the Republican State committee from nominating or indorsing him. His election would make no change in the political complexion (if it has or should have a political complexion) of the court. In the selection of judges for this court the record of our State is most admirable in its application of politics. Judges Andrews and Rapallo were nominated by both parties for re-election as associate judges, one being a Republican and the other a Democrat. In 1892, when the last vacancy of the chief judgeship was filled, Judge Andrews, having been nominated by the Republican State committee, was in-

dorsed by the Democratic State committee, and elected by the votes of both parties, although the State went Democratic.

It seems to us that to lift the court above and keep the selection of its members out of partisan politics, it would be eminently wise and proper that Judge Gray be nominated by both Democrats and Republicans, and he thus practically unanimously elected.

Collisions between bench and bar are, happily, somewhat rare in this country, as well as in Europe, and when they do occur it may be safely asserted that both sides are to blame. Judges, being human, are perhaps quite as liable to err as are the lawyers who practice before them. It should be remembered always that no judge is above the law. Counsel in the conduct of cases in court have rights which are as much entitled to respect, and duties to perform which are as sacred as those which pertain to the bench. The members of the profession are, in effect, officers of the court. This being the case, fair and moderate criticism of the behavior of judges, when the facts warrant it, is proper and beneficial alike to the bench and the bar. It has been well said that the pathway between the rights of judge and counsel is frequently narrow and easily crossed. Not infrequently the judge is the trespasser, but, except on points of law, and even then demurely, a judge is seldom or never opposed. One can but admire the fearless and outspoken criticism of the bench frequently observed in English law journals, an attitude which is matched by that of the bar in asserting and maintaining its rights, irrespective of all possible consequences. Every piece of overbearing conduct on the part of a judge is protested against and publicly condemned. Recent examples, from the Law Notes, for March, are interesting:

In a case Mr. Willis was examining one of the railway officials, and submitted to him a plan showing the position of the trolley, when Mr. Justice Hawkins interrupted him, stating that he should allow no costs of a third day in this case, remarking that the facts were quite clear. On Mr. Kemp, Q. C., rising to cross-examine the witness, his lord-

ship again interfered, saying: "These cases are spun out." Mr. Kemp: "By whom, my lord?" Mr. Justice Hawkins: "By all parties." Mr. Kemp: "Including your lordship?" Mr. Justice Hawkins: "Don't be impertinent." Mr. Kemp: "Your lordship has no right to say I prolong cases. I reply that it is your lordship." Mr. Justice Hawkins: "I say that unnecessary questions are put to witnesses." Mr. Kemp: "I am the person to consider whether it is necessary to put certain questions, and you have no right to say that." Mr. Justice Hawkins: "Don't be impertinent, Mr. Kemp, and sit down." Mr. Kemp: "I am not impertinent; it is your lordship. It is not because your lordship is sitting there that you have a right to address me in this language." Mr. Justice Hawkins: "I do." Now, Mr. Kemp lost his temper, but small blame to him when the judge deliberately charges him with spinning out a case to obtain another refresher. When will judges imitate the example of their revered ancestors and hold their tongues?

Mr. Justice North, last month, went outside his judicial functions. His lordship was only asked to decide a question of copyright about the song, "You Never See the Same Bird Twice." The public are not one bit interested in knowing that his lordship thinks it is a drivel. The public do not ask their judges to act as censors for their songs. A silent tongue makes a good judge.

We hear that in the amusing "bug" case decided last month, too late for us to comment on, Judge Bacon, at the Bloomsbury County Court, behaved most curiously. To the witness, Mrs. Phillips, he said: "Take your veil off and tip your hat back." Mrs. Phillips: "I can't." Judge Bacon: "You can. Tip it farther back." Mrs. Phillips: "I can't." Judge Bacon: "Oh, yes, you can. I have had other women here, and I know what can be done." Surely, even a judge is not justified in speaking so brusquely to a woman. In addition, his honor thought fit to severely question the witness, she having taken the oath on the New Testament. Altogether, his behavior appears to once again illustrate our article, "Judges' License."

In this connection the article in this issue, entitled "Historic Collisions Between Bench and Bar," embodying leading examples cited by Mr. Oswald in his work on "Contempt of Court," will be found intensely interesting.

The ancient custom, in the law courts of the world, of requiring witnesses to "kiss the

Book" before testifying, has recently received much discussion in English journals, and with a view of determining whether, as had been asserted, the practice was responsible for the spread of disease, Mr. Richardson, consulting chemist to the Bradford corporation, made an analysis of a Testament used in Ripon, England, court-house for sixty years, and said to have been kissed by 40,000 people. Mr. Richardson found no germs of typhoid, tuberculosis, or diphtheria. The only germ of a dubious character was the "pus cocci," usually found on wounded or sore skin. Although these germs were not necessarily harmful, there were conditions in which they might produce complications, and the expert is quoted as saying he would not kiss any surface on which they were spread. And yet hundreds kiss Testaments quite as objectionable as the Ripon Testament, or more so. The danger of contracting disease by this means may not be imminent, but it would seem to be just as well to avoid it by substituting some other method of "swearing witnesses." The bar associations might properly take up the matter.

Two recent decisions with reference to the liability of telegraph companies are of special importance. In the case of *Western Union Telegraph Co. v. Gossett* (38 S. W. Rep. 536), decided by the Texas Court of Civil Appeals, the company's failure to deliver a message at Gainesville, Texas, was the cause of plaintiff's being detained in jail at Ardmore, Indian Territory, about five days longer than he would otherwise have been; and this cost the telegraph company \$500, besides costs. Gossett's home was at Gainesville, where he had a wife, and where his father was an old resident. But he himself had the misfortune to land in jail at Ardmore for some bailable offense. The law required resident sureties on his bail bond, and these he could only obtain by indemnifying them. His wife visited him in jail, and it was agreed that she should return to Gainesville, and should arrange with the elder Gossett to put up "collateral" sufficient to indemnify his son's sureties. The prisoner, in the meantime, was to find resi-

dents who would accept such indemnity and go upon the bond; and when they were found he was to telegraph home to that effect. Both husband and wife succeeded in what each undertook, and, on September 9, he forwarded a message in these words: "Come at once; bring father to secure my bond." This message was sent from Ardmore at 7:02 P. M., and was received at the Gainesville office at 7:06 P. M., the offices being but about forty miles apart. An office boy was sent out with the message, but returned soon after and reported that the addressee, Dora Gossett, lived in the country a mile and a half distant. As a matter of fact, Mrs. Gossett lived within a half-mile of the telegraph office, and might have reached Ardmore that night, with her father-in-law, had the telegram been delivered. But instead of being delivered, the message was placed upon a file at the telegraph office, on the strength of the boy's false report. Hearing nothing from his relatives, Gossett, after a day or two of impatient waiting, wrote a letter to his wife, which she received on the 13th. She at once repaired to the telegraph office, and, upon her demand, the telegram, which had been lying there ever since the evening of the 9th, was given to her; and she at once set about getting up the collateral; but it was not until the 15th that all arrangements were completed, the bail perfected, and Gossett released. He at once sued the company, and a jury gave him a verdict of \$500. The company appealed, claiming the verdict to be excessive, but the Appellate Court refused to disturb it, saying, in so many words: "The \$500 damages awarded by the jury are not excessive."

The other case referred to, which was recently decided by the Supreme Court of Missouri, that of *Reed v. Western Union Telegraph Co.* (37 S. W. Rep. 904), abrogates a rule of damages in suits against telegraph companies, which has been steadily adhered to for more than thirty years, and substitutes a new and entirely different rule of damages in that class of cases. In *Wann v. Western Union Telegraph Company* (37 Mo. 472), decided in March, 1866, the Su-

preme Court established the rule (which was similar to that of the Federal Supreme Court at the present day) that the company could not be held liable for damages caused by error in transmitting messages, unless the same were repeated, in accordance with the terms of the notice printed on all telegraphic blanks of the company. This rule, after being upheld for nearly a generation, is now entirely overthrown, and under the following circumstances: The plaintiff lived at Kansas City, Mo., but owned land near Cedar Rapids, Iowa, which was being looked after by a local agent, living at the latter place. May 25, 1889, her agent undertook to send to her a telegram like this: "Offered \$1,300 cash. Can't get more. Must hear immediately." There was no formal repetition of the message, but it was of such importance to the plaintiff that, before replying to it, she requested the company's agent at Kansas City to verify its correctness. This he did, or pretended to do, and assured plaintiff that everything was all right. Relying upon this assurance, she wired her agent to sell for the amount offered. The agent at once closed the deal at \$1,300. Meanwhile the plaintiff had executed a deed, reciting a consideration of \$1,900, which was promptly forwarded to the agent, reaching him on the 29th. On receiving this deed, and finding that it recited a consideration of \$1,900 instead of \$1,300, the agent requested delay until he could communicate with his principal by mail. This the purchaser would not accede to, but demanded immediate possession, and threatened suit for damages unless his demand was complied with. Under these circumstances the agent delivered the deed and forwarded the purchase money. Plaintiff's demand for \$600, the amount she had lost by the transaction, was refused, on the ground that the message had not been repeated. Plaintiff obtained judgment before the trial court. The Supreme Court, on appeal, held squarely against the right of the company to stipulate against its own negligence, under the plea that the transmission of messages by electricity was so seriously affected by atmospheric causes, which were uncontrollable,

that it would be ruinous to deny telegraph companies the right to limit their liability to any extent short of gross negligence. The court said the decision in the case of Wann had been rendered when the system of telegraphic communication was yet in a crude state; the difficulties which then appeared to the courts to be so serious had largely vanished; and when, as in this case, there was no evidence whatever of atmospheric disturbances or unfavorable conditions, it was plain that an error by which "thirteen" had been distorted into "nineteen" was caused either by careless operatives or imperfect and insufficient instruments and appliances. "Without rendering them liable as insurers, or holding them for the action of the elements over which they have no control," says the court in conclusion, "sound judicial reasoning does demand that they should be required to perform their duties in a careful and diligent manner, and that they should respond for the negligence of their servants."

The next meeting of the American Bar Association will be held at Cleveland, O., in August. In view of the great interest which attaches to the meetings of this influential body, the suggestion has been made that two meetings a year be held — one somewhere in the summer cool of the North, and the other in the winter warmth of the South. We entirely agree with the suggestion of the American Law Review that "a winter meeting at Jacksonville, Atlanta, New Orleans or Galveston, and an occasional migratory meeting on the Pacific coast, would make the American Bar Association more nearly a national body, and less an eastern body, than it now is."

The danger of blending fact with fiction is forcibly illustrated in a suit which recently occupied the attention of Part IX. of the Supreme Court, New York city. It was that of Col. Jenyns C. Battersby v. Peter Fenelon Collier, the publisher of the magazine *Once a Week*, to recover \$25,000 for alleged libel. The plaintiff is about 70 years

of age, a graduate of West Point, and served with distinction during the Civil War. He was present at Lee's surrender, when he was lieutenant-colonel of the First Regiment, New York cavalry, attached to Grant's command. Col. Battersby devoted his waning years to painting a mammoth canvas, representing the scene at Appomattox Court House, making the figures life-size, the portraits accurate, and the surroundings historically accurate. When Judge W. L. Sessions, of Jamestown, N. Y., was engaged in selecting works of art to be exhibited at the World's Fair, held at Chicago, he examined Col. Battersby's picture, being accompanied at the time by his daughter, Mrs. Edith Sessions Tupper, the writer. The fact that she was a writer, Col. Battersby says, was not known to him when he gave Mrs. Tupper permission to inspect the painting. Some time after a story by the lady appeared in the 1892 Christmas number of *Once a Week*. It was entitled "The Colonel's Christmas," and the hero was represented as an old army officer who had devoted his waning years to painting a mammoth picture of the meeting between Grant and Lee, at Appomattox. Many graphic details about the picture were given, but it was described as a daub. When the soldier-artist read the story he was deeply grieved, being convinced that he would be generally recognized as the hero. Another thing which grieved him was the fact that the author, in her concluding passage, made her hero expire from excitement, when notified that the examining board had finally decided to accept the picture for exhibition. Col. Battersby declared that some of his acquaintances actually inferred that he was dead. Furthermore, as a matter of fact, the painting was not accepted, and the artist alleged that the story in *Once a Week* caused its rejection. Hence the suit against Collier. A unique feature of the trial was the reading of the story in question to the jury, by the plaintiff's attorney. Judge Bischoff, in his charge to the jury, said there was no evidence to show that the story was actuated by malice, but that if they found the plaintiff had suffered by reason of the ridicule to which he

had been subjected by the article, they were to find a verdict for an amount of damages commensurate with the amount of ridicule actually sustained. The jury thereupon gave a verdict for the plaintiff for \$1,822.16, which seems quite enough, under all the circumstances, to salve his wounded sensibilities. The case being a novel one, and the points involved peculiar, it is altogether likely to be taken to the highest court, on appeal.

The Supreme Court of the United States has affirmed, in an opinion delivered by Justice Brown, on April 17, the decision of the Circuit Court of Appeals for the sixth circuit, in the case of the petition of James Lennon for a writ of *habeas corpus*. This case originated in 1893, and has attracted widespread attention. Lennon was a locomotive engineer on the Lake Shore and Michigan Southern Railroad, and as such refused to haul the cars of the Toledo, Ann Arbor and North Michigan Railroad Company in disobedience of an order of the Circuit Court of Ohio, because the engineers of the Ann Arbor road were on a strike, and those of the other line were in sympathy with them. Lennon was arrested and a fine of \$50 imposed. This occurred in the Circuit Court of the northern district of Ohio. Lennon immediately filed a petition for a writ of *habeas corpus*, which was successively denied by the courts below, and their action is now sustained by the court of last resort. We shall take occasion to fully review the case as soon as the full opinion is at hand.

Congressional investigations, in view of a decision handed down by the United States Supreme Court, on the 18th inst., will have more terrors for recalcitrant witnesses than heretofore has been the case. The decision referred to was in the case of Elverton R. Chapman, the New York broker, who was convicted in the district courts for refusing to answer certain questions propounded by the senate committee investigating the alleged Sugar Trust scandal, in connection with the passage of the so-called Wilson Tariff bill, in 1894. The decision of the

court, which was unanimous, is an announcement to every citizen that he is subject to the subpoena of either house of congress through its committees, and if he refuses to answer any question the committee may ask, is liable to fine and imprisonment. Chapman was subpoenaed by the senate committee appointed to investigate the rumors that the rates in the Wilson Tariff bill had been influenced by dealings of senators in the stocks of the American Sugar Refining Company. When asked whether any senators had dealt with his firm in sugar stocks, Chapman, under advise of his counsel, declined to answer. Besides him, Messrs. Havemeyer and Searles of the trust, John McCartney, A. Washington Croker, and Messrs. E. J. Edwards and John A. Shriver, newspaper correspondents, also declined to answer questions put to them by the committee. Under the terms of section 102, Revised Statutes, they were certified to the attorney for the District of Columbia, who secured indictments against each of them. Chapman's was selected as a test case and ex-Senator Edmunds and Jere. M. Wilson defended him. They exhausted every resource known to the law, reviving, after a lapse of nearly a century, the writ of prohibition to prevent the Criminal Court of the District from trying the case. But all in vain. Chapman was tried, convicted, and sentenced to imprisonment for thirty days and to pay a fine of \$100. His release from the custody of the marshal under that sentence was sought by *habeas corpus* proceedings initiated in the Supreme Court.

The questions raised by petitioner's counsel were that the district court had no jurisdiction; that the questions asked by the senate committee were not authorized under the Constitution, and that the law under which he was indicted and tried is unconstitutional. The purpose of the law, as stated in the title of the original act, was "more effectually to enforce the attendance of witnesses on the summons of either house of congress, and to compel them to discover testimony." To secure this it was provided that a witness thus summoned, who refused to answer "any question pertinent to the question under in-

quity," should be punished. It was suggested that the statute was defective because it was too broad and unlimited, but, said Chief Justice Fuller, the word "any" in the sections named referred to matters within the jurisdiction of the two houses of congress before them for consideration, and proper for their action, to questions pertinent thereto, and to facts or papers bearing thereon.

"According to the preamble and resolutions in this case," said the court, "the integrity and purity of the members of the senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject members to censure or expulsion. The senate, obviously, had jurisdiction of the subject-matter of the inquiry it directed, and power to compel the attendance of witnesses, and to require them to answer questions pertinent thereto, and the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the fourth amendment to the Constitution. The questions were not intrusions into the affairs of the citizens, but whether that firm was employed by any senator to buy or sell for him any of that stock whose market-price might be affected by the senate's action. We cannot regard these questions as an unreasonable search into the private affairs of the witness, simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of the two houses, they cannot be defeated on purely sentimental grounds."

The opinion says that the history of the act of congress demonstrated the difficulties under which congress had labored in compelling unwilling witnesses to disclose facts deemed essential, and the court agreed with the District Court of Appeals "that congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions." Other objections by counsel were swept aside, and

in conclusion the court said that "the law was not open to constitutional objection, and that the Criminal Court of the District of Columbia had jurisdiction to try and determine the case. The writ must be denied."

Chief Justice Fuller announced that the petition for a writ of *certiorari* to bring up the whole record of the case for review of law and facts, which could not be made on a petition for a writ of *habeas corpus*, was also denied.

The unmanly and un-American boycott has again been invoked, this time by some score or more labor unions in Butte, Mont., against the Chinese. The methods in no wise differ from those usually employed, embracing the circulation among citizens of warning circulars, notifying them not to deal with the proscribed parties, stationing men before the doors of the latter for the same purpose, and hiring spies to follow the Chinese to threaten them with violence. The principal sufferers have appealed to the United State District Court for relief, and Judge Knowles has granted a temporary restraining order directed against the defendants, forbidding the whole boycott business until the suit which has been instituted can be heard, or until the injunction shall be removed. This case is certain to be carried to the court of last resort. However objectionable may be the presence and methods of Chinese in this country, there can be no defense of the boycott method of driving them out. The whole question of boycotting should be settled for all time by the highest judicial authority.

In the New York City Court, recently, a jury decided a suit insignificant in the amount involved, but important as establishing a precedent. Ephraim C. Force sued the Pullman Palace Car Company to recover \$250, the value of a sealskin sacque and a boy's overcoat. The testimony went to show that Mrs. Olive A. Goodwin, while traveling between Cincinnati and Washington, in November, 1895, with her 12-year-old son,



left her sealskin sacque and the boy's overcoat in the sleeping car while she went into the dining car for breakfast. When she returned the garments were not to be found. Mrs. Goodwin testified that when she left the articles she called the porter's attention to them. This the porter denied. The company also placed in evidence the notice printed on their tickets warning passengers that the company would not be responsible for the loss of wearing apparel, money or jewelry. Justice McCarthy charged the jury that if they were convinced that Mrs. Goodwin did not read the instructions on the back of the ticket, or was ignorant of the company's rules, or if they were convinced that the company was guilty of negligence, their verdict must be for the plaintiff. The jury promptly found for the plaintiff for the full amount claimed.

#### IMPRISONMENT FOR DEBT.

"I AM more afraid of debt than of the house of lords."—Dr. Sam Johnson.

"They have e'en put my breath from me, the slaves. Creditors? Devils."—Timon of Athens.

We all know how easily borrowed money is spent, and how assertive is the need of money; but it is comparatively easy in these days, either by specious promise or direct denial, or by the use of the elastic promissory note, with its inevitable renewals, to refer payment to that period of large reference—the future. But the time has not long gone by when it was necessary to produce either money or flesh. I refer to the days when imprisonment of the body for the debt of its owner was common, and, indeed, regular—the days when prison-reformers were unborn and international prison congresses unknown.

The subject of debt itself always has an interest, more or less absorbing in correspondence with our honesty and our means, for debt touches all and presses many. The complex debts of the bankrupt of advanced society need a many-claused statute. In more primitive times the bankruptcy of a merchant was simply expressed by the actual breaking of the bench or counter upon or behind which he traded or did business. From this breaking came the word "bankrupt." It was formerly the custom in France, we are told, even so late as the seventeenth century, for bankrupts to be distinguished by the wearing of a green bonnet. This was simple, indeed.

The Romans, in their days of vigor, helped

creditors and punished debtors by a table or law devoted to the matter, which is the third of the twelve tables. By these same tables it was provided that those who slandered by word or verse should be beaten with a club; false witnesses were to be thrown headlong from the capitol; parricides were to be sewn up in a sack and thrown into the convenient Tiber; so that it is not extremely surprising to find the high crime of debt rigidly dealt with. This third table, which was in force during the middle period of Roman jurisprudence, was as follows:

#### "TABLE III.

##### "OF LOANS AND THE RIGHT OF CREDITORS OVER THEIR DEBTORS.

"*First Law.* Let him who takes more than one per cent. interest for money be condemned to pay four times the sum lent.

"*Second Law.* When any person acknowledges a debt, or is condemned to pay it, the creditor shall give his debtor thirty days for the payment of it; after which he shall cause him to be seized and brought before a judge.

"*Third Law.* If the debtor refuses to pay the debt, and can find no security, his creditors may carry him home and either tie him by the neck, or put irons upon his feet, provided the chain does not weigh above fifteen pounds; but it may be lighter, if he pleases.

"*Fourth Law.* If the captive debtor will live at his own expense, let him; if not, let him who keeps him in chains allow him a pound of meal a day, or more, if he pleases.

"*Fifth Law.* The creditor may keep his debtor prisoner for sixty days. If in this time the debtor does not find means to pay him, he that detains him shall bring him out before the people three market days, and proclaim the sum of which he has been defrauded.

"*Sixth Law.* If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber."

Even Gibbon is not able to tell us whether the "one per cent." established as the legal rate of interest by the first section of this table, meant one per cent. yearly or one per cent. monthly. If the latter, we who struggle with a horrible six per cent., many times unsuccessfully, know that the Roman poor debtors certainly needed earnest prayers.

Slaves for debt, under the provisions of this third table, as above, and as modified and abridged to meet Roman progress and enlargement, were very numerous. It will be seen that the Roman debtor had thirty days after judgment to pay his debt; if he did not then pay or give security, or

sell himself by entering into the *nexum* (or slavery for debt), the creditor had a right to seize him, wherever found, and carry him before the prætor; if the delinquent resisted, the creditor had a right to drag him. Doubt has been felt and expressed by some whether the sixth law meant that a debtor's body be actually cut into pieces. Gibbon is in favor of a strict interpretation of the law. He thinks it meant just what it said.

Under this law of slavery many abuses took place. We are told of one Venturius, the son of a man of consular rank, who, not having been able to pay for his father's funeral ceremonies, was kept in the *ergastulum* (or workhouse) by C. Plautius, his creditor. One day he contrived to escape, and ran to the Forum, all covered with blood. This was in 326 B. C. Abuses produced reforms, and the severity of the law was met by an entire abolition of debt itself; all scores were rubbed out, all slates were made clean again.

Leaving Rome, and passing to England, we find that imprisonment for debt was there provided for by statute, and was legal, down to the time of Victoria, the present gracious sovereign. Such imprisonment was abolished in England in November, 1861, except in cases where the debt had been fraudulently contracted, or where there had been other moral delinquency. This English exception suggests, in order that the brutal harshness of the Roman law be well understood, that it should be stated that the word "defrauded" (the last word in the fifth law) is inapt. Apparently, imprisonment for debt was proper and sanctioned by the Roman law, fraud or no fraud. The Latin of the tables is obscure and obsolete, and the tables, as we now have them, come from scattered sources. The word "defrauded" should probably have a lay meaning to it, and not a legal one.

The Fleet prison was long a place of security or confinement for debtors, and, apparently, was founded in the first year of Richard the First. It was first used for the incarceration of political prisoners, being called, in fact, the "Roya' Prison." The sentences of the unconstitutional Court of Star Chamber keep the Fleet well supplied with inmates. After the abolition of the Star Chamber the Fleet was used more especially for the imprisonment of arrested debtors. The old prison perished in the great fire, but a second rose from the ashes. The old prison, with its political associations, had a record of horrible atrocities; the new prison succeeded to these—it seemed as by heirship. London debtors (in 1805, for instance) would be sent to the King's Bench prison, the Fleet, the Marshalsea, Ludgate prison, Giltspur Street Compter, Newgate, Whitechapel prison, or the Clink. The Whitecross Street prison for debtors was erected in 1813 or 1815. The Fleet, the Marshalsea and the Newgate prison were abolished by the Prison act of 1877.

The annals of the Fleet have much and the most

interest, as that prison was geographically, and in fact, closely connected with Fleet street, "The Highway of Letters," and its literary denizens.

"Yet think what ills the scholar's life assail,  
Toil, envy, want, the garret, and the jail."

Money always had its value in the Fleet. If a prisoner or his friends could command enough influence or money, a lodging could be hired within "the rules" or "the liberty" of the Fleet. Such a resident was required to furnish security to the warden, and to pay three per cent. of his amount of debts to the same. This concession was granted by the courts of Westminster around the time of the great conflagration. However, "the rules" embraced quite a neighborhood, and the personal liberty of a favored lodger therein was not greatly restricted, though he was supposed to be always under the surveillance of an official. William Penn lived within "the rules" of the Fleet, his offense, preaching in the street, apparently; and, later Richard Savage, the admired of Dr. Johnson, thus spent a season.

Nicholas Nickleby, on his mission to Madeline Bray, was directed to "a row of mean and not over-cleanly houses, situated within 'the rules' of the King's Bench prison, and not many paces distant from the obelisk in St. George's Fields. The rules are a certain liberty adjoining the prison, and comprising some dozen streets in which debtors who can raise money to pay large fees, from which their creditors do *not* derive any benefit, are permitted to reside by the wise provisions of the same enlightened laws which leave the debtor who can raise no money to starve in jail, without the food, clothing, lodging or warmth which are provided for felons convicted of the most atrocious crimes that can disgrace humanity. There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets."

"Atty.—Some sons of Phœbus in the courts we meet.

"Serj.—And fifty sons of Phœbus in the Fleet."  
—Prologue to "The Rivals."

Pope designated the Fleet as "the haunt of the muses."

The office of warden of the Fleet was farmed out, and the mercenary wardens often refused the very necessities of life to needy prisoners. There were three sponging-houses attached to the prison, and controlled by the chief wardens. These houses were a kind of ante-chamber to the prison proper, and their absorbing mission is well expressed in the name. A debtor might remain in one of these

places upon payment of twelve or fourteen shillings a day, or until the return day of the writ, when it was necessary that he should go to a public prison. These houses sheltered vile extortion and robbery.

Once the wardenship of the Fleet was bid for and obtained by a vile fellow named Huggins, who, in turn, underlet the office to a man of yet lower and more inhuman nature than himself, Bambridge by name. This Bambridge actually held people for ransom, and would readily connive at an escape if his interest were duly engaged. If a prisoner's friends were not sufficiently generous, a horrid cell, some punishment with instruments of torture, and a deprivation of food, were quickly resorted to by the stimulating Bambridge. The fellow even took contributions from the charity-box. A parliamentary committee of investigation was appointed, and sat at the prison. Hogarth has a picture of the scene in oils, executed about 1730—"The Committee of the House of Commons Examining Bambridge"—of which Horace Walpole was presented with a copy. Relief followed the sitting and report of the committee, yet gross inhumanity was practiced until the burning of the prison in 1780. Sir Walter Besant, in "The Chaplain of the Fleet," speaks of this Bambridge as "a devil incarnate." This novel of Sir Walter contains fine descriptions of Fleet prison practices.

Howard, Earl of Surrey, Wyatt's friend, who was sent to the Fleet in 1542, for sending a challenge to a gentleman, described the prison as "a noisome place, with a pestilent atmosphere." The Fleet ditch probably contributed its share to that character of atmosphere. Pope, in "Dunciad," consigned dark and dirty authors to this ditch:

"Foul ditch, which, with disemboгуing streams,  
Rolls its large tribute of dead dogs to Thames."

The Fleet ditch flowed beneath what is now called Farringdon street, to the Thames. No sign of the ditch now exists. The site of the Fleet prison itself is now occupied by the Memorial Hall built by Nonconformists, in memory of the victims of religious bigotry who were incarcerated there in the times of Queen Mary and Charles I.

It is suggested that Richard Lovelace, who suffered from dire poverty, but was not embittered by it, probably thought out his well-known lines while confined in the Fleet, for they seem to "fit:"

"Stone walls do not a prison make,  
Nor iron bars a cage;  
Minds innocent and quiet take  
That for an hermitage.  
If I am freedom in my love,  
And in my soul am free,  
Angels alone, that soar above,  
Enjoy such liberty."

In 1643 James Howell, whose "Familiar Letters" are largely quoted in reference to his time, had his fling at his tormentors by writing in one of his epistles, "Let the English people flatter themselves as long as they will that they are free, yet they are, in effect, but prisoners, as other islanders are." We know that this was indited from the Fleet, but whether Mr. Howell was incarcerated for debt, or for a greater or less offense, we do not know.

Above the entrance to the Fleet was the figure "9," and the polite form of addressing debtors confined there was, "At No. 9, Fleet Market." In 1792, when the foundations of the Tower of London shook with the fate of the Paris Bastille, a placard was set up in the Fleet, announcing:

"THIS HOUSE TO LET. PEACEABLE POSSESSION WILL BE GIVEN BY THE PRESENT TENANTS ON OR BEFORE JANUARY 1ST, 1793. THE REPUBLIC OF FRANCE HAVING ROOTED OUT TYRANNY, BASTILLES ARE NO LONGER NECESSARY IN EUROPE."

A humorous descriptive poem, entitled "The Humours of the Fleet," was written by "A Gentleman of the College," who professes himself "but a common scribbler," not at all to be compared with Mr. Pope, with whose works, however, he shows a student's acquaintance. To this book the author finds it necessary to add critical and explanatory notes in explication of the cant words of the Fleet necessarily used in a humorous description of the same. The author acknowledges that his object in putting forth his book is "to get money," thus openly avowing what is generally concealed beneath the surface of skilful prefaces.

The thought, "Every island is but a prison," is found, as we have seen, in Howell's "Letters;" but this "Gentleman of the College" is not Howell, since he tells us that his father built Buckingham House, in St. James Park, and we know that Howell's father was a Welsh minister. This writer also tells of his being arrested for debt, and "hurried away by those horrid, merciless fellows, the bailiffs, to the sponging-house;" and, upon his not liking that place, being brought by a *habeas corpus* over to the Fleet. The book is prefaced with a wood-cut depicting the interior of the Fleet and a scene of high hilarity in the drinking line. Beneath the cut are the following lines:

"Welcome, welcome, Brother Debtor,  
To this poor, but merry place,  
Where no bailiff, dun or settor (?),  
Dare to show his horrid face;  
But, kind sir, as you're a stranger,  
Down your garnish you must lay,  
Or your coat will be in danger—  
You must either strip or pay.  
N'er repine of your confinement  
From your children or your wife;  
Wisdom lies in true resignation  
Through the various scenes of life.

Scorn to show the least resentment,  
 Though beneath the frown of fate  
 Knaves and beggars find contentment,  
 Fears and cares attend the great;  
 Though our creditors are spiteful,  
 And restrain our bodies here,  
 We will make a gaol delightful  
 Since there's nothing else to fear.  
 Every island's but a prison,  
 Strongly guarded by the sea;  
 Kings and princes, for that reason,  
 Prisoners are as well as we.  
 What was it made great Alexander  
 Weep at his unfriendly fate?  
 'Twas because he could not wander  
 Beyond the world's strong prison gate;  
 For the world is also bounded  
 By the heavens and stars above —  
 Why should we then be confounded,  
 Since there's nothing free but love.

In truth, besides the "Review" of Defoe, many publications emanated from the different prisons for debt. Minor and better poets, pamphleteers and transient scribblers, so confined, either subsisted or diverted themselves by the pen. Though foreign to the subject of debt, we are reminded of solitary Walter Raleigh, in the Tower of London, working on his ambitious "History of the World," fulfilling a character so different from that given to the gay young Walter Raleigh, the maker of compliments, by Scott, in "Kenilworth." Also are we reminded of the brave and accomplished patriot, De la Noue, at once a soldier and a scholar, who was made prisoner by Philip of Spain, and passed five years of the closest confinement in the vilest of dungeons. De la Noue was offered his liberty by his Spanish captors if he would permit his eyes to be put out! During such captivity were composed his famous military and political discourses, his annotations upon Plutarch, and other works. (Motley's "Rise of the Dutch Republic," vol. iii., p. 481.) The anonymous author of "Fleta" named his well-known legal work for the prison in which it was written.

For the year ending Michaelmas, 1802, 200,000 writs for debt had been issued in England; and this issuance was followed by 114,300 actual arrests. In the eighteen months subsequent to the panic of 1825 as many as 101,000 writs for debt were issued.

The unfortunates were always "grateful for small favours," as the following, from the Times of December 29th, 1794, will show:

"ADVT.—The unfortunate DEBTORS in LUDGATE PRISON beg leave, thus publicly, to return their grateful thanks to LADY TAYLOR, of Spring Gardens, for her Magnificent Benefaction of 149 lbs. of Beef, 21 half-peck Loaves, 21 sacks of Coals, and 66 lbs. of Cheese, each article being of the best quality.

"At the same time they entreat the Lord Mayor to accept their unfeigned Thanks for his kind present of a Guinea, which was equally divided among the Unfortunate Debtors.

"N. B.—The smallest Benefaction from their fellow-citizens and other liberal minded persons will at all times be thankfully received, particularly at this inclement season of the year."

Good for Lady Taylor!

The following item, in the Times of April 25, 1793, is an instance of a vicious creditor of that period:

"There is now a man confined for debt in Newgate who has been a prisoner there for over fifteen years for a debt, the original sum of which does not exceed 45 shillings."

*Ex nihilo, nihil fit.*

This case of this 45-shilling debtor is far less outrageous than that of John Bird, a market gardener of that period, who was arrested and committed at the suit of a liquor-dealer for the grand sum of one penny!

A pamphleteer against imprisonment for debt, writing in the year 1700, well compares the system to punishing a cow for giving no milk by shutting her up from herbage.

The costs upon a liberation were generally so dextrously elevated that frequently a prisoner fully entitled to his liberty would be further restrained until he had paid a new debt "arising out of a satisfaction of all his former debts." So that it may be that when a certain Irishman confined in the Fleet said he "would get out by stratagem," which stratagem (by his own discourse) was to raise the money to pay his plaintiff, he may have been indulging in both "bull" and truth.

Precedents — as excuses are sometimes called — can always be found, or worked out, along any given line. Debtors may be pleased to know that the great Cæsar himself was an insolvent; that Rembrandt became a bankrupt; and the pitiless and mean research into Napoleon's private life, which was a literary feature of 1895, tells us that the emperor himself once found it necessary to pawn his watch.

An amusing reference to the money irregularities of Steele is found in Thackeray's "English Humorists," wherein we read that Steele "fled from many a bailiff." Steele was really incorrigible. Sometimes his wife would be asked "to send over his nightgown and shaving plate to some temporary lodging-place where the nomadic captain was lying hidden from the bailiffs. Oh, that a Christian hero, and late captain in Luce's, should be afraid of a dirty sheriff's officer! That the pink and pride of chivalry should turn pale before a writ!"

Steele's kindness and carelessness, in reckless combination, were responsible for his troubles.

But one would hardly believe, after straying through the intimately-mingled essays of Addison and Steele in the "Tatler," the "Guardian," and the "Spectator," that Addison at one time sold Steele's household furniture that he might procure satisfaction for a debt due him from the latter. "Jack," in "Spectator," No. 82, is evidently "Dick" Steele himself. "Jack has been arrested twice or thrice a year for debts he had nothing to do with, but as surety for others." Speaking of Thackeray, it will be remembered that "Vanity Fair" contains a description of the sponging-house of the period, being the establishment of Mr. Moss. Rawdon Crawley, living, as he did, on "nothing a year," knew the interior of this place. He was released, however, in time to confront his wife in the company of Lord Steyne.

As we would expect, good-natured, alms-giving Goldsmith did not escape a debtor's troubles. When "Doctor" Goldsmith was arrested for debt at the instance of his aggrieved landlady, he sent to Dr. Sam Johnson for aid. The latter came, and learning that Goldsmith had on hand, unsold and unpledged — which was unusual — the manuscript of a new book, Dr. Johnson put on his hat, stuffed the manuscript under his arm, and went off to the booksellers. The free doctor sold that manuscript for the benefit of the imprisoned doctor for £60. From that manuscript came the dear old "Vicar of Wakefield;" and it seems very fitting that we should find therein a description of a debtors' prison. Readers will recall how the good Dr. Primrose was arrested upon his default on his bond to the libertine, Mr. Thornhill, who seduced the doctor's daughter, Olivia, and how he was carried off to prison, some eleven miles away. This prison was one common to both felons and debtors. The whole place was filled with riot, laughter and profaneness, which was heightened as soon as the inmates had secured from the doctor his "perquisite," so-called, or the money which he had brought in his pocket to the prison. In the slang of the jail, this was called "Chummage," and was always demanded by prisoners of newcomers. "Pay or strip" were the fatal words; money or apparel was insisted upon. This was also called "Garnish," as we saw in the amusing "Humours of the Fleet." When Mr. Booth, in Fielding's "Amelia," entered the jail, he was asked for money, and having none, "the prisoners immediately, without loss of time, applied themselves to uncasing, as they termed it, and with such dexterity that his coat was not only stripped off, but out of sight, in a moment." "Chummage" furnished drink and revel, of course. Returning to Dr. Primrose, it will be remembered how the good old gentleman's efforts to inculcate morality in the prison were finally successful, though met at first by much ridicule and obstruction. One of the prisoners had and exer-

cised the trick of spitting through his teeth in showers on the good book; and another succeeded in substituting obscene jest-books for the holy books disposed in front of the doctor. Goldsmith died owing £2,000. "Was ever poet so trusted before?" — or since? But, as Dr. Johnson said, "Let not his frailties be remembered; he was a very great man."

The great Cham of Literature himself, the same Dr. Johnson, was once arrested for a debt of five guineas. This experience well qualified him to give advice in that regard, and he did so. "I never retire to rest without feeling the justness of the Spanish proverb, 'Let him who sleeps too much borrow the pillow of a debtor,'" said the doctor at one time.

The Spanish proverb referred to by the doctor is probably embodied in the following few lines of Baltazar De Alcazar, a Spanish poet, "On Sleep:"

"When sleep hangs heavy on my eyes,

I think of debts I fain would pay,

And then, as flies night's shade from day,

Sleep from my heavy eyelids flies."

Again, the doctor thus admonished Boswell: "Do not accustom yourself to consider debt only as an inconvenience; you will find it is a calamity." "The Rambler" and the doctor's letters are pregnant with reflections on debt and poverty. In one letter is the observation: "Small debts are like small shot; they are rattling on every side, and can scarcely be escaped without a wound." Dr. Johnson assumed in "The Idler," in 1759, that more than 20,000 persons were then confined for debt, and that one in four died yearly, "consumed by famine, or putrified by filth." These remarks of Dr. Johnson remind one of Henry Ward Beecher's advice to his son in later years: "You must not go into debt. Avoid debt as you would the devil. Make a fundamental rule, No debt — cash or nothing."

By MARSHALL VAN WINKLE, New Jersey Bar.

(Continued next week.)

RUFUS W. PECKHAM.

By L. B. PROCTOR.

THE eminent jurist whose portrait appears in this number of THE LAW JOURNAL is the sixth judge whom the bar of the State of New York has given to the Supreme Court of the United States. They are John Jay, Brockholst Livingston, Smith Thompson, Samuel Nelson, Ward Hunt and Rufus W. Peckham.

Jay, the negotiator of the Treaty of Peace, by which Great Britain assented to the independence of our Republic, was the first chief justice of the State of New York and the first chief justice of the Federal Court. Peckham, like Jay, Livingston, Thompson and Nelson, had adorned the bench of the Supreme Court of the State of New York before taking his seat on the bench of the

United States Supreme Court. All of these distinguished jurists were lights and ornaments of the bar before their judicial promotion. Judge Peckham was elevated to the bench of the Court of Appeals in 1886, from which he was summoned by the executive of the nation and an approving senate to his present high judicial position.

Rufus W. Peckham was born at Albany, N. Y., in 1838. After a careful and thorough classical education, he entered the law office of Colt & Peckham, an eminent law firm of Albany. Here he began the study of law, which he pursued with diligence, acumen and analytic industry for the term of three years, at the expiration of which time he was called to the bar, having just attained his majority. Though he began his practice surrounded by many favorable circumstances, he relied but little upon them, for he knew that no adventitious supports alone are fabrics upon which a successful professional career can be permanently founded. And so, self-reliant, practical, industrious and well-prepared, he confidently demanded the honors and emoluments of the profession of his choice; and he won them, surrounded by a learned, experienced and brilliant bar. He soon attracted attention by his learning and discretion as a counselor, and applause for the skill, eloquence and success with which he conducted the trial of causes. His arguments were not set with diamonds, nor decked with flowers, but they went forcibly and successfully along the track of learning, logic and reason; and he went easily and boldly beyond the mere reasoning of authorities. He always commanded the respectful attention of courts and jurors.

His practice was successful, and it brought him so favorably before the people that, in 1868, he was nominated and elected district attorney of Albany county.

Though criminal law practice was not particularly attractive to Mr. Peckham, he entered on the discharge of his arduous duties, fully equipped for a successful performance of them. The *causes célèbres* which he conducted for the people with marked success have passed into the history of Albany county and of the State, and are familiar to lay and professional readers.

He retired from the office of district attorney December 31, 1871. For years prior, there had existed a copartnership with Judge Tremain. No name is brighter in the legal history of the State of New York than Lyman Tremain's; no name in that history revives more pleasing recollections than his. In him were blended, in happy combination, characteristics that constitute an accomplished lawyer, judge and legislator.

Judge Tremain was a long and intimate friend and had been the law partner of the elder Judge Peckham. He recognized in the son very many of the

characteristics that distinguished and adorned the father, and their relationship went beyond the mere formality of a law partnership to that of intimate and affectionate friendship.

This law firm was one of the most distinguished in the State. It was succeeded by a copartnership between Mr. Peckham and Grenville Tremain, the son of Lyman Tremain, one of the most brilliant and promising lawyers at the bar of the State, whose untimely death was sincerely lamented.

After the death of both Tremons, which took place in 1878, the firm of Peckham, Rosendale & Hessberg was formed, which carried forward the business of the former firm with great success and popularity. It existed until 1883, when Peckham was elected a justice of the Supreme Court of the State for the third judicial district.

Peckham's career as a judge of our Supreme Court stands conspicuously favorable before the bar and the people, and it would be the work of supererogation to enter into any large analysis of it; but perhaps we may say, without affectation, that at *nisi prius* he tried causes with expedition, for he saw the true points of a case at a glance, and determined them without unnecessary delay, though not without deliberation. His charges to juries were characterized by judicial acuteness and compactness of reasoning, enforced by a careful order of arrangement and a learned, lucid presentation of the law involved in cases. His opinions delivered on the bench of the Supreme Court are familiar to the profession, exhibiting the native strength of his mind, his erudition and demonstrative reasoning.

On November 4, 1886, Judge Peckham was elected an associate judge of the Court of Appeals of the State of New York. His judicial career is marked by the interesting circumstances that he resigned his seat on the bench of the Supreme court of the State to take his place on that of its court of last resort, and that he resigned that exalted place for a still higher judicial position, that of an associate judge of the Supreme Court of the United States. His career on the bench of the Court of Appeals is written for all time in his opinions, which form a large part of the contents of the New York Reports, from 1886 down to his retirement from the court in which they were pronounced. It is the unanimous voice of the legal profession that these opinions are models of juridical composition and learning.

As we have already seen, he took his seat on the bench of the United States Supreme Court in 1896. His first opinion in that court, the prevailing one in the case of the U. S. v. Gettysburgh Electric Railway Company (160 U. S. Reports, 668), was received with general commendation by the profession and the press, not only at home but abroad. In this case Judge Peckham held, among other

things, that any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motive to defend them, and which is germane to and intimately connected with, and appropriate to, the exercise of some one or all of these powers granted by congress, must be valid, and the proposed use in this case comes within such description. The favorable comments of the London Times on that decision were highly complimentary, not only to the eminent jurist who pronounced the opinion, but to the great tribunal of which he is a member. The Times called attention to the singular interest which the English and American bars took in the opinion, and the editor of its legal department reviewed the opinion with singular learning, discrimination, justness and generosity. We do not believe that we will be charged with invidiousness in saying that very few of our great judicial officers have ever received the glowing tribute of respect, admiration and fair appreciation that Judge Peckham received from that journal of towering influence, the London Times. Its reference to the interest which Judge Peckham's opinion in the United States Supreme Court created revives the interest which his first opinion as a justice of the Court of Appeals of New York stimulated. The doctrine which that opinion established, though not of the national importance which his first opinion in the United States Supreme Court was, is yet of vast consequence to the professional and business world. We allude to the case of *Becker et al. v. Koch* (59 New York, 394).

Passing the long line of interesting prevailing opinions delivered by Mr. Justice Peckham, we come to his great opinion, recently pronounced, in the case of the *United States v. The Trans-Missouri Freight Association*, embracing all the great railway lines of the west, and practically applicable to the Joint Traffic Association, embracing the Vanderbilt, Pennsylvania, Wabash and other great eastern systems, with headquarters in New York city. All of the decisions of the lower courts had been favorable to traffic associations and these all-powerful corporations were confident that the court of last resort would sustain them. It would be difficult to find in the whole range of our judicial records a more comprehensive, condensed and closely reasoned opinion than this. There is a strong analogy between it and the great opinion of Chancellor Kent in *Griswold v. Haddington*, in the Court for the Correction of Errors (16 Johnson, 438), sustaining the opinion of Chief Justice Ambrose Spencer (15 Johnson, 57). This opinion of Judge Peckham, in its independence and disregard of powerful influence, resembles that of Marshall in the case of *Burr*, that of *Marbury v. Madison* (1 Cranch, 137), and that of *Gibbon v. Ogden* (9 Wheaton, 1-240). But Judge Peckham's

opinion is more sweeping, affecting more interests than either of the opinions to which we have referred, and perhaps there is no opinion in any case on record which compares with the vast importance and far-reaching effect of this opinion. It has already been read and closely studied by lawyers, legislators, great business men and powerful corporations.

Judge Peckham always took much interest in politics, and was, therefore, necessarily a partisan, giving his allegiance to the Democratic party, adhering to it with unshaken fidelity; his advice and counsel was always potent with party dictators and managers of conventions and campaigns. But when he assumed the ermine he retired from all active participancy in politics. It was, of course, impossible for a nature like his not to retain a lively interest in the public acts and policy of the country, neither did he surrender his political sentiments or his independent fealty to the Democratic party. In this his course resembles that of his father, who was the compeer of the great leaders of the Democratic party, Samuel Beardsley, Greene C. Bronson, Benjamin F. Butler, William L. Marcy, Edwin Croswell, and other historic lights of this party. No stronger or more influential partisan ever existed in the State of New York than that illustrious jurist, the John Marshall of the northern bench, Chief Justice Ambrose Spencer, whose political power held in check the gigantic ambition of Martin Van Buren and yet, when he ascended the bench, there was a total abnegation of politics in his career, though he retained his loyalty to his party through all his judicial life.

Those who are acquainted with the careers of the former and present Judge Peckham will readily recognize in their personal appearance and mental characteristics a singularly interesting parallel. In 1838 the elder Peckham was appointed district attorney of Albany county. On November 8, 1861, he was elected a justice of the Supreme Court of the State of New York. At the expiration of his term he was re-elected. On November 2, 1870, he was elected a judge of the Court of Appeals. In November, 1876, he was re-elected. Long before the expiration of his term, on November 22, 1873, he was lost at sea, in mid-ocean, by the wrecking of a vessel that was bearing him to a distant country, in the hope of restoring health impaired by arduous labors in his high office.

In November, 1868, the present Judge Peckham was elected district attorney for the county of Albany. In November, 1883, he was elected a justice of the Supreme Court for the third judicial district for the term of fourteen years. In November, 1886, he was elected a judge of the Court of Appeals. In 1895, as we have seen, he was appointed a justice of the United States Supreme Court.

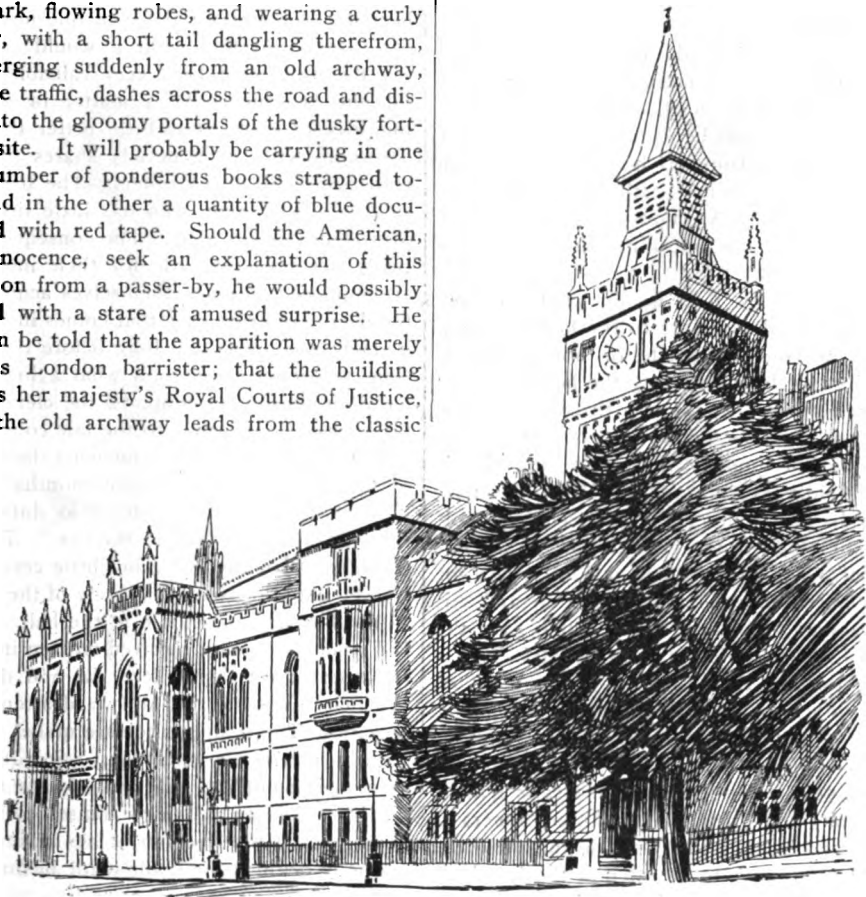
## HER MAJESTY'S ROYAL COURTS OF JUSTICE.

## WHAT THE LONDON BARRISTER MUST DO IN ORDER TO BE QUALIFIED TO PRACTICE IN THEM.

AN EXPENSIVE COURSE OF TRAINING, WITH THE EATING OF MANY DINNERS, NECESSARY — AN INTERESTING AND INSTRUCTIVE INTERVIEW WITH MR. SIDNEY PHIPSON.

THE American visitor passing along Fleet street, from the direction of St. Paul's Cathedral to the point where it merges into the Strand, will find on his right a somewhat colossal building of gray stone, writes "Ascor," the London correspondent of the New York Mail and Express. As he stands gazing at its Gothic architecture he may be startled by the apparition of a human figure, clad in dark, flowing robes, and wearing a curly white wig, with a short tail dangling therefrom, who, emerging suddenly from an old archway, dodges the traffic, dashes across the road and disappears into the gloomy portals of the dusky fortress opposite. It will probably be carrying in one hand a number of ponderous books strapped together, and in the other a quantity of blue documents tied with red tape. Should the American, in his innocence, seek an explanation of this phenomenon from a passer-by, he would possibly be greeted with a stare of amused surprise. He would then be told that the apparition was merely a harmless London barrister; that the building opposite is her majesty's Royal Courts of Justice, and that the old archway leads from the classic

who occupies a suite of rooms in the Inner Temple, is a very high authority on all matters legal. He is the author of "The Law of Evidence," a standard work that is gradually superseding the well-known "Digest of Evidence," by the late Mr. Justice Stephen, which, though ad-



THE INN, HALL AND LIBRARY, INNER TEMPLE, LONDON.

precincts of the temple — the headquarters of the legal profession.

Surmising that a sketch of the facts and figures appertaining to the cradling and coaching of an English barrister might prove interesting to readers of the Mail and Express, I took the preliminary step of securing an interview with a distinguished member of the bar. Mr. Sydney Phipson,

mirable in many respects, is in too skeleton a form to be of great service to practitioners.

Mr. Phipson's private sanctum is a typical one of its kind in London. Situated in the picturesque seclusion of the Temple, under the shadow of rustling trees and historic buildings, it lies in the very heart of the legal world. My impressions of its material features are a congestion of legal docu-



ments, walls made of books, and perpetual artificial light. I found the genial barrister quite resigned to the worry of an amateur cross-examination, and to his courteous replies and lucid information I owe most of the facts here set down.

#### QUALIFICATION.

One of the first things I elicited from Mr. Phipson was that eight out of every ten barristers are college men. A university education seems to be almost a necessity. Very few successfully dispense with it. The preliminary training for the profession may be commenced at college. A barrister must have passed at least three examinations. (1.) Ordinary college examination in classics and general subjects; (2.) first examination in law called "Roman Law" examination; (3.) second and final law examination.

A college man will, in the usual course, secure the first of these, and by taking an "honors" degree of D. C. L. at Oxford, or LL. D. at Cambridge or London, will be excused the second or Roman law examination. If he only achieves an "ordinary" degree, he must still tackle the ordeal of "Roman Law." All non-collegiates, before they can study for the bar, must pass in classics and general subjects.

But, whoever they may be or whatever they may have done, all aspirants to the honor of wig and gown, whether collegiate or non-collegiate, must, subject to their satisfying the boards of examiners in Roman law, spend a three years' probation in one or other of the inns of court. The inns are four in number: Lincoln's Inn, Gray's Inn, the Middle Temple and the Inner Temple. They may be briefly described as societies or colleges for the study of the law, and are of ancient origin. Second to none in their jealous regard for the observance of professional tradition and etiquette, the inns maintain a strict watch over the attendances and behavior of the students. To insure that none of them shirk the obligation of duly "serving their time," a system of checking attendance exists, commonly known as "Eating Dinners in Hall."

The legal year is divided into four terms: Hilary, Easter, Trinity and Michaelmas. Three dinners in each term, or a total of thirty-six during the three years' probation, have to be eaten at the Inn Hall by every college man. Non-collegiates must tackle twice this number, or seventy-two total. Attendance at these dinners is checked by the "janitors," who keep the door and tick off each man's name as he enters. In one respect these janitors are remarkable men. Long practice has trained their memories to such perfection that among all the hundreds of diners, no member, however erratic in his intervals of attendance, is ever met with a second request for his name from the same doorkeeper.

#### THREE YEARS' DINNERS.

The first two years of the student's inn membership are occupied in general study and coaching for his final examination. He never finds much difficulty in procuring professional tuition. Many impecunious members of the bar, who find time hang heavily on their hands, are only too willing to proffer their services in this direction for moderate fees.

Having duly passed his examinations, the student must devote the last year of his inn-dwelling to the somewhat expensive pastime known as "Reading in Chambers." The explanation of this, with its rather misleading title, is simply that he secures the free run of some practicing barrister's office, with liberty to scan all the briefs and watch the procedure. For this he has to pay the barrister the substantial fee of one hundred guineas (\$525). At first sight it would seem safe to say that this must be a very valuable experience for the beginner. As a matter of fact, in the majority of cases, it is little better than a farce. To begin with, he generally shares the privilege with some half-dozen others. The barrister, as a rule, is a busy man, who has little time to waste over struggling readers. The consequence is they really get precious little for their money. They are supposed to make themselves acquainted with the details of every case that comes in, but it more frequently happens that long before they have had time to properly ascertain what a brief is about, let alone master its contents, the clerk annexes it for hurried conveyance to the law courts.

Notwithstanding the somewhat farcical nature of these proceedings, twelve months' experience of them is gravely considered as duly qualifying the student for a "call to the bar." This is quite a simple affair, involving but little ceremony. On a given date the governing body of the inn, known as the benchers, assemble in the hall. The qualified students, having received written intimation of the event, meet them there, eat and drink at the benchers' expense, and afterward attend a sort of reception. The senior candidate makes a eulogistic speech, receives a courteous rejoinder, and the process is complete. Henceforth the new-fledged barrister, having provided himself with wig and gown, enjoys the freedom of her majesty's courts, and may begin to look about for business.

#### FINANCES.

If, like a prudent business man, he sits down now to take a retrospective survey of his financial position, he finds that his out-of-pocket expenses up to this point have reached a total of about \$1,375. This includes a stamp fee of \$250, which he has to pay to her majesty's exchequer for the privilege of addressing a British judge and jury. It also includes the \$525 "reading" fee and all the incidental expenses attached to the routine of inn

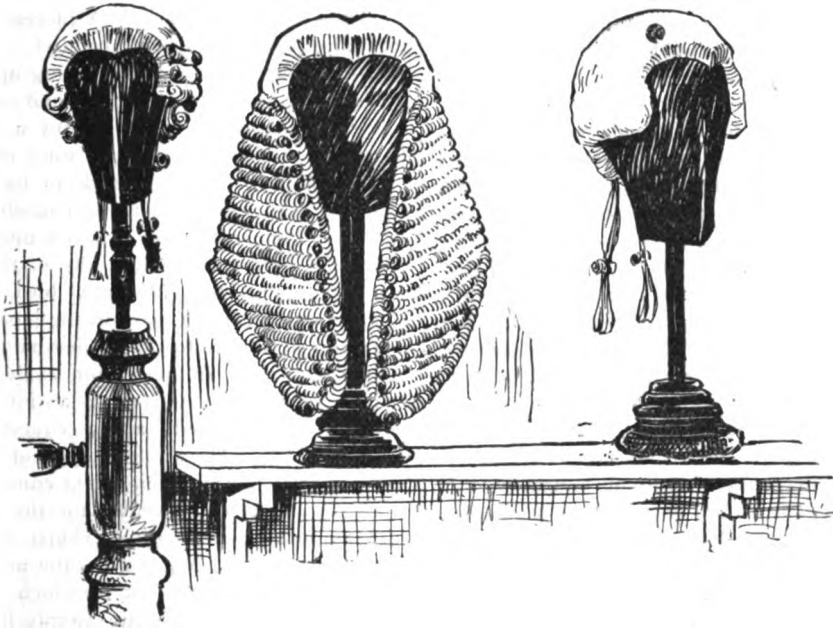
life. But it makes no allowance for the cost of maintaining himself during the long and tedious sojourn in the wilderness of probation.

There is an old saying in legal circles that "to succeed, a barrister must marry a rich solicitor's daughter," a theory which Mr. W. S. Gilbert has satirized in his "Trial by Jury." But there are one or two alternatives to this desperate expedient. The most promising one for the young beginner to adopt is—to join the ranks of the "devils." This, as an alternative to wedded wealth, is not such an infernal jest as it sounds. A legal "devil" is one who, attaching himself to some barrister in full practice, undertakes, in return for the experience thereby acquired, to assist him in routine work, to arrange details, collect figures, look up precedents and generally make himself useful. This arrangement has very great advantages for the

him. Very few of the successful men of the present day occupy positions in that particular department of law practice to which they originally turned.

#### REAL BEGINNING.

After the "devil" has established a certain reputation and qualified himself for a sphere of independence, he may rent offices, engage a clerk and launch out "on his own." He would not take such a speculative step, however, until he had made something of a name and secured a measure of influence among the solicitors. And here let me say a word or two as to the position of solicitors and their relation to the barristers. The preliminary legal training is much the same in both cases. An intimate acquaintance with the vagaries of English law is essential. But barristers ascend



SOME WIGS WORN BY LONDON BARRISTERS.

beginner. He gets a thorough insight into practical work, and if at all energetic and wide awake, soon begins to make his mark. He gets no salary, but if his senior is practicing in the "Equity" division he is entitled to half the fees. In the "Common Law" division he would have no such right, but in either case the value of the experience gained more than repays him. To be "devil" to a popular man is a much-envied position. The attorney-general's devil is practically sure of a judgeship in time to come. Mr. Justice Wright and Lord Justice Smith are instances of attorney-general's "devils."

At the present day there are almost as many "special" branches in law practice as in the musical world. But the aspiring barrister cannot pick and choose. He must await his chance, and adapt himself to the sphere into which the tide may float

to a higher grade of privilege, into which solicitors may not trespass. No solicitor is allowed to plead in any of the high courts. He may address the magistrates or minor judges of police and county courts, but before the robed dignitaries of her majesty's royal courts of justice he must be silent. The privilege of raising the persuasive voice of eloquence is reserved exclusively to the fraternity of wig and gown. The social position also of solicitors is distinctly inferior. Very few of them are university men. Their ranks are recruited chiefly from that section of the community which has come to be known as the "middle classes." Exceptions there are, of course. A few names could be mentioned that shine with the lustre of well-earned wealth and social influence. But they are not many, inasmuch as the profession has not that opportunity of attracting the

public gaze which is the coveted possession of successful barristers.

But if the popularity of a Sir Frank Lockwood or a Sir Edward Clarke is denied them, solicitors have their compensating advantages. The inexorable law of etiquette forbids a barrister taking up a case except through the medium of a solicitor's "brief." In criminal cases this rule may be relaxed, but such an occurrence is rare. The best-known exceptions are those in which a judge requests some member of the bar present in court to defend a prisoner charged with murder or other serious crime, who has been unable, through poverty, to engage a lawyer on his own behalf.

#### BRIEFS AND FEES.

The brief is a document setting forth in detail all the facts and history of a case. In big *causes célèbres*, the brief sometimes attains a prodigious bulk. The mastering of its contents is an operation associated in the public mind with much burning of midnight oil. But this is a fallacy for which novelists are largely responsible. A barrister who knows his business will master a brief however voluminous, at one reading. Long practice enables him to extract the salient points and determine at once the proper course to be pursued. Many eminent members of the bar will read half a dozen briefs in the morning before going into court. When they have once perused and underscored them with their blue or red pencils, they may be relied upon to conduct the case in their usual masterly style, with no prompting whatever. Frequently they may be seen in court studying the points in one case while conducting another.

Barristers' fees are a variable quantity. As viewed in a solicitor's bill of costs, they look somewhat mysterious. A barrister's guinea (\$5.25) is always £1 3s. 6d. (\$5.87); two guineas (\$10.50) are invariably £2 7d. (\$11.75), and so on. This is explained by the fact that he charges a supplementary fee for his clerk at the rate of 2s. 6d. (62c.) for every guinea he earns. No fee is less than a guinea. An unwritten law, dating from the time when the guinea was a coin of the realm, decrees that barristers must not accept silver. One transgression of this rule is recorded. A somewhat impecunious member of the profession accepted a few shillings as payment from a poor client. He was promptly called before the benchers of the inn to explain. His plea was, if he did not take gold, he at least took all the man had got, whereupon he was at once honorably acquitted. It was impossible to cavil at such a worthy upholding of all the traditions of the profession! Like physicians, barristers cannot recover their dues at law. The fee is supposed to be an "honorarium" which was not expected. There is a quaint survival of the alleged sensitiveness of barristers about fees. In their gowns may still be noticed a

sort of long, narrow pocket arrangement, hanging down at the back of the left shoulder. Its occupation is gone now, but in the old time it was the recognized receptacle for the guineas which were supposed to be dropped in surreptitiously by the client. Very different is the brazen effrontery of these days, when eminent pleaders will calmly demand their fifty guineas "retainer" to induce them even to look at the proffered brief.

#### AS A Q. C.

A career of continued prominence and success may culminate at last in a desire on the part of the barrister to exchange his stuff gown for the silk robe of "one of her majesty's counsel learned in the law." Now, this is an honor which, so far from being eagerly accepted as soon as offered, requires the utmost care and consideration. To use Mr. Phipson's graphic phrase, "It is a tremendous leap in the dark." A successful barrister may utterly fail as queen's counsel. The change may be likened unto a doctor giving up a lucrative practice in one town for another and entirely fresh one somewhere else. It is simply a speculation. Inasmuch as the laws of professional etiquette forbid him doing "junior's" work, he has practically to begin again and work up an entirely fresh connection. For this reason it is not uncommon for successful barristers to fight shy of the new dignity, preferring their substantial bird in the hand to any two speculative ones in the bush.

Should he decide to make the venture, his first step is to send in an application to the lord chancellor. In due time he receives an intimation that he has "been selected," and a request to wait on the lord chancellor at the house of lords on a given date to be sworn in. Next comes a demand from the clerk of the crown for the payment of fees amounting to £60 12s. (\$303). A full-bottomed wig and a silk gown are the next indispensable items, the total cost of which varies from twenty guineas (\$105) to twenty-five guineas (\$131). Add to this a full court livery, consisting of coat and vest, knee breeches, black silk stockings, dancing pumps, with steel buckles, white kid gloves and white dress tie, and you have the complete necessary outfit for a new queen's counsel. Having donned all this paraphernalia, and incidentally provided a new silk hat for his clerk, he joins the assemblage of other applicants in an ante-chamber at the house of lords. Taking his turn in order of seniority, and attended by his clerk, he proceeds into the lord chancellor's room, where that great legal dignitary of the crown, arrayed in plain clothes, is waiting to receive him. The chancellor's clerk reads aloud a declaration of loyal service, etc., which the embryo Q. C. repeats after him. The lord chancellor then presents him with a crimson leather box, containing the "patent," engrossed on vellum, and sealed with the great seal of England. They then shake

hands in solemn silence, no word having been spoken except the declaration.

This part of the ceremony completed, the new Q. C. proceeds at once to the law courts. He pays a visit to all the courts in order of their legal seniority, that happen to be sitting. The business in progress is abruptly interrupted by his entrance. The court usher rushes to the barrier gate and closes it. The presiding judge, having been provided with the new counsel's name on a piece of paper, delivers himself with grave solemnity of the following formula:

"Mr. —, her majesty having been pleased to appoint you one of her counsel learned in the law, you will take your seat within the bar accordingly."

The barrier gate is thrown open; the Q. C. passes into the front row and bows to the judge, who bows in return. He then turns right about face and bows to the counsel present, who acknowledge the courtesy. Finally he bows to the junior barristers, who reciprocate the compliment. He then sits down. The judge asks, "Do you move, Mr. —?" Rising and again bowing, he answers, "No, my lord," and forthwith leaves the court. Having inflicted this ordeal on all the other courts, the new counsel is now regarded as duly initiated into the mysteries of the craft. All that remains for him to do is to have some large cards printed with his name and the words, "On appointment as one of her majesty's counsel," in one corner. He leaves one of these with each judge, and is now free to come and go as he pleases.

The ultimate goal of a queen's counsel's ambition may vary according to his own taste and character. He may struggle for that avenue of legal dignity which leads from the judge's bench through the Supreme Courts of the Lords of Appeal to the Woolsack of the High Chancellor. Such a career is graced with unlimited dignities, but limited salaries. On the other hand, there are some few shining lights of the profession who possess a happy combination of great ability, a practical and democratic mind, a strength of will enabling them to resist the glamour of pomp and state, and, above all, a capacity for seizing upon their opportunities. Such men rapidly attain a position which enables them, financially speaking, to look down upon her majesty's judges and law lords, and even the high chancellor himself. By the magic of their genius and boundless energy they reach and sustain themselves at the high-water mark of professional prosperity.

#### HISTORIC COLLISIONS BETWEEN BENCH AND BAR.

THE remark of Mr. Oswald, in his interesting work on "Contempt of Court," that good feeling nearly always existed between bench and bar in England, and when it is interrupted, the reason for

it may generally be found to exist on both sides, is pretty nearly correct. He finds scarcely a case on record in the Superior Courts of a conflict between the bench and the bar becoming so acute as to lead to the committal of an advocate for contempt, while conducting his client's cause. Even Chief Justice Jeffreys, who is said to have on more than one occasion browbeaten and threatened counsel, does not appear to have put in force the power of committal against counsel. "The natural disinclination of the court to interfere with counsel in such a way as to take his services from his client," Mr. Oswald well remarks, "ought to form a strong reason for counsel not assuming too great a license." The London Law Times concludes that it would be difficult to find a clear case of a barrister being punished for contempt while actually pleading for his client in court.

There are some historic precedents of impassioned dialogue between the representatives of the two orders. To begin with, there is the classic story of Wedderburn in 1757. Lockhart, being against him in the Inner House at Edinburgh, showed "even more than his wonted rudeness and superciliousness," and called him "a presumptuous boy." "When," says Campbell (Life of Lord Loughborough in the Chancellors, vol. 6, p. 47), "the presumptuous boy came to reply, he delivered such a furious personal invective as never was before or since heard at the Scottish bar." Wedderburn's language, reported by Campbell, was an outrage on decency. "Lord President Craigie, being afterwards asked why he had not sooner interfered, answered: 'Because Wedderburn made all the flesh creep on my bones.' But at last his lordship declared in a firm tone that 'this was language unbecoming an advocate and unbecoming a gentleman.' Wedderburn, now in a state of such excitement as to have lost all sense of decorum and propriety, exclaimed that 'his lordship had said as a judge what he could not justify as a gentleman.' The president appealed to his brethren as to what was fit to be done, who unanimously resolved that Mr. Wedderburn should retract his words and make an humble apology, on pain of deprivation. All of a sudden, Wedderburn seemed to have subdued his passion, and put on an air of deliberate coolness, when, instead of the expected retraction and apology, he stripped off his gown, and, holding it in his hands before the judges, he said: 'My Lords: I neither retract nor apologize, but I will save you the trouble of deprivation. There is my gown, and I will never wear it more—*virtute me involvo*.' He then coolly laid his gown upon the bar, made a low bow to the judges, and, before they had recovered from their amazement, he left the court, which he never again entered."

Another Scotchman, who also rose to be Lord Chancellor of England, played a nobler part in his contention with the bench. In 1784 the Dean of

St. Asaph was indicted at Shrewsbury for seditious libel, and he was defended by Thomas Erskine. The jury found him "guilty of publishing only." Buller, J.: "If you find him guilty of publishing you must not say the word 'only.'"—Erskine: "By that they mean to find there was no sedition."—Juror: "We only find him guilty of publishing. We do not find anything else."—E.: "I beg your lordship's pardon, and with great submission. I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'"—Juror: "Certainly, that is all we do find."—B.: "If you only attend to what is said, there is no question or doubt."—E.: "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict."—Jurymen: "Certainly."—B.: "Gentlemen, if you add the word 'only' it will be negating the innuendoes."—E.: "I desire your lordship, sitting here as judge, to record the verdict as given by the jury."—B.: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment."—Juror: "Certainly."—E.: "Is the word 'only' to stand part of the verdict?"—Juror: "Certainly."—E.: "Then I insist it shall be recorded."—B.: "Then the verdict must be misunderstood; let me understand the jury."—E.: "The jury do understand their verdict."—B.: "Sir, I will not be interrupted."—E.: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded."—B.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."—E.: "Your lordship may proceed in what manner you think fit; I know my duty as well as your lordship knows yours. I shall not alter my conduct."

The verdict was finally entered, "Guilty of publishing, but whether a libel or not we do not find."

Valuable as this precedent is, the comment of Campbell, himself a judge and Lord Chancellor, is equally precious: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

Another hot forensic *mêlée* is recorded about 1817 (2 Law and Lawyers, 357). Sergeant Taddy was examining a witness in the Common Pleas, and spoke of the plaintiff "disappearing" from that neighborhood. Park, J.: "That's a very improper question, and ought not to have been

asked."—T.: "That is an imputation to which I will not submit. I am incapable of putting an improper question to a witness."—P. (angrily): "What imputation, sir? I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression 'disappear' means 'to leave clandestinely.'"—T.: "I say that it means no such thing."—P.: "I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper."—T.: "I never will submit to a rebuke of this kind."—P.: "That is a very improper manner, sir, for a counsel to address the court in."—T.: "And that is a very improper manner for a judge to address a counsel in."—P. (rising, very warmly): "I protest, sir. You will compel me to do what is disagreeable to me."—T.: "Do what you like, my lord."—P. (sitting down): "Well, I hope I shall manifest the indulgence of a Christian judge."—T.: "You may exercise your indulgence or your power in any way your lordship's discretion may suggest, and it is a matter of perfect indifference to me."—P.: "I have the functions of a judge to discharge, and in doing so I must not be reproved in this sort of way."—T.: "And I have a duty to discharge as counsel which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Sergeant Lens was about to interfere. Taddy protested against any interference, but Lens said: "My brother Taddy, my lord has been betrayed into some warmth—" "I protest," said Taddy; "I am quite prepared to answer for my own conduct."—P.: "My brother Lens, sir, has a right to be heard."—T.: "Not on my account; I am fully capable of answering for myself."—P.: "Has he not a right to possess the court on any subject he pleases?"—T.: "Not while I am in possession of it, and am examining a witness." Mr. Justice Park, then seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair, and was silent.

Lord Brougham mentions a strange scene of which he was a witness, amusing rather than of good example. At Durham (about 1810?) a cause was being tried before Baron Wood. "There was heard an undergrowl on the other side from the Sergeant (Cockell), abusing Topping for his insolence and ingratitude, and the Baron for his ignorance and partiality, and calling for his clerk to bring him some of the stomach tincture, which we knew would console him, as it was generally brandy with some water added, to give it a name rather than materially alter its nature." (Works, vol. 4, p. 384.)

Something has been said about Kenealy's case above. As a matter of fact, his utterances in court never formed the subject of inquiry by any professional tribunal, but the important point to notice is that it was his inn, Gray's, which set the Lord

Chancellor in motion (on account of his editorship of the *Englishman*) with the result that he was dispatented, and which disbenched and disbarred him on the same ground.

It will be clear from all the instances that no formula can exactly define to what length of retort or of freedom of speech in addressing a judge counsel may with propriety go. Obviously, a genuine instinct of self-respect will inspire an advocate with the exact measure of what is due to himself, and what is due to his professional superior, just as it will antagonists in any other controversy.

Perhaps the true "rule" may be collected from a dictum attributed to Curran *arguendo*. He offended Judge Robinson, who exclaimed furiously, "Sir, you are forgetting the respect that you owe to the dignity of the judicial character." "Dignity! my lord," said Curran, "upon that point I shall cite you a case from a book of some authority, with which you are perhaps not unacquainted. A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger, and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a bystander to hold, but having lost the battle, he turned to resume his garment, when he discovered that he had unfortunately lost that also — that the trustee of his habiliments had decamped during the affray. So, my lord, when the person who is invested with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is vain, when he has been worsted in the encounter, that he seeks to resume it — it is in vain that he endeavors to shelter himself behind an authority which he has abandoned." Robinson exclaimed: "If you say another word, sir, I'll commit you." — "Then, my lord, it will be the best thing you'll have committed this year." The judge did not do as he threatened, any more than was done in any of the cases already mentioned, or, indeed, in any recorded; but it is instructive to read that "he applied to his brethren to unfrock the daring advocate," but they refused. The true principle may be adduced from Curran's apologue. So long as a judge speaks in that capacity, be he right or wrong, he is entitled to all respect of demeanor and all courtesy of language. The moment he descends to personalities, invective or criticism not warranted or required by his duty to the court, that is, to the public, he strips himself of his judicial function, and the person aggrieved by his language is entitled to speak to him as man to man, a relation which of course still includes that of gentleman to gentleman.

#### ENGLISH NOTES.

The London Law Times deprecates "hurrying up" in the filling of the vacancy on the bench of

the Queen's Bench Division. Judges, it says, can and do remain away months indisposed without substitutes being found, and a little deliberation before making a judge is fully justified, in view of the fact that he may do infinite harm or incalculable good.

An honorary degree of the University of Edinburgh has been conferred upon the lord chief justice of England.

Sir Henry Hawkins recently left London for the continent for a short rest from his judicial labors.

The committee recently appointed by the home secretary to inquire into the education of persons sent to jail has recommended, among other things, that all under forty years old who cannot pass Standard 4 shall receive school instruction in their cells, at least twice a week, and arrangements are to be made to permit this reform being carried out without avoidable delay.

It is not generally known that Mr. Thomas Hope McLachlan, whose sudden death occurred on the 1st of April, was a barrister, who at one time appeared likely to do a considerable Chancery business. He was called to the bar at Lincoln's Inn in 1868, but gave up law for painting, and became well known at Burlington House, the Grosvenor and New galleries, and at the Institute, for his poetic landscapes.

Probably for the first time in the annals of English local government a lady has discharged the duties of returning officer at an election. At Pinchbeck, West, near Spalding, a lady, Mrs. Sanders, presided over the poll on Monday last.

The Easter vacation regulations are a little complicated. No court will sit. The judge will sit in chambers on the 22nd inst. At other times his lordship can be approached by post or personally, "in which latter case the applicant should proceed to Sutton by the London, Brighton and South Coast Railway, and thence by cab to Woodmansterne." The Law Times adds: "It is not to be assumed that the adoption of any other route or mode of locomotion will render invalid or ineffective any order made by the learned judge at Woodmansterne."

The length of judicial service of some English County Court judges, which has been noticed by the Law Times, is, writes an Irish correspondent, far surpassed by the Irish record. Of the twenty-one Irish County Court judges no fewer than eight are entitled to full retiring pensions. The appointments of two of these gentlemen date thirty-nine years back — from 1859, of one from 1861, of one from 1865, of one from 1866, of two from 1872, and of one from 1876. Five Irish County Court judges have had a judicial career of over thirty years, two of over five-and-twenty years, and one of one-and-twenty years.

### Legal Notes of Pertinence.

Among the new instructors in the law department of Columbia College is Alexander Tison, recently professor of law in the Imperial University of Japan, at Tokio.

Governor Black, of New York, has signed the bill providing that whenever a non-resident justice of the Supreme Court shall be assigned to duty at Trial Term or Special Term in the first district, he shall be paid \$20 a day for every day of judicial service. This is an increase of \$10 a day, the compensation to out-of-town judges having been \$10 *per diem* for many years.

A New York lawyer has been arrested for riding too fast on his bicycle. Ignorance of the law excuses no man.

The publisher of the *Avoca* (Cal.) Herald recently sued a delinquent subscriber for seven years' subscription, \$24. He secured judgment, with costs, notwithstanding the paper had been refused at the post-office. The arrearages had not been paid, and the name was continued on the books and the paper mailed to his address.

The generic term "money" is held, in *Hendry v. Benlisa* ([Fla.] 34 L. R. A. 283), to cover everything that by common consent represents property and passes as money in current business transactions. Therefore the payment of a debt or judgment during the late Civil War in Confederate money, if accepted, is regarded as a full settlement, providing the payment was made to one who had authority to receive it.

Some American juries are inclined to be eccentric in their verdicts, but they cannot "hold a candle" in this regard to juries of Russia. The most incredible stories are told of Russian jurymen. Thus the foreman of a jury declared he would not send a poor fellow to prison because it happened to be his (the jurymen's) birthday. Another jury had agreed upon a verdict of guilty, when the church bells began to ring. They revised their verdict because a holiday had begun. A burglar was allowed to go free because the man whom he had robbed had refused to lend him money. This, in the opinion of the jury, was a direct incentive to crime.

A Mount Vernon woman was sentenced to three months' imprisonment in the Kings county (N. Y.) penitentiary because she did not keep her children clean. She was the first woman to be convicted on such a charge.

Artist Joseph Pennell gets \$250 damages from the London *Saturday Review*, and Actress Marion Terry gets \$2,500 damages from the *St. James Budget*. The British juror seems to be agin the sassy critics every time.

### Notes of Recent American Decisions.

**Constitutional Law — Interstate Commerce — Privilege Tax.**—Laws 1895 (2d. Sess.), ch. 4, § 3, requiring all persons other than photographers of the State, who shall solicit pictures to be enlarged outside of the State, to pay a privilege tax of \$25 in every county where so engaged, as applied to agents soliciting pictures to be enlarged in another State, is unconstitutional, as imposing a burden on interstate commerce. (*State v. Scott* [Tenn.], 39 S. W. Rep. 1.)

**Contract — Release.**—One who renders services at another's request does not release his claim for compensation by stating to such other that he will leave it to him to say what the services are worth. (*Whiting v. Dugan* [Tex.], 39 S. W. Rep. 148.)

**Contract for Future Delivery — Wager.**—A contract for the future delivery of cotton is a wager, where it is not intended that the cotton shall be delivered, but one party is to pay the other the difference between the contract price and the market price at the date fixed for executing the contract. (*Campbell v. New Orleans Nat. Bank* [Miss.], 21 South. Rep. 400.)

**Guardian and Ward — Loss of Funds Deposited.**—To entitle a guardian to protection from a loss of funds of his ward by the failure of a bank in which he deposited them, the deposit must clearly show that it was made by him as such guardian, and the letters "Guar." after his name in a certificate of deposit, are insufficient. (*O'Connor v. Decker* [Wis.], 70 N. W. Rep. 287.)

**Judgment Against Married Woman — Separate Estate.**—The separate estate of a married woman cannot, after coverture ceases, be subjected to a general judgment obtained against her during coverture. (*Woodfolk v. Lyon* [Tenn.], 39 S. W. Rep. 227.)

**Libel.**—A newspaper publication containing a statement which would be understood by those reading it, who knew plaintiff, to refer to him, and to imply that he was guilty of misappropriating public funds as an officer, is libelous *per se*. (*Forke v. Homann* [Tex.], 39 S. W. Rep. 210.)

**Partnership—Dissolution—Liability for Debts.**—A retiring partner is liable for the debts of the firm to a creditor having actual knowledge that under the terms of the dissolution, the other partner had assumed to pay the debts, though the creditor had attached the goods of such other partner, and subsequently had released the attachment. (*National Cash Register Co. v. Brown* [Mont.], 47 Pac. Rep. 995.)

**Wills — Construction — Nature of Estate.**—Testator devised land to his son for life, and after death to the "heirs of his body, by him begot-

ten," with remainder over if he should have no "heirs of his body, by him begotten, him surviving." *Held*, that the modifying words to the term, "heirs of his body," limiting that phrase to "children," the rule in Shelley's Case cannot be invoked to extend the devise to the son for life to a devise in fee simple. (*Granger v. Granger* [Ind.], 46 N. E. Rep. 80.)

### Notes of Recent English Cases.

**Gaming—Boxing Match — Deposit with Stakeholder — Money Lent for Deposit.**—The defendant agreed with one Corfield, of Sheffield, to engage in a boxing match with him, each party to deposit £500 with a stakeholder, who was to pay over the stakes to the winner. The defendant then borrowed £500 from the plaintiff for the purpose of making the deposit, and the plaintiff lent him the money upon the terms that the defendant should repay him the £500 in the event of his winning the match and receiving the stakes. The match came off, and the defendant being the winner, received from the stakeholder £1,000, the amount of the stakes. The plaintiff being unable to obtain from the defendant repayment of the £500, brought the present action to recover that sum as money lent to the defendant. The defendant relied upon the Gaming acts, 1845 and 1892. At the trial of the action before Day, J., without a jury, the learned judge gave judgment for the plaintiff. The defendant appealed. *Held* (allowing the appeal), that, since the terms of the loan were that repayment should depend upon the result of the boxing match, the promise of repayment was void under § 1 of the Gaming act, 1892, as being made in respect of an agreement rendered null and void by the Gaming act, 1845. Judgment for the defendant. (*Carney v. Plimmer*, Ct. of App.; L. T., Apr. 10, '97.)

### New Books and New Editions.

**A Treatise on the Specific Performance of Contracts, As It Is Enforced by Courts of Equitable Jurisdiction in the United States.** By John Norton Pomeroy, LL. D., late Professor of Municipal Law in the Hastings' Law Department of the University of California; author of Archbold's Criminal Practice and Pleading. 1897. Banks & Brothers, New York and Albany.

The second edition of this standard work on contracts, which has just been issued, is by the son of the original author, John Norton Pomeroy, A. M., LL. B., of the San Francisco bar. In this edition great pains have been taken to incorporate and assimilate the vast mass of case-law relating

to this most important subject, which has accumulated since the publication of the first edition. In this the editor has been assisted by the help of scholarly and elaborate notes to an unpublished edition of Fry on Specific Performance, prepared about nine years ago, by his friend, Prof. Nathan Abbott, of Leland Stanford, Jr., University. For this generous aid the editor expresses his most earnest thanks, and is confident that the profession will appreciate the degree in which the value of the editorial work has been thereby enhanced. As to the original work, very little need be said. That the author's endeavor to produce a treatise suited to the needs of the American lawyer, and representing the equitable doctrines concerning specific performance as they have been established and are administered by the American courts has been successful is shown by the marked favor with which the work under review has been received by the lawyers of the United States. The popularity of the work is due not alone to its completeness in presenting the system of doctrines and rules relating to specific performance of contracts (which is quite different in many important respects from that which exists in England), but also to its masterly grasp of the subject, its lucidity of style, and its felicity of expression. No claim is made that every particular instance in which a contract has been specifically enforced has been mentioned, but the principles are stated and explained to which every instance may be referred, and by which it must be determined. The author has been particularly painstaking in his preparation of the notes, which contain a very full commentary on and illustration of the text. It is no exaggeration to say that no more satisfactory and altogether excellent work on the subject has been published, and we confidently predict for the second edition as large and ready sale as that of the original.

**Negligence — Rules, Decisions, Opinions.** By Edward B. Thomas, of the New York Bar. Banks & Brothers, New York and Albany.

The plan of this most excellent work, as stated by the author, comprises a statement of general principles—a condensation to the smallest compass consistent with reasonable exposition—a chronological digest and topical arrangement of the decisions of the Court of Appeals of the State of New York, the unreviewed decisions of the General Term of the Supreme Court reported in Lansing and Hun, and as exhaustive a digest of all other authorities as the limits of a single volume would permit. In its preparation a vast amount of labor has been involved, extending through a number of years. The author's twenty years of actual experience in the trial of cases, involving the Law of Negligence, has evidently stood him in good stead, indicating what, and what amount of pertinent literature and decision was useful, and



in what form it should exist. In other words, the aim has been to make the work entirely practical, a presentation of the law and authorities in such form as will best aid the lawyer, who has a case to prepare or try. Among the topics fully treated may be mentioned Agency, Bailments, Banks—Savings, Bills, Notes and Negotiable Instruments, Common Carriers of Goods, Common Carriers of Passengers, Contracts, Contractors, Contributory Negligence, Crossings (Railway), Damages, Death from Negligence, Domestic Animals, Elevators, Evidence, Fires, Games and Sports, Insurance, Indemnity, Landlord and Tenant, Manufactures and Vendors, Master and Servant, Municipality, Parties, Pleading, Private Premises, Professional Persons, Release, State, Streets—Injuries Received On, Sunday—Injuries Received On, Telegraph Companies. The subjects of Evidence and Damages have been considered with that particular fullness which their importance merits, and will be found most satisfactory. A feature of special value and importance is the copious extracts from the opinions of the courts, where there has been a marshaling or analysis of authorities, or a discussion of unsettled or unusual questions. "This," as the author well says, "gives the examiner an ample view of the subject from the standpoint of the court, whose reasoning should be more authoritative than the disquisitions of law writers, and equally instructive." Some idea of the vast amount of labor expended upon the preparation of this work may be gathered from the statement that more than 10,500 cases have been examined and cited. All this is done in a not inconveniently bulky volume of 1,393 pages. "Thomas on Negligence" is, indeed a *vade mecum* to the busy lawyer on one of the most important and frequently-recurring subjects which will claim attention. That it will automatically win cases is not claimed for it—that it will greatly facilitate the task there is no manner of doubt.

Calman's Code Time-Table. By Joseph A. Arnold. of the New York Bar. 1897. Baker, Voorhis & Co., New York.

This is the fourth edition, revised and enlarged. It contains an alphabetical arrangement of the various periods of time required by the laws of practice in all actions and proceedings in the courts of the State of New York, as regulated by the Codes of Civil and Criminal Procedure, the rules of the courts, the New York City Consolidation act, and the general laws of the State. It is conveniently arranged for ready reference, and cannot fail to be a valuable aid to the busy lawyer, who would avoid possible annoying and costly mistakes—one of those time-saving and trouble-avoiding devices of which every lawyer should avail himself.

Greene's Practice Time-Table. By H. Noyes Greene, of the Troy Bar. 1897. Matthew Bender, Albany, N. Y.

This volume of 150 pages covers the same ground as does Calman's Time-Table, viz.: Indexing and digesting the practice laws of the State, with a view of avoiding the necessity of compelling busy practitioners to hunt through a mass of matter in order to be sure they are right before going ahead. This the compiler of the Code Time-Table has done for the busy lawyer, who is, by its aid, enabled to ascertain, within a few moments, the periods of time within which certain steps are required to be taken. It is easily conceivable that such a book may save profanity, as well as time. In truth, it ought to be in every practicing lawyer's library.

A Digest of the New York Code of Civil Procedure. Edited by Charles W. Disbrow, of the New York Bar.

This is a handy little pamphlet of 76 pages, being, as its title indicates, a digest of the Code of Civil Procedure. While valuable to the lawyer, it ought to prove particularly so to the student in depriving that *bête noir*, the "exam's," of at least a part of its terrors. Mr. Disbrow has done the digesting with evident care.

Mr. L. B. Proctor has written, and dedicated to the members of the New York State Bar Association, the story of the trial and conviction of David Duncan Howe, of the murder of Melville W. Church. This *cause célèbre*, which was tried at Angelica, N. Y., September, 1828, together with the subsequent conviction and execution of the murderer, attracted wide attention at the time from the peculiar circumstances surrounding it; and the trial itself was no less remarkable than was the crime, by reason not only of the purely circumstantial evidence upon which the prosecution relied for conviction, but because of the eminence and distinguished ability of the opposing counsel—Abraham Van Vechten, a learned and able member of the Albany bar, who defended the prisoner, and John C. Spencer, reviser of the statutes and a statesman of historic fame, who, as special attorney-general, conducted the prosecution with marvelous skill and legal acumen. Mr. Proctor most admirably epitomizes the story, graphically portrays the inhuman, devilish persecution of Howe by Church, and by his vigor of expression, and graphic description, sways the reader at will, bringing the tragic scenes before his mental vision with almost startling vividness. Altogether, it is a remarkably strong bit of work, upon which the accomplished author is receiving many deserved congratulations, in which THE ALBANY LAW JOURNAL heartily joins.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, MAY 8, 1897.

### Current Topics.

THE New York legislature, which recently adjourned, left the governor a legacy of some 780 so-called thirty-day bills, in addition to the 358 which had previously been placed on the statute book. The governor's responsibility in settling the fate of this mass of proposed laws would be great but for one thing — there are few really important or necessary measures among the lot. Should they all die a-borning the State would probably be, on the whole, better off. On this subject, the Albany Argus has something to say which we can unreservedly endorse:

"We are too much governed. We are legislated to death. The absurdity of a thousand new laws every year, in one of the oldest and most conservative of States, carries its own comment. Ignorance of the law excuses no man; and yet the claim that the most law-abiding citizen of the State cannot possibly get through a week without breaking some law is not extravagant. It may be that, with human nature as it is, it is too much to hope, to demand that every individual bill be considered on its merits, apart from the fact that the introducer has agreed to vote for other bills in consideration of support thereby secured for his own; if it is so, then human nature is the lawyer's best friend, for the present system is prolific of law-suits, and keeps the courts busy construing imperfect and conflicting statutes."

It is altogether too easy to put new laws

VOL. 55 -- No. 19.

on the statute book, while the usefulness of a legislator is too apt to be gauged by the number of bills which he has "jammed through" the legislative hopper. Biennial sessions, limited to, say, 60 or 90 days, might perhaps, not entirely eradicate the evils of over-legislation, but that they would mitigate them is hardly open to doubt.

It is worthy of note that several States of the Union are considering measures designed to check the "pernicious activity" of law-makers. The Pennsylvania Bar Association has prepared a bill for the appointment of a commission of experts, whose duty it will be to revise and pronounce upon bills and proposed laws. The commissioners are to be three in number, and are to have the qualifications required in a justice of the Supreme Court. All bills are to be referred to it, and its report upon each must contain, first, a concise statement of the existing law, if any, upon the subject, and of the precise nature of the change proposed; second, whether any amendment is needed in substance or in phraseology; third, whether it is consistent with constitutional and statutory requirements. Opinions may differ as to whether such a commission would do its work more intelligently and faithfully than it is done by the judiciary committees of the legislature, which are supposed to consider all these points. The trouble with the regular committees is that they are too apt to be controlled by political influences in reporting bills referred to them. If some means could be devised to render this influence nugatory, the people would have cause to congratulate themselves, because it is a well-known fact that the great bulk of bills introduced and given preference are intended to serve some private, partisan or local interest. The crying need is for more statesmanship and less partisanship in legislation. The New York State Bar Association might, with profit, take up this interesting and important question.

The code of ethics of the medical, like that of the legal, profession, while unwritten, and, perhaps, from its very nature, incapable of

being reduced to a written system, is, or ought to be, none the less sacredly binding upon all honorable members thereof. Physicians have, from time immemorial, been recognized as occupying peculiar relations to society. They not only have the health and life of the patient in their keeping, but in the practice of their profession necessarily come into possession of secrets which they are expected to hold sacred, to guard as carefully as they would their own personal reputation and honor. This, it should be remembered, is not based primarily upon the theory of the protection of the individual, either from the consequences of misfortune or misdeed, but rather that society may be saved from exposures which might shake it to its foundation without, in many if not most cases, accomplishing any good purpose; for, so long as human nature is as it is, the merely animal part can never be eradicated, not if all the doctors in the world were to disclose all their secrets in a day. We are prompted to make these observations by the occurrence of an unusually flagrant case of the violation of professional etiquette by a member of the medical profession, who, after having been entrusted by an erring clergyman with the details of his secret crime, assisted in bringing into the world an illegitimate child, the fruit of the guilty *liaison* of the minister of the gospel and his domestic. What added still more to the sacredness of the obligation in this case was the fact that the doctor was a leading member of the flock of the erring divine. Entrusted, as we have said with the minister's terrible secret, his position was, indeed, a difficult and delicate one. Should he, as a medical practitioner, undertake the case and preserve the secret inviolate? or should he absolutely refuse to be mixed up with it, expose the duplicity of his pastor and insist that he be forthwith unrobed? Or should he, still regarding the minister's confidence as sacred, decline to take the case? Any one of these alternatives was open to him; but he could not, with honor, assist the erring divine without also tacitly agreeing to be bound by the ethics of his profession and hold the secret inviolable, just as he would in the case of any other

patient who came to him for aid. But what did this doctor do? He waited more than two years, and then, after the minister had been lulled into fancied security, and after the perhaps equally guilty woman had been happily married, he made the awful exposure; the clergyman, who was performing a large and important work, beloved, even idolized, by his congregation, was suddenly and without warning brought to the bar of justice, the grinning skeleton in his closet thrust forth into the light, and another human idol rudely shattered, the cause of Christianity dealt a cruel blow, and more than one happy home plunged into the depths of misery and despair. Upon the clergyman himself not much sympathy need be wasted, but what of the innocent ones who were, by this cruel exposure, forced to drain the cup of misery to its deepest dregs? Are they not entitled to our commiseration and pity? And what thought intrudes itself upon the mind when one thinks of the doctor who thus forced the cup to their trembling lips? Is he not to be despised and detested, fully as unfit to remain in the profession he has disgraced as the minister whose fall made possible the *denouement* just witnessed?

The Supreme Court of the United States, in a case coming from the Court of Appeals of New Orleans parish, La., recently passed upon the interesting question of the legal disabilities of dogs. George W. Sentell, of New Orleans, was the owner of a valuable registered Newfoundland bitch, which he kept for breeding purposes. While following him on the streets of the city, she stopped on the track of the New Orleans and Cowallton Railroad Company, and not observing the approach of an electric car, and, moreover, "being in a delicate state of health and not possessed of her usual agility, she was caught by the car and instantly killed." Sentell sued the railroad company in a District Court for \$250 damages, and recovered that sum. On appeal the Court of Appeals reversed the lower court, holding that Sentell should have shown a compliance with the State laws and city ordinance regarding dogs. A Louisiana statute provides that dogs are only to be re-

garded as personal property when duly recorded upon the assessment-rolls. Mr. Sellt's dog was not so recorded, and two leading questions arose: First, could his owner recover for the loss, and, secondly, was the Louisiana statute in question constitutional? In affirming the judgment of the Court of Appeals, the Supreme Court, through Mr. Justice Brown, who wrote the opinion, took pains to make clear the legal status of the dog, property in which is declared to be of an imperfect or qualified nature. They are not to be considered as being in the same plane with horses, cattle and sheep, in which the right of property is perfect and complete, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity or caprice. In other words, they have no intrinsic value—that is, common to all dogs and independent of the particular breed or individual. This is, of course, by common law. But the court thinks it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, and therefore all legislation on the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. The court continues:

“Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability on the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are such as beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from annoyance and destruction. Such legislation is clearly within the police power of the State. While these regulations (in Louisiana) are more than ordinarily stringent, and

might be declared to be unconstitutional if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. The statute really puts a premium upon valuable dogs by giving them a recognized position, and by permitting the owner to put his own estimate upon them. The judgment of the Court of Appeals is affirmed.”

The court thus clearly and correctly defines the legal status of the dog; but it will probably not be claimed that the law is perfect. It is difficult to conceive a good reason for refusing to dogs such proud equality as would come from ranging them with thoroughly domesticated animals, like common pigs and “setting” hens. Their services in watching and guarding property are of great value, alone entitling them to such recognition. But even though they were all “kept for pleasure, curiosity or caprice,” they would be on a par with many other so-called luxuries which the laws have always recognized. Give the dogs a chance.

The Supreme Court of New Jersey recently rendered an extraordinary decision respecting the rights of railroad travelers, in which they depart from well-established principles and precedents, laying down the rule that the rights of a passenger must be measured by the contract made with the company, and that it is of no consequence whatever that the conditions annexed to the contract are onerous and unreasonable—that, so long as the parties were competent to contract, the agreement could not be altered by either party, nor by the courts. It has been the general rule, uniformly adhered to, that, owing to the *quasi*-public character of common carriers, the conditions printed on the tickets are only binding upon passengers when the same are reasonable and consonant with public policy. This rule would seem to be clearly more just, as well as equitable, than the one more recently declared by the New Jersey Supreme Court.

The recurrence of the movement, in the New Jersey legislature, to alter the law so as to abate the scandal concerning marriages in

the city of Camden, again sees the clergymen of that city arrayed against it, on the alleged ground that their rights are being invaded. But there is reason to believe that their opposition to the proposed reform is really based on the ground that their income would thereby be decreased. It is a well-known fact that several thousands of dollars are paid into the pockets of the Camden ministers annually by people who cross over the Delaware from Philadelphia in order to evade the Pennsylvania law, which requires them to obtain a license before getting married. It is this sum of money which induces the Camden clergymen to appear in force at Trenton every time a marriage license bill is introduced, and to oppose the bill with might and main. This fact is not at all creditable to the cloth. One of the opposing clergymen declared that the bill was not drawn in the interest of New Jersey, but rather for Pennsylvania, where the license fee is but 50 cents. "This," he solemnly declared, "will cause numberless people to go across the river in order to save the extra 50 cents. I have married many people who did not have a cot to lie on, and who embarked on the matrimonial sea without as much as a dollar." If this be true, it is high time that some obstacles were placed in the way of such hasty and ill-advised alliances, and no wonder that, in so many instances, marriage proves a failure. Marriage licenses are already required in forty-one States of the Union, and New Jersey ought to get into line, in spite of the opposing clergymen and any possible reduction of their income.

The declaration that the law is a laggard science ought not to carry much weight, in view of the many innovations constantly being witnessed. Not long ago attention was called to the employment of the X rays to settle a mooted question of fact, and now we are confronted with the novel possibilities involved in the influence of applied science in another direction, upon legal evidence. This was an attempt to present to a jury the sounds registered by a graphophone. It was in a suit for damages against a railroad com-

pany by an owner of real estate, who claimed that his property was injured by the noise of passing trains. As part of the evidence in support of his claim, the plaintiff proposed to turn loose upon the ears of the jury the jargon of sounds registered upon the sensitive cylinders. The learned judge trying the case was naturally somewhat perplexed as to the proper ruling on so novel a proposition. It is evident that modern ingenuity is prepared to invade court-rooms, and to have important effect upon the interpretation of the law and the decision of legal issues.

The passage by the New York legislature of the so-called Anti-Railroad Ticket Scalping bill marks an important step in a long-needed reform. There is reason to believe that by some legislators the measure was at the outset regarded as another "corporation strike," but the advocates of the bill succeeded in silencing all opposition and in passing the measure by a decisive vote, thus declaring illegal a vocation which has long been recognized as provocative of crime, where crime did not actually enter into the conduct of the business. The demand of the railroad corporations for the enactment of this measure was entirely proper, and justified by the well-known fact that most serious abuses connected with transactions in railroad tickets have long existed. The States of Pennsylvania, New Jersey, Illinois, Indiana, Montana and Texas have already legislated on the subject, and the Federal bill, applying to all interstate railroads, which is pending in congress, will, when passed, go far toward completing the good work.

In the recent case of *Day v. City of Lawrence* (Massachusetts Reports, vol. clxvii., part 2), the Supreme Judicial Court affirmed the constitutionality of Pub. Sts., c. 11, § 5, cl. 6, exempting from taxation "household furniture not exceeding \$1,000 in value," and held that the exemption applies to all furniture appertaining to a dwelling house, and bought and kept for use in the household, including that used in sleeping-rooms occupied by boarders. The words used, the court holds, do not mean necessary furniture only,

but all the furniture, furnishings and utensils of the dwelling, and in the construction of a will they have been held to include bronzes, statuary and pictures used to adorn a home, if in accord with the means and style of living of the householder. The fact that a large portion of the furniture was kept in sleeping-rooms used solely by occasional guests or permanent boarders, did not take it out of the exemption. Indeed, permanent boarders are held, under the decisions of Massachusetts, to be part of the householder's family, and entitled to the protection of the house as their castle, as part of the family. So, too, the householder retains possession of the rooms occupied by his lodgers, and of the furniture in them, and a mere lodger in the house of another is not a tenant or an occupier of a house.

An interesting question as to the effect of a mutual mistake in the matter of a conveyance of property in performance of an antenuptial contract was decided by the Supreme Court of Massachusetts recently, in the case of *James H. Ogden and Others v. Margaret McHugh and Another*. When the contract in question was executed, and when the ceremony of marriage was performed, Margaret and Ogden both believed that James McHugh, her former husband, was dead, and remained in that belief down to the time of the death of Ogden, five years later, though in fact James McHugh was and is now living, and no divorce between him and Margaret was ever had. The court held that the heirs-at-law could not maintain a bill in equity to have the conveyance set aside, upon discovering the existence of the former husband, because they had no better right than he would have had, if living. When Ogden performed the contract he knew of the fact that the only evidence of the death of the former husband was his absence from the year 1876 until the time of the marriage, in 1888. He took the chance that the former husband was yet alive, and he was equally responsible with the defendant for all the consequences to her and to himself resulting from the marriage ceremony and his living with her as his wife.

#### IMPRISONMENT FOR DEBT.

(Continued from last week.)

It is very probable that the poets and playwrights of Shakespeare's time — Marlowe, Massinger, Green, Peele, and their fellows, boon companions all, brawlers and tavern-haunters, all of whom consorted with men of low lives — felt the force and reality of the English Poor Debtors' law in operation during the period when they flourished. There is an imploring letter, signed by Massinger, which came, in all probability, from some tight prison for debt.

Mention of Shakespeare brings up the recollection that the "Fat Knight," Falstaff, because of the social slights he inflicted upon his landlady (in "King Henry IV.") was arrested for debt, but saved himself, by a renewal of his blandishments, from being actually restrained of his liberty.

It is known that Smollett, at one time, stung a person in power with a biting paragraph, and for this sting spent some three months in the King's Bench prison. It is also known that some of the sketches that appear in his "Roderick Random," which novel was written in 1748, are of and from Smollett's own life. The hero, Roderick Random, was arrested on a tailor's bill of £50. The tailor refused to be amused, and could not be frightened by loud oaths. The circumstances were as follows: Roderick was in desperate straits (where is the hero who has not been?), and upon consultation with his ingenious friend, Banter, he was advised to take two or three suits of rich clothes, as he still had credit with the tailor, and convert them into cash by selling them at half price to a salesman in Monmouth street. Roderick was sanguine enough to think that he would soon be in funds, and so made himself easy as to his honesty in the matter. A player, having purchased one of the suits exposed for sale, appeared in it on the stage one night. The tailor happened to be present, and, recognizing his own goods, he inquired into the affair, and discovered the whole contrivance. The hero was taken into custody, and he himself thus proceeds: "I refused to go to a sponging-house, where I heard there was nothing but the most flagrant imposition, and, a coach being called, was carried to the Marshalsea, attended by a bailiff and his follower, who were very much disappointed and chagrined at my resolution." Smollett was probably employing the perceptive faculty in the description of the interior of the jail, which he then gives. The narrative of Mr. Melopoyne, who was living on the "common side" of the jail, is very interesting. This gentleman was an excellent poet. He had also composed a tragedy, which, however, he had peddled and marketed with very much discouragement and no success. Failing to sell his tragedy, and having contracted obligations on the faith of its prospective sale,

he was imprisoned for debt. To use the hero's own language again: "I saw a number of naked, miserable wretches assembled together. We had not been here many minutes when a figure appeared, wrapped in a dirty rug, tied about his loins with two pieces of list of different colors, knotted together, having a black, bushy beard, and his head covered with a huge mass of brown periwig, which seemed to have been ravished from the crown of some scare-crow." This apparition was the unfortunate Mr. Melopoyne. The novel also contains a very interesting account of the loquacious Miss Williams, a member of the sisterhood of the streets, and of her intimate acquaintance with bailiffs and prisons.

"Amelia" opens with a prison scene. This novel Dr. Johnson read from beginning to end without once stopping. He said of it that it was "perhaps the only book of which, being printed off betimes one morning, a new edition was called for before night. The character of Amelia is the most pleasing of all the romances." Captain Booth, in this novel, was twice arrested for debt, though he got no further than a bailiff's house in Gray's Inn lane. We are given instances of the stratagems and force used by the bailiffs of the period in making arrests. There was a certain territory called "the verge of the court," which was sanctuary for debtors, but in this territory the debtors had to huddle close, for they were well watched. References are made in the course of the narrative to the one day of the week in which all parts of the town were indifferent. Needless to say, this day was Sunday; and immunity from arrest on that day was conferred by the statute 29 Car. II, C. 7. Captain Booth was lured from his house and from the "verge," under the idea that his wife had been suddenly seized with an illness while on an errand. Once outside the "verge," the captain was laid hold of without any ceremony. He addressed himself to the bailiff, and the latter replied as follows: "Well, sir, and whither am I to go with you?" "O, anywhere, where your honor pleases." "Then suppose we go to Bruno's coffee house," said the prisoner. "No," answered the bailiff, "that will not do; that's in the verge of the court." "Why, then, to the nearest tavern," said Booth. "No, not to a tavern," cries the other: "that is not a place of security; and you know, captain, that your honor is shy cock. I have been after your honor these three months. Come, sir: you must go to my house if you please." "With all my heart," answered Booth, "if it be anywhere hereabouts." "O, it is but a little ways off," replied the bailiff, "It is only in Gray's Inn lane, just by, almost." The bailiff then called a coach, and desired the prisoner to walk in. The prisoner was treated civilly—that is, they neither struck him nor spat in his face.

Upon the prisoner's arrival at the bailiff's house

the bailiff began his work of extracting gratuities for coach-hire, for punch, and for the like. A messenger was supplied Booth at his request, that he might inform his wife of his arrest and whereabouts. "Poor men always use messengers instead of the post," said Thackeray. Despite the wish expressed by the bailiff to see Booth released, this same messenger was ordered by this same bailiff to stay his errand for Booth, and to first call upon two or three other bailiffs, and as many attorneys, in the endeavor to load the prisoner with as many actions as possible, to the profit of the said bailiff, of course.

The bailiff applies himself to the selling of drink to the imprisoned captain. "I have told you, sir, I never drink in the morning," cries Booth a little peevishly. "No offense, I hope, sir," said the bailiff; "I hope I have not treated you with an incivility. I don't ask any gentleman to call for liquor in my house, if he does not choose it; nor I don't desire anybody to stay here longer than they have a mind to. Newgate, to be sure, is the place for all debtors that can't find bail. I know what civility is, and I scorn to behave myself unbecoming a gentleman; but I'd have you consider that the twenty-four hours appointed by act of parliament are almost out; and so it is time of thinking of removing. As to bail, I would not have you flatter yourself, for I know very well there are other things coming against you; besides, the sum you are already charged with is very large, and I must see you in a place of safety. My house is no prison, though I lock up for a little time in it, indeed, when gentlemen are gentlemen, and likely to find bail, I don't stand for a day or two; but I have a good nose at a bit of carrion, captain. I have not carried so much carrion to Newgate without knowing the smell of it."

After this very promising opening, it is not surprising that the bailiff and prisoner soon came to blows.

At the time of the captain's second arrest the bailiff, being called upon to vindicate his calling, delivers himself in this very lucid manner:

"I am all for liberty for my part." "Is that so consistent with your calling?" cries Booth. "I thought, my friend, you had lived by depriving men of their liberty." "That's another matter," cries the bailiff; "that's all according to law, and in the way of business. To be sure, men must be obliged to pay their debts, or else there would be an end of everything."

Booth desired the bailiff to give him his opinion of liberty; upon which he hesitated a moment, and then cried out: "O, it is a very fine thing; it is a very fine thing, and the constitution of England."

Booth told him that by an old constitution of England he had heard that men could not be arrested for debt. To which the bailiff answered, that must have been very bad, "because, as why,

would it not be the hardest thing in the world if a man could not arrest another for a just and lawful debt? Besides, sir, you must be mistaken, for how could that ever be? Is not liberty the constitution of England? Well, is not the constitution, as a man might say, whereby the constitution, that is the law and liberty, and all that —"

Booth had a little mercy upon the poor bailiff when he found him rounding in this manner, and told him he had made the matter very clear. Finally, the wicked lawyer and the forged will were found out, the captain was relieved, and there were no more arrests for debt.

Daniel Defoe was a restless man, and versatile and indefatigable to the degree of genius. His literary output was enormous, and yet his commercial activity was seldom ever interrupted, but, as is well known, he was unfortunate all around. Our knowledge of his life is by no means as accurate and pleasant as it might have been had he himself been more truthful in his confidential moments. It has been said of him that "he could lie like the truth," and, further, that "he was a story-teller in more senses than one." Of himself he said:

"No man hath tasted differing fortunes more,

For thirteen times have I been rich and poor."

Early in life it is quite certain that Defoe found it necessary to flee from his creditors and hide in Bristol. There is a story that he was known there as "the Sunday gentleman," because he appeared on that process-resting day, and on that day only, in fashionable attire, being kept indoors the rest of the week for fear of the bailiffs. He himself says he compromised and ultimately settled these early debts. Politics afterwards landed him in Newgate prison, and not once alone. In this connection he said of himself:

"If a stranger taps me on the shoulder in the street, I at once turn round and walk toward Newgate, purely from force of habit."

While in Newgate, Defoe published the "Review," a little newspaper or newsletter. In this publication he called the attention of the legislature to some flagrant abuses in connection with the prison.

Defoe was released from Newgate on condition that he keep silence on political topics for several years, or, at least, "not write what some people might not like." He was in hiding the last two years of his life, and the opinion held by most is that debts were the cause of this secreting. At his death a creditor cited the next of kin to appear and take upon themselves the burden of administration. On default thereof, she applied for the issuance of letters to herself. Defoe had, previous to this, however, with his usual prudence and energy, made what he thought to be proper conveyances of his property. He nevertheless passed through all his troubles to write "Robinson

Crusoe," which classic some one has characterized as a story that has exercised more influence on the English-speaking race than any other story, and yet it neither draws a laugh nor a tear.

Defoe made his debts actual pieces in his political game. His poverty, apparent, if not real, effectually screened his employment under government. He would journey to Scotland or elsewhere, on secret missions under appointment from the queen, wiping his eyes at the hardship of having to flee from his creditors.

In Defoe's "Journey Through England" (1722), we find the following quaint passage: "The King's Bench is in Southwark; its rules are more extensive than those of the Fleet, having all St. George's Fields to walk in, but the prison-house is not near so good. By a *habeas corpus* you may remove yourself from one prison to another; and some of those gentlemen that are in for vast sums, and probably for life, chose the one for their summer and the other for their winter habitation."

Wycherly, the dramatist, languished in the Fleet for seven years because of his unpaid and neglected debts — and this despite his interest and intimacy with the notorious Duchess of Cleveland, the king's mistress. James the Second happened in one evening on a production of Wycherly's clever but licentious comedy, "The Plain Dealer." So pleased was he with the performance, and so touched by the fate of the writer, whom he probably remembered as one of the gayest and handsomest of his brother's courtiers, that he paid the fellow's debts, and, moreover, adding gratuity to kindness, settled £200 a year upon him.

Wycherly's jail experience proves that the sergeant (in prologue to "The Rivals") spoke the truth when, representing the plaintiff in the case of Profit v. Fame, he said: "In adverse days this wig is warmer than a bush of bays."

The dandies of the gay days and court of Charles the Second had to keep constant watch and ward against tailors and bailiffs. Beau Fielding was at one time saved from the hot pursuit of process-servers only by putting his long legs to the best pace that his frills and furbelows would permit, and by having the officers on guard at St. James Palace, his friends, to whom he ran, drive his pursuers away at the point of drawn swords.

Theodore Hook, the wit, served for a season as treasurer of the island of Mauritius. Later we find him undergoing a rigid examination before the colonial audit board, the finding of which was that Hook was a debtor of the government. He spent nine months in a sponging-house for this offense, under a writ of extent, only exchanging that residence for a closer one in the Bench itself, or the "rules" thereof. He was liberated in 1825, upon the understanding that the government should be reimbursed if and when Hook



found himself able to do so. I do not know that history records what his subsequent ability was or just how the same was exercised.

The last days of Richard Brinsley Sheridan were made fearful by his debts. At this period he was out of parliament, and could not plead membership therein in avoidance of arrest. His books found their way to the pawnbrokers. The precious portrait of his beautiful first wife, the sweet songstress, Miss Linley, from the brush of Sir Joshua Reynolds himself, passed away from him. In 1813 Sheridan was haled to a sponging-house in Tooke's Court, Cursitor street, where he remained two or three days. Tom Moore is authority for the statement that when Sheridan reached home after this experience he burst into a passionate and uncontrollable fit of weeping at what he termed the "profanation" of his person. After this writs and executions came in swift succession. In a letter to Rogers, his friend, Sheridan wrote: "They are going to break into Mrs. S.'s room and take me. For God's sake let me see you." A sheriff's officer at last made his way to the dying man's bedside, and actually essayed to carry him off in the blankets. The doctor in attendance managed to avert this threatened outrage by the use of counter-threats and strong persuasion. Though his friends thus forgot him in his last moments, Sheridan had the *post-mortem* satisfaction of being borne to the grave by a noble crew of earls, dukes and lords.

Sheridan's qualities, moral and physical, have been well glanced at in the following two lines:

"Good at a fight, but better at a play;  
God-like in giving, but — the devil to pay."

During the "jubilee year" (1809) a popular form of expressing happiness at the reign of an easy king was the raising of funds for the release of prisoners confined for small debts. A "Society for the Relief of Prisoners for Small Debts" existed during this year; and we find the king himself contributing £2,000 out of his privy purse for this purpose, to show how he felt about it.

Charles Mathews, the comedian, whose humor was so much admired by Leigh Hunt, in proposing the toast of "The Army and Navy" at his farewell banquet, observed: "I have never been in the army, though I have been in many *à* mess; and the only chance I ever had of joining the navy was once when I had a narrow escape of getting into the Fleet."

Purchas, who, in the reign of James the First, had spent his life in travels and study to form his "Relation of the World," when he gave it to the world, for the reward of his labors was thrown into prison at the suit of his printer. Rushurst, the author of "Historical Collections," passed the last years of his life in jail, where, indeed, he died. Simon Ockley, a learned student in Oriental literature, after having devoted his life to Asiatic re-

searches, had the mortification of dating the preface of his great work from Cambridge Castle, where he was confined for debt. Ockley observes: "Young men will hardly come in on the prospect of finding leisure in a prison to transmit those papers for the press which they have collected with indefatigable labor, and oftentimes at the expense of their rest and all the other conveniences of life, for the service of the public — no, though I were to assure them from my own experience, that I have enjoyed more true liberty in six months here than in thrice the same number of years before." Sydenham, who worked many years on a laborious version of Plato, died in a sponging-house. Lydiat, whom Dr. Johnson refers to as "a learned scholar," wrote his "Annotations on the Parian Chronicle" while confined in the King's Bench for debt.

In our times it is certain — for it has been proved — that traders will not trust a penniless literary man any more than they will any other penniless creature. Along this line, it is significant, however, that the writers of the present have introduced themselves into literary activity and profit from some profession or pursuit which was not itself abandoned, if at all, until money success in literature has been assuredly attained. We even now speak of "Dr." A. Conan Doyle; and Stanley J. Weyman, and Anthony Hope (Hawkins) are lawyers. S. R. Crockett is a Scotch minister, and I should like to hear him preach. Ian Maclaren also preaches the Word. This seems to show that men are unwilling to sacrifice all for literature, pure and simple, as of old. Thus literature, among those who are really its followers, is now a diversion and not a pursuit; and it does not become the latter until profitable demands for production are made. Such literature is diverting, as becomes a diversion, rather than permanent, as becomes a pursuit.

Clerical prisoners for debt living within the rules of the Fleet claimed, quite continuously, apparently, that they were exempt from the jurisdiction of the Bishop of London, and they would thereupon perform marriages without banns or license. In 1616 this style of marriage flourished. The competition was so strong at that period that signs reading, "Weddings Performed Cheap Here," were common in the windows of taverns and bailiffs' houses near the prison. Touts were employed to bring in the customers, the nominally-imprisoned parson would marry them, and the landlord would act as clerk.

The bidding for custom is illustrated in the following advertisement of the time:

"G. R.

"At the true Chapel

"at the old Red Hand and Mitre, three doors from Fleet Lane, and next door to the White Swan; Marriages are performed by authority of

the Reverend Mr. Smyson, educated at the University of Cambridge, and late Chaplain to the Earl of Rothes.

"N. B.—Without Imposition."

The "N. B." is quite modern in its implied declaration that "none others are genuine."

During four months in 1705, 295 of these marriages were performed. The Grub Street Journal of January, 1735, contains the following:

"There are a set of drunken, swearing parsons, with their myrmidons, who wear black coats, who pretend to be clerks and registers of the Fleet, and who ply about Ludgate Hill, pulling and forcing people to some peddling ale-house or brandy-shop to be married, even on a Sunday stopping them as they are going to church, and almost tearing their clothes off their backs."

Temporary husbands were frequently hired at the Fleet by women who were desirous of defeating actions of debt by pleading coverture. References to that practice are found in the contemporary literature. In "Roderick Random," Beau Jackson, whom Roderick finds in jail, told the latter that he had been arrested for the debts of a common woman of the town, who "decoyed him into matrimony in order to enjoy the privilege of a *femme covert*." In the same novel the apothecary's daughter was married to Squire Gawky at the Fleet. "On a pretense of going to a play, they drove to the Fleet, where they were coupled." Readers will recollect that had the lady been more exact and circumspect in her relations, she would have been wedded to O'Donnell, and not to Gawky.

There is an old print of the eighteenth century showing a wedding at the Fleet. The parson is seen advancing with outstretched hands, but whether in welcome or for compensation is not plain. A landlord, with his apron on, is handing the lady from the coach in a familiar, embracing manner. In 1702 the Bishop of London attempted to break the practice, but it was not until the passage of an act of parliament in 1854 that the thing really ceased.

I found the following original certificate in the archives of the British Museum:

"At the Hand and Pen and Golden Pott at the Ditchside, EDWARD SKIRING of St. James, Coachman and Batchelor, and SARAH SIMKINS, of the same place, were married at the Fleet, London, on the 23 day of February, 1727, according to the Rites and Ceremonies of the Church of England, as appears by the Register in the custody of Jno. Floud, Min. MATTHIAS WILSON, Cler."

Evidently somebody was careless with respect to this documentary evidence of the conjugal relations of Edward and Sarah. The certificate itself, however, looks well and reads regular.

These "Fleet marriages" were always rather "rum" affairs, for it seems to have been an es-

sentia part of their celebration that the parties and celebrants visit some tavern neighboring the Fleet—if they were not already in one—and there drink to the occasion. The Gretna Green marriages, of which we have heard so much, were things of a different class, and the two should not be confounded. It was the law of Scotland that all that was necessary to the validity of a marriage ceremony was a declaration of the contracting parties, before witnesses, of a willingness to marry—license, banns and priest were dispensed with. This declaration was generally made to the village blacksmith, at Gretna Green, just over the border. These marriages had a sort of Lochinvar complexion, and there was honesty and romance about them. They should have had, and they seem to have had, the patronage of ladies who were commanded to marry "laggards in love and dastards in war." Burns followed his country's custom with his Highland Mary, but if memory serves well, God and a running brook were the only witnesses to his ceremony. I will have done with the common sin of digression by reminding readers how Lydia Languish bemoaned her loss of a Gretna Green ceremony to Julia, when she found out that Ensign Beverly and Captain Absolute were identical. The Gretna Green marriages were abolished by act of parliament in the year 1856. The "Fleet marriages," however, were entirely unromantic, vicious in their easiness, and, of course, many times were performed by persons not really in orders; and, further, the obligation of them seemed to set very easily upon the parties concerned. Some notables, nevertheless, indulged in matrimony through the medium of the Fleet. Edward Wortley Montague (Lady Mary's son) was married in the Fleet, as was Charles Churchill, the poet.

We reach Dickens. How many eyes have moistened and dimmed over Little Dorritt, "The Child of the Marshalsea!" But let us turn to the gayer Pickwick.

The action of *Bardell v. Pickwick* having terminated disastrously, it was ordered "that the body of Samuel Pickwick be confined to the custody of the tipstaff, to be by him taken to the warden of the Fleet prison, and there detained until the amount of the damages and costs in the action of *Bardell* against *Pickwick* were fully paid and satisfied." We are then given a view of the interior of the Fleet, and we may rely upon Dickens' force as being faithful.

"Mr. Tom Roker, the gentleman who had accompanied Mr. Pickwick into prison, turned sharp around to the right when he got to the bottom of the little flight of steps, and led the way through a little iron gate which stood open, and up another short flight of steps, into a long, narrow alley, dirty and low, paved with stone, and very dimly lighted by a window at each remote end.

" 'This,' said the gentleman, thrusting his hands into his pockets, and looking carelessly over his shoulder to Mr. Pickwick, 'this here is the hall flight.'

" 'Oh,' replied Mr. Pickwick, looking down a dark and filthy staircase, which appeared to lead to a range of damp and gloomy stone vaults beneath the ground, 'and those, I suppose, are the little cellars where the prisoners keep their small quantities of coals. Ah! unpleasant places to have to go down to, but very convenient, I dare say.'

" 'Yes, I shouldn't wonder if they were convenient,' replied the gentleman, 'seeing that a few people live down there pretty snug. That's the Fair, that is.'

" 'My friend,' said Mr. Pickwick, 'you don't really mean to say that human beings live down in those wretched dungeons?'

" 'Don't I?' replied Mr. Roker, with indignant astonishment. 'Why shouldn't I?'

" 'Live—live down there!' exclaimed Mr. Pickwick.

" 'Live down there! Yes, and die down there, too, very often!' replied Mr. Roker. 'And what of that? Who's got to say anything agin it? Live down there! yes, and a very good place to live in, ain't it?'

" As Mr. Roker turned somewhat fiercely upon Mr. Pickwick in saying this and, moreover, uttered, in an excited fashion, certain unpleasant invocations concerning his own eyes, limbs and circulating fluids, the latter gentleman deemed it advisable to pursue the discourse no further."

In slang phrase, Mr. Pickwick was very soon, very easily, and very completely "buncoed;" and here is the way it happened—and the incident is an evidence of prison practices—and a description of keener humor has never been written:

" 'Well, but come,' said Mr. Swangle; 'this is dry work. Let's rinse our mouths with a drop of burnt sherry. The last comer shall stand it, Mivins shall fetch it, and I'll help to drink it. That's a fair and gentlemanly division of labor, anyhow—curse me!'

" Unwilling to hazard another quarrel, Mr. Pickwick gladly assented to the proposition, and consigned the money to Mr. Mivins, who, as it was nearly eleven o'clock, lost no time in repairing to the coffee-room on his errand.

" 'I say,' whispered Mr. Swangle, the moment his friend had left the room, 'what did you give him?'

" 'Half a sovereign,' said Mr. Pickwick.

" 'He's a devilish pleasant gentlemanly dog,' said Mr. Swangle; 'infernal pleasant. I don't know anybody more so; but—' here Mr. Swangle stopped short and shook his head dubiously.

" 'You don't think there is any probability of his appropriating the money to his own use?' said Mr. Pickwick.

" 'Oh, no—mind, I don't say that; I expressly say that he is a devilish gentlemanly fellow,' said Mr. Swangle. 'But I think, perhaps, if somebody went down, just to see that he didn't drop his beak into the jug by accident, or make some confounded mistake in losing the money as he came up stairs, it would be as well. Here, you, sir, just run down stairs and look after the gentleman, will you?'

" This request was addressed to a little, timid-looking, nervous man, whose condition bespoke great poverty, and who had been crouching on his bedstead all the while, apparently quite stupefied by the novelty of his situation.

" 'You know where the coffee-room is,' said Swangle; 'just run down and tell that gentleman you've come to help him up with the jug. Or—stop—I'll tell you what; I'll tell you how we'll do him,' said Swangle, with a cunning look.

" 'How?' said Mr. Pickwick.

" 'Send down word that he is to spend the change in cigars. Capital thought. Run and tell him that; d'ye hear? They shan't be wasted,' continued Swangle, turning to Mr. Pickwick; 'I'll smoke 'em.'

" 'This manœuvring was so exceeding ingenious and, withal, performed with such immovable composure and coolness, that Mr. Pickwick would have had no wish to disturb it even if he had the power.'

Charles Dickens is eloquent when speaking about the "Poorside" of a debtor's prison. He tells of the iron cage, formerly in the wall of the Fleet, within which was posted some prisoner of hungry looks, who, from time to time, rattled a money-box, and exclaimed in a mournful voice, "Pray, remember the poor debtors; pray, remember the poor debtors." The receipts of the box, when there were any, were divided among the poor debtors; and the men on the poor side relieved each other in this degrading office. Readers of Victor Hugo's "Notre Dame" will recall the walled-up cage, the "rat-hole," in which Esmeralda's mother immured herself upon the loss of her child. This custom is referred to in No. 82 of the "Spectator," attributed to Steele himself: "Passing under Ludgate the other day, I heard a voice bawling for charity"—and a half-crown went into the box, as we would expect.

By MARSHALL VAN WINKLE, New Jersey Bar.  
(Concluded next week.)

#### POETRY IN COURT RECORDS.

JUDGES NOT INFREQUENTLY CITE FAMOUS LINES  
IN THEIR OPINIONS.

POETRY, in the opinion of the judges of the Supreme Court of the State of Missouri, is one of the features that has been observed and brought to light by a St. Louis judge.

Those not versed in law think that the nearly two hundred volumes of Supreme Court reports contain nothing but learned and dry dissertations on law. They possess a terror for the layman, but to a careful jurist they are read, enjoyed and digested as rapidly as they are issued.

Judge James E. Withrow, of the Criminal Division of the St. Louis Circuit Court, not only detected the legal points, but in his readings made notes and showed a reporter where four different judges resorted to poetry in rendering their opinions on important cases.

Judge Gantt rendered the opinion in the case of Charles Wisdom, the negro who was hanged for the murder of Edward Drexler at 818 Pine street on April 24, 1892. Wisdom was sentenced to hang in Judge Edmund's court, and the case was carried to the Supreme Court.

It appeared that in the course of the examination of a witness in the trial court, he was asked to tell what happened when he went down to the morgue by the dead body of the deceased, when a witness, John Williard, and defendant, were there prior to the inquest.

The witness answered that they were told to put their hands on Mr. Drexler. He did so, but defendant wouldn't do it. The action of the court in admitting this testimony was assigned as error by the defendant. In this case the court said: "The request to touch the body was evidently prompted by the old superstition of the ordeal of the bier in Europe in the middle ages, which taught that the body of a murdered man would bleed freshly when touched by his murderer, and hence it was resorted to as a means of ascertaining the guilt or innocence of a person suspected of a murder.

"This superstition has not been confined to one nation or people. It obtained among the Germans, prior to the twelfth century, and is recorded in the 'Nibelungenlied,' the great epic poem of that country, in the incident in which the murdered Siegfried is laid on his bier, and Hagen is called on to prove his innocence by going to the corpse, but at his approach the dead chief's wounds bleed afresh. That it dominated the English mind is attested by the passage of Matthew Paris, that when Henry II. died at Chinon, in 1189, his son and successor came to view his body, and as he drew near, immediately the blood flowed from the nostrils of the dead king as if his spirit was so indignant at the approach of the one who caused his death that his blood thus protested to God. And Shakespeare voices the same superstition in 'Richard III.' in act 1, scene 2, thus:

"O! gentlemen, see, see! Dear Henry's wounds  
Open their congealed mouths and bleed afresh."

"And so does Dr. Warren, in 'Diary of a Late Physician,' vol. iii., p. 327. That it was a prevalent belief in Africa and Australia, in another form, see xvii. Encyclopedia, pp. 818-819.

"This superstition has come to this country with the emigration from other lands, and, although a creature of the imagination, it does to a considerable degree affect the opinions of a large class of our people.

"It is true it was not shown that defendant believed that touching this body would cause any evidence to appear, or that he entertained any fear of possible consequences, but it was simply a test proposed by some bystander, and it was offered as showing the manner in which the three suspects conducted themselves when it was proposed.

"While defendant had a perfect right to decline, either because of his instinctive repugnance to the unpleasant task, or because no one had a right to subject him to the test, and his refusal might not prejudice him in the minds of a rational jury, on the other hand, a consciousness of guilt might have influenced him to refuse to undergo the proposed test, however unreasonable it was, and it is one of the circumstances of the case that the jury could weigh. The jury could consider that, while it was a superstitious test, still defendant might have been more or less affected by it, as many intelligent people are by equally baseless notions, as shown by their conduct and movements. It often happens that a case must be established by a number of facts, any one of which, by itself, would be of little weight, but all of which taken together would prove the issue. There is not the slightest evidence any member of the jury itself regarded the test itself anything more than a groundless superstition. Moreover, no ground for its exclusion was suggested, save immateriality, and the fact that a piece of immaterial, but harmless, evidence creeps into a case is not enough to reverse it. It must be an error materially prejudicial."

John Benson had been sentenced to two years in the penitentiary in Barton county on the charge of obtaining property under false pretenses. Benson had bought some hay of a farmer, and agreed to pay for it when he sold it.

Judge Thomas, of the Supreme Court, in passing on the case, said:

"We are loath to interfere with the finding of a jury in a case of this character, but when we have an abiding conviction that the accused has committed no crime we feel it to be our imperative duty to say so. Humanity revolts at the punishment of the innocent. It has been justly said that it is better that nine and ninety guilty men escape than that one innocent man should suffer. A careful and attentive study of the facts disclosed by this record convinces us that defendant committed no crime. This case sharply illustrates the statement of Robert Burns, that

"Man's inhumanity to man  
Makes countless thousands mourn."

"Defendant was torn from his wife and child

incarcerated in jail, and finally sentenced to imprisonment in the penitentiary for no higher crime, in our opinion, than being poor, failing in business, and being unable to pay his debts.

"The defendant made shipwreck of his business. He proceeded in a loose way. He was improvident. But improvidence is no crime. He bought the hay expecting to be able to pay for it when delivered, and if his business had prospered, as he anticipated, he would have paid for it. Hay badly baled and damaged was sent to market, and of course was sacrificed. When his creditors came upon him he paid out all he had, and then he was sent to jail because he had nothing more to pay with. This record discloses the same old story of a hard-hearted, merciless creditor on one side, and a helpless, unfortunate debtor on the other. A Shylock always presses his victim,

"Unmindful tho' a weeping wife  
And helpless offspring mourn."

"If the defendant can be convicted of a felony on the facts of this case, then no man who engages in business and fails is safe."

Charles R. Anderson, of St. Louis, brought a suit to restrain the city from taking possession of his property on the levee. He lost the case, and it was carried to the Supreme Court. Judge Wagner delivered the opinion of the court, and said:

"It has become too painfully true that under the exercise of the power of eminent domain, gradual approaches have been made upon the rights of property, until it is a matter of doubt whether the owner can rely upon the possession of anything. The fashion is, upon every fancied demand or speculative interest, to despoil the proprietor of his estate.

"Whilst there is nothing more important for the interests of society than this right of taking private property, upon just compensation being made, for the public use, yet the right should be exercised with the greatest caution and conformity with the exact and precise limitations of law."

"The ordinance provides that when a jury is about to be impaneled for the purposes named, all parties, whether interested in damages or benefits, shall be notified that proceedings are about to be had, and that all such interested parties may appear and attend to their interests on the day and at the place appointed by the land commissioner." As no such notice was given, the whole proceeding was held to be irregular and void. It was further held that the jury was not legally constituted or impaneled. No notice was given, and that to say that an individual could be deprived of his property under such circumstances would be worthy only of that state of society where the sentiment prevails.

"That they should take who have the power,  
And they should keep who can."

John Moore was tried and convicted in White county of stealing a horse. He was given a two years' penitentiary sentence. The case was appealed. The question arose as to whether certain evidence as to the attempted flight of defendant was competent. Judge Sherwood gave the opinion of the court. He said:

"Flight, escape or attempt to escape, or to effect prison breach, all constitute legitimate evidence, where the guilt of the party on trial is in question. How much weight it is to possess depends, of course, upon the individual circumstances of each case. And the relevancy or competency of such evidence does not at all depend upon the fact that the flight or attempted flight or escape were made in the endeavor to avoid some specific or threatened prosecution. Evidence of flight is admissible on the ground that it commonly betrays a consciousness of guilt, and this induces endeavors to escape." That "nothing is more common in criminal prosecutions than the introduction of such evidence, though the flight occurred not only before any prosecution was threatened, but before the community became aware that any crime had been perpetrated. So true it is that

"Suspicion always haunts the guilty mind;  
The thief doth fear each bush an officer."

"It is this result of this 'experience of common life' which gave origin to the unfavorable presumption arising from flight."

#### BANKRUPT JUDGES.

**B**ANKRUPTCY should *ipso facto* disqualify a judge," says Law Notes, London. From the statements in that journal it seems that quite a hubbub is raised in England because a County Court judge has been gazetted a bankrupt and yet remains in office. The utter unfitness for official duty of a man who owes more than he can pay may be so entirely obvious that any questioning of the fact may amount to an exposure of stupidity. But Yankee inquisitiveness takes the risk, and raises a query as to the existence of any necessary connection between judicial qualifications and the leanness of a purse. If a judge can pay his debts and will not, this clearly shows that he is not honest enough for a judge; but if sheer misfortune financially overwhelms an eminent and conscientious judge, why must he be kicked off the bench? Sir Walter Scott and George William Curtis have illustrated the fact that, in former days at least, chivalrous manhood and honor might survive a bankruptcy.

"Who steals my purse steals trash," once wrote an English writer whose works are still read — in America; but in his country now such loss of trash seems to leave a judge poor indeed, naked to his enemies, stripped even of his judicial honor and good name.

The situs of judicial functions in a British judge seems to have slipped below the wig and into his pocket. When his purse is empty he must retire from the bench as incompetent because he has become *non compos marisupii*. The wig as an emblem of his office seems to be worn in the wrong place.

In this country it has sometimes happened that creditors of an insolvent, hoping for favors yet to come from his prospective salary, have joined their forces to lift him into a lucrative office. But whatever public policy may say of this scheme, it has at most not become our usual custom in choosing officers, and has probably never been adopted in selecting a judge. It is doubtful, indeed, if the creditors in such case have been sufficiently satisfied with the results of their enterprise to recommend the scheme as altogether successful. It may be, however, that the secret of continuance in office of this English county judge against such vigorous protests by different journals, and even under the awful ordeal of having attention "directed to the matter by a question in the house of commons," could be explained by his creditors if they should speak. They may be numerous and powerful enough to prevent his removal.

Possibly the underlying purpose of our English friends in attempting to push a penniless person from the bench is simply to preserve the independence of the judiciary. They may have taken their suggestions from the ancient anecdote of a preacher, whose weekly custom was to borrow \$5 to carry into the pulpit on Sunday for the sake of the buoyancy and independence of feeling which it gave him. Certainly it is to be hoped that under their present agitation there is some worthier feeling than a snobbish notion that man is a mere attribute of money. A very good authority has intimated that a man's life consisteth not in the things which he possesseth, and we hope that idea is not altogether obsolete in the British Isles.

### DOCTORS' STORIES.

#### HOW THE MEDICOS ARE OFTEN VICTIMIZED BY STUPID JURIES.

"THINGS seem to be at sixes and sevens in our courts of justice," remarked a meditative physician to a Chicago Record reporter. "Here's a case, for instance:

"Half a dozen big physicians had told a man that his leg would have to be amputated. The patient was reconciled to it, but another physician insisted that he could save the limb.

"Well, he was given a trial, and he did it, with only a minimum of attendance upon the man. The patient recovered, and was so lively that he protested against the bill for \$1,000. The doctor brought suit, and the jury rendered a verdict for \$100 and court costs.

"That is one side of the case. But there is another.

"Another physician of my acquaintance set a broken leg for a patient. The patient was a drinking fellow, careless of himself, and he walked too soon. The result was a crooked leg. He brought suit against the physician and recovered \$5,000 for damages.

"The point is here:

"One physician saved a leg which otherwise would have been cut off, and a jury decided that the well-to-do patient should pay him only \$100 for the service. Another physician allowed a broken limb to grow crooked, and paid the patient \$5,000 damages.

"Now, if a sound leg given to a man who would otherwise be legless is worth only \$100, how does it come that a crooked leg is worth \$5,000?

"Where is the justice in these findings?"

Everybody gave it up, as everybody always does, but another doctor told a similar story.

"I knew a fellow once who was born rich, but unlucky," he began. "He was always getting hurt and having to be patched up by surgeons.

"He had measles, small-pox, pneumonia, typhoid fever and appendicitis; he fell off a barn and had to have his skull trephined; he was struck by lightning once and was laid out for dead; finally he was blown up in a steamboat explosion, and so scattered that they never found one hand and the left leg below the knee.

"But he lived. I believe you could have driven him up to his neck in trap rock, using a pile-driver to do it, without giving him even a headache. But these were expensive experiences.

"He had doctors' bills till you couldn't rest. He had to get a wooden arm, a wooden leg, a glass eye, a lot of costly dental work, and no end of stitches, plasters, bandages, lotions, braces, and what not.

"How much do you suppose repairs have cost me?" he asked one day.

"Oh, I don't know," I said.

"Well, sir," he replied, "I've spent \$15,000 to keep on my feet, even in this damaged condition," and he smiled sort of pitifully.

"That was the last time that I saw poor Dobson alive. The very next day a switch engine ran over him at an unguarded crossing, and left his widow with a suit for damages against the company. It was a great fight in the courts. The attorneys for the plaintiff held that the maximum of \$5,000 for accidental death could not apply to Dobson.

"Why, gentlemen of the jury," exclaimed Attorney Befogle, "\$5,000 won't compensate for repairs in this case. The deceased was no ordinary man; after nature had done her best for him, the most skillful specialists of the country took up the work of amplifying him. He spent \$15,000 in ana-

tomical repairs, and it is absurd to try to apply the statute in his case."

"But the jury did it. It gave the widow only the \$5,000 allowed by law.

"Where was the justice of that, hey?"

There was another silence.

"It's like my wife's sewing machine," suggested a listener.

"How's that?"

"I paid \$45 for it in the first place, and she hadn't run it a week until she broke something.

"I had the part put in, and it cost me \$3.60. Within ten days, two or three other things broke, and I was out \$15 for repairs.

"Then I began to think a little.

"I got a catalogue of extras, embracing every bit of a sewing machine, and showing the cost of every extra. I listed the lot, added up the cost, and found that to buy a whole machine by extras would cost me \$315.35. So I went down and bought another whole machine for \$45, and I'm using that one now and making repairs from pieces of the old one. It's a money-saving scheme."

#### A QUAIN OLD DEED.

BY IT THE INDIANS CONVEYED PHILADELPHIA TO  
WILLIAM PENN.

ISRAEL T. COWLES, manager and legal officer of the title guaranty and abstract department of the Union Trust Company, has in his possession a very interesting document. It is a copy of the original deed which secured the land of the present site of Philadelphia from the Indians to William Penn.

Mr. Cowles was visiting in Washington a couple of years ago, and, being acquainted with the register of deeds, paid a visit to his office. He was greatly interested in the original deed of Philadelphia, and, expressing a desire to have a copy, was given one by his friend.

The consideration the Indians received, the wording of the deed and the manner in which they described the property, are all typical of the times when Indians occupied the land now settled by white men.

The following is a copy of the deed:

"This Indenture Witnesseth, that Wo Lare, Packenak, Tareckham, Sickias, Pettquesitt, Tonis, Essepinaick, Tethoy, Kekellappan, Teomis, Mackaloka, Methconga, Wisse Powsy, Indian Kings Sachomakers, Right Owners of all the Lands from Quingus Creek, called Duck Creek, unto Upland called Chester Creek, all along by the west side of Delaware River, and go between the said Creeks, backwards as far as a man can ride in two dayes with a horse, for and in consideration of the following goods to us in hand paid and secured paid by William Penn, proprietary and Gov

of the province of Pennsylvania and Territories thereof vi docolot:

"Twenty Guns, Twenty Fathoms Natchcoat, Twenty Fathoms Stroudwaters, Twenty Blankets, Twenty Kettles, Twenty pounds of powder, One hundred Bars of Lead, forty Tomahawks, One hundred Knives, Forty pair stockings, One Barrell of Beer, Twenty pound Red Lead, One hundred fathom Wampham, Thirty Glass Bottles, Thirty Pewter spoons, One hundred aul Blades Three hundred Tobacco pipes, One hundred hands of Tobacco, Twenty Tobacco Tongs, Twenty Steels, Three hundred flints, Thirty pare sissors Thirty combs, Sixty Looking Glasses, Two hundred needles, One Skiple Salt, Thirty pounds of Sugar, Four Gallons of Molasses, Twenty Tobacco Boxes, One hundred Jews harps, Twenty Howes, Thirty Gimlets, Thirty Wooden Screw boxes, One hundred Strings Beeds.

"Doo hereby acknowledge in behalf of ourselves, as only right owners of the aforesaid Tract of Land to Bargain and Sell and by these presents Do fully clearly and absolutely bargain and Sell unto the said William Penn, his Heirs and assignees forever the said Tract of Land with all the Woods, Runns, Creeks and appurts unto the same belonging, to be held used possessed and enjoyed by the said William Penn, his Heirs and assignees forever without any molestation or hindrance from or by us or any of us or from or by another Indians whatsoever that shall or may claim any Right Titles or Interest in or unto the said Tract of Land or any part thereof.

"In Witnes whereof we have hereunto set our hands and seals at New Castle this second day of the Eighth month 1685."

Then follow the seals of thirteen Indian chiefs, being merely scratches, similar to the Chinese writing. Attached, also, are the affidavits or affirmations of men as to the genuineness of the transaction. One affidavit states that "John Durborow, being one of the people called Quakers, upon his solemn affirmation, according to law," etc.

The transfer of the property from the Indians to William Penn took place on August 2, 1685, and the deed was registered and recorded on April 21, 1735. — Detroit Journal.

STATE OF NEW YORK

BENJAMIN BURNHAM  
County of Albany

commissioners of knighthood. As late as the time of Charles I., Sir Anthony Loper was fined \$4,000 for violating a law made in the time of Henry VII., against converting arable land to pasture. Morley, for striking one of the king's servants in the court of Whitehall, was fined \$10,000. Richard Grenville was fined £8,000 for saying the Earl of Suffolk was 'a base lord.' Ray, for exporting some fuller's earth, was set in the pillory and fined \$2,000. Bishop Williams, who had been lord-keeper of the seal to James I., having said something displeasing to Archbishop Laud, was fined £10,000, and committed to the Tower during the king's pleasure. In levying upon his effects, some letters from a schoolmaster named Osbaldiston, containing the expression, 'a little great man,' were discovered, and the bishop, for receiving the letters, was mulcted £8,000 more. Osbaldiston was fined £5,000, and sentenced to have his ears nailed to the pillory in sight of his own school."

#### LEGAL REASONING.

##### WHY THE DEFENDANT SHOULD NOT BE FORCED TO AN EARLY TRIAL.

THE judge was inclined to be put out about the matter. That was very evident. He scowled and shook his head, and for a minute or two it looked as if he would arbitrarily refuse to entertain the motion.

"This is the eighth time you have asked for a continuance," he said at last.

"It is, your honor," admitted the lawyer, "but your honor must realize that there are great interests at stake in this trial, and my client is entitled to every reasonable opportunity to prove his innocence."

"Would an immediate trial interfere with that in any way?" demanded the judge.

"Indeed, it would," answered the lawyer.

"I don't see how," said the judge. "It is now a good many years since suit was first brought against your client, and on one excuse or another trial has been put off, and there has been procrastination of all kinds."

"Nothing more than is called for under the circumstances," argued the lawyer.

"What preliminary litigation there has been has been strung out interminably."

"Your honor must see that the rights of a defendant in a matter of this description are protected."

"You have had ample time to get all your witnesses here," asserted the judge.

"That's just the trouble, your honor."

"The trouble?"

His honor was puzzled.

"Certainly. If we go to trial now," said the lawyer, "there is every reason to believe that a

few subpoenas would get most of the witnesses into court, and — and —"

"Well?"

"Why," exclaimed the lawyer in desperation, "surely your honor knows enough of modern court procedure to realize that we are entitled, at the very least, to sufficient time to allow some of the principal witnesses against us to die or get beyond the jurisdiction of the court by moving to foreign countries and taking up their residence there. Surely your honor will not permit the prosecution to beat us of our right by forcing us to trial before a single witness has died. It is not our fault that they are a long-lived lot."—Chicago Post.

#### Legal Notes of Pertinence.

Judge W. W. Wood, at Sedalia, Mo., of the Jackson county Circuit Court, has decided that the Sedalia school district must pay \$23,000 to the holders of school bonds issued in 1883 and fraudulently sold to eastern people. The bonds were paid ten years later and left in the custody of J. C. Thompson, cashier of the First National Bank and financial agent for the school bonds. Instead of turning them over to the treasurer to destroy, Thompson resold them to eastern people, and by paying the interest on the coupons the swindle was not detected until the bank failed and Thompson had fled to Mexico.

The Nebraska Supreme Court, in *Hastings v. Foxworthy* (45 Neb. 676), hold that, on a second appeal of a case, where the case was on the first appeal remanded generally for a new trial, and the same questions are presented on the second trial, the Appellate Court is not bound to follow opinions on questions of law presented on the first appeal, and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect.

The United States Circuit Court of Appeals has decided that the United States Circuit Court did right in condemning Francis M. Rhodes, of Hannibal, Mo., to refund \$9,847 to the government, he having, as was claimed, received the amount as pensions by fraudulently representing that he had contracted a serious disease of the eyes while in active service in the army in the war of the rebellion, when, in fact, he was afflicted with it before he enlisted as a soldier.

A reservation of the right to annul all contracts every four months stamped across the face of a contract with a school teacher is held, in *Thompson v. Gibbs* ([Tenn.] 34 L. R. A. 548), to give the school directors no right to dismiss him without charges, or notice, or testimony under a statute authorizing a dismissal "for incompetency, improper conduct, or inattention."



### English Notes.

Persons become Jesuits and members of other Roman Catholic orders in this country at very great peril, says the Law Times. For it is enacted by §§ 28 and 34 of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), that, "in case any person within any part of this United Kingdom become a Jesuit, or brother or member of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, such person shall be deemed guilty of a misdemeanor, and, being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life." Mr. Healy is pressing for the repeal of this and other sections of the act of 1829 by a Statute Law Revision bill, and Mr. Balfour has referred him to the statute law revision committee; but it is a matter of some doubt whether their repeal would fall within the scheme of statute law revision as at present framed. Other curious provisions of the act, it may be observed, such as that by which every Roman Catholic bishop is liable to a penalty of £100, and every Roman Catholic ecclesiastic who shall "wear the habits of his order save within the usual places of worship of the Roman Catholic religion, or in private houses, is liable to a penalty of £50," are, by § 38 of the act, enforceable only by proceedings taken by the attorney-general; but it appears to be open to any one of her majesty's subjects to indict all the Jesuits and Roman Catholic monks in any of the three kingdoms, and obligatory on any of her majesty's judges before whom such indictment may be tried, to pronounce sentence of banishment for life upon a convicted offender.

The controversy recently raised in both houses of parliament, with reference to the right of Irish judges when going as commissioners of Assize to have a military guard as sentinels outside their lodgings, calls to mind a curious adventure in the early career of Sir Peter O'Brien, the present lord chief justice of Ireland. Before his call to the Irish bar, the future chief justice accompanied his uncle, the late Mr. Justice James O'Brien, as his registrar on circuit. During the Fenian outbreak of 1865 the chief justice, on coming home from dinner to the judge's lodgings, was challenged for the watchword by the sentinel on duty. He gave the man some chaffing reply, whereupon the soldier instantly presented a bayonet to his breast, and kept him thus unpleasantly secured till he was identified by the servants of the judge as a "friend." — Law Times.

The death of Mr. John Roche, who was appointed to an Irish County Court judgeship so recently as July, 1894, in the prime of life, from a nervous affection, whose origin may be distinctly traced to shock sustained in a railway accident

many years ago, directs attention to the fact that railway accidents number among their victims members of the Irish judiciary. In 1868 the Hon. Walter Berwick, a judge in the Irish Bankruptcy Court, perished in a terrible railway collision at Abergelle when traveling in the Irish mail. Some of the judges of a past generation, who had grown old in the stage-coach system, were vehement opponents of traveling by rail, notably the first Lord Abinger, Lord Chief Baron of the Exchequer, who never lost an opportunity either on or off the bench of pointing out the dangers of the "iron road."

His Honor Judge Turner, before taking his seat at the York County Court last Tuesday, referred to Mr. Richard Perkins having attained his jubilee as registrar of the York County Court. He said Mr. Richard Perkins had been the registrar of that court ever since its establishment fifty years ago, and he hoped he would long continue to be connected with it.

Lord James, of Hereford, has taken a new lease of Ferne, near Salisbury, the seat of Sir Walter Grove.

### Legal Laughs.

*A propos* of an alleged ratification after majority of a debt contracted during infancy by admitting that it was a just debt, and promising to pay if the debtor ever got so that he could without inconvenience, the court in a late North Carolina case says this recalled to the minds of some members of the court a settlement of accounts which may with propriety be preserved as history in the judicial annals of the State. A debtor named Huggins, when solicited to close an old open account by note, agreed to do so provided he should be allowed to draft the instrument, and accordingly presented the creditor the following:

"I, John Huggins, agree to pay James James \$150.00 whenever convenient; but it is understood that Huggins is not to be pushed.

"Witness my hand and seal this the — day of ————  
JOHN HUGGINS. [Seal.]"

The story-teller was talking with a lawyer in his office in one of the mountain villages, when the door opened and a typical native entered. He nodded to the lawyer, and sat down on a chair with his shotgun on his knees.

"Well, Jim," said the lawyer after a bit, "can I do anything for you to-day?"

"Reckon yo' kin," replied Jim.

"What is it?"

"Thar's gwine to be a lawsuit yere to-day, and yo' ar' fur the plaintiff — Tom Rose."

"Oh, yes. Yes, the suit is on to-day. Are you a witness, Jim?"

"I ar', sah: I'm a witness fur the defendant — Sam Kellar."

"I see."

"Wall, it'll be this way. When I git on de stand yo'll ax me lots of questions."

"I'll certainly ask you a few, Jim. Is that what's bothering you?"

"Jest that, sah. I've heard yo' axin' other men, and I thought we might as well hev a leetle understandin' befo' I went on the stand."

"I see. What do you propose?"

"If yo' should ax me if I was ever in the moonshine business I'd feel that I orter hev a pop at yo' with this gun."

"Well, I won't ask that."

"Gwine to say I don't pay my debts?"

"No."

"Gwine to call me a liar?"

"No."

"Gwine ter say that if I chawed less terbacker and drunk less whiskey the ole woman would hev mo' shoes?"

"Of course not."

"Hain't gwine ter say I was mixed up in a hawg case and likewise had a lawsuit over a blind mewl?"

"I don't think it will be at all necessary."

"Wall, that's all I wanted to know," said Jim, as he arose to go. "It's best to talk these things over. If yo' was gwine to pitch into me and rip me up the back I thought I'd shoot yo' yere in the office, but if yo' was gwine to slide along and go easy I wouldn't waste any powder." — Chicago Post.

### Notes of Recent American Decisions.

**Married Woman — Disability of Coverture.**— Since the disability of coverture can be removed only in the way prescribed by statute, a married woman may plead coverture in bar of contracts made in her behalf by one whom she has orally appointed and held out to the public as her agent. (*Troy Fertilizer Co. v. Zachry* [Ala.], 21 South Rep. 471.)

**Master and Servant — Assumption of Risk.**— An experienced freight brakeman, having a general familiarity with the road, while ascending, in daylight, in the course of his usual employment, a ladder of a box car of ordinary width, was struck by a similar car standing on a spur used for the storage of cars, of which spur, and of the purpose of which, he was aware. *Held*, that he assumed the risk. (*Vining v. New York, etc., R. Co.* [Mass.], 46 N. E. Rep. 117.)

**Master and Servant — Assumption of Risk.**— An experienced brakeman, having knowledge of a notice requiring extra care to be used to prevent being caught between lumber projecting beyond the end of a car, assumes the risk of injury if he attempts to make a coupling between the engine

and a car loaded with lumber projecting beyond the end (which was not an unusual manner of loading cars), even where the drawhead of the tender was shorter by several inches than the drawhead of ordinary freight cars. (*Nash v. Chicago, etc., Ry. Co.* [Wis.], 70 N. W. Rep. 293.)

### Notes of Recent English Cases.

**Husband and Wife — Husband's Petition for Divorce — No Legal Evidence Against Alleged Adulterer — Dispensing with Co-respondent.**— In his petition for dissolution of marriage a husband alleged that his wife had frequently committed adultery with a person whose name was unknown to him. The petitioner filed affidavits which contained statements to the following effect: The petitioner left his house in Wales on the 17th April, 1894, and went to America. He did not return until the 27th May, 1896, and he then ascertained that his wife had given birth to a child on the 27th April, 1896. She registered the birth of the child without the name of any father. On the 2nd June, 1896, she took out a bastardy summons against one H., as being the father of the child. The summons was made returnable on the 17th June, 1896. The hearing was adjourned to the 8th July, 1896, for the attendance of witnesses. On that day the wife failed to attend in support of the summons, and the justices struck out the case. The wife told the clerk of the husband's solicitor that H. was the father of the child, and that she had never committed adultery with any one else. H. denied that he was the father of the child, and was prepared to go into the box and to swear that he had never had intercourse with the wife. It was not disputed that, when he presented his petition, the husband knew where H. was, and that he knew where he was still living. By § 27 of the Divorce act, 1857 (20 & 21 Vict. c. 85) every petition for dissolution of marriage "shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded;" and by § 28, "upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent on the said petition unless on special grounds, to be allowed by the court, he shall be excused from so doing." By § 11 of 21 & 22 Vict. c. 108, a person named as co-respondent may be dismissed by the court from the suit if the court thinks there is not sufficient evidence against him. By the divorce rules of 1865 every petition must be verified by the petitioner's verifying the facts of which he has personal cognizance and deposing as to his belief in the truth of the other facts alleged in the petition (rule 2). Alleged adulterers must be made co-respondents unless the judge shall otherwise direct

(rule 4), and applications for such direction must be supported by affidavits (rule 5). If the name of the alleged adulterer is unknown to the petitioner when he presents his petition, the name must be supplied as soon as known, and the petition must be amended accordingly (rule 6). Barnes, J., on the authority of *Jones v. Jones* (75 L. T. Rep. 190; [1896] P. 165), refused to allow the petitioner to proceed without making H., the person who, the wife said, had committed adultery with her, a co-respondent. The petitioner appealed. *Held* (*dissonante* Smith, L. J.), that by "alleged adulterer," in § 28 and rule 4, was meant alleged by the petitioner in his petition, and that, if he did not allege any adulterer, § 28 and rule 4 did not apply: that the expression "unknown," in rule 6, referred to name and not to guilt, and the expression "alleged adulterer," in rule 6, could not refer to any person already named in the petition, for the rule only applied where the name of the petitioner was unknown. *Held*, therefore, that the appeal should be allowed, and that leave to proceed without naming any co-respondent should be granted. (*Saunders v. Saunders*, Ct. of App. No. 2; L. T., Apr. 10, 1897.)

#### THE MAGAZINES FOR MAY.

Ian Maclaren contributes to the May number of the *North American Review* a most attractive paper, entitled simply "Henry Drummond." As the fellow-student of Professor Drummond at Edinburgh University, and a life-long friend, these memoirs of one of the most brilliant men of our day from the pen of the author of "Beside the Bonnie Brier Bush," are invested with a charm and value peculiarly and unapproachably their own.

The editor of the *Review of Reviews* declares that the charter of the Greater New York, as passed by the legislature, is "a practical impossibility." "Its object purports to be a transfer to New York of municipal business which has heretofore been done by the State legislature at Albany. But immediately after passing the charter the State legislature took up and proceeded to indorse several enormous jobs, erecting special commissions of politicians named in the bills — one to carry out a boulevard system in the upper part of New York, and another to control a great trunk sewer scheme in the new northern district of the city. The charter definitely provides for the carrying out of just such projects by the regularly constituted machinery of the city government." The limitation of the mayor's power of removal to six months makes the charter, in Dr. Shaw's opinion, a huge piece of folly. "With that limitation removed, objectionable as the instrument would remain in many respects, it would not be —

what it now is for practical purposes -- a self-evident absurdity."

The *Century* for May contains a group of three papers dealing in an authoritative way with a fresh topic — the scientific uses of kites. Lieutenant-General Schofield contributes the first of his records of unwritten history, his article dealing this month with "The Withdrawal of the French from Mexico," and including an important letter from General Grant to General Sheridan showing the attitude of the United States government towards the French invasion. A supplementary article by the present minister of Mexico to the United States, Mr. Romero, sets forth his belief that the fall of the second empire was closely related to the events described by General Schofield. Affairs in the east are treated in an article on "Crete, the Island of Discord," by Demetrius Kalopothakes, a Greek writer educated in America, now resident in Athens, and in a paper on "The Royal Family of Greece," by Professor Benjamin Ide Wheeler, late of the American School of Athens, who writes from personal acquaintance with King George and the Greek princes. There is an illustrated description by Mrs. Schuyler Van Rensselaer of "A Suburban Country Place," the residence of Professor Charles S. Sargent at Brookline, Mass., and Colonel George E. Waring, Jr., writes "Bicycling Through the Dolomites," General Horace Porter's "Campaigning with Grant" deals with the siege of Petersburg, and Dr. Mitchell's novel, "Hugh Wynne," is now well along in the revolutionary period.

The May number of McClure's Magazine is especially abundant and interesting in the matter of portraits of famous people. In illustration of a paper by Miss Tarbell on the remarkable work of G. C. Cox in photographic portraiture, there are truly speaking likenesses of Donald G. Mitchell ("Ik Marvel"), Walt Whitman, Eleanor Duse, Henry Ward Beecher, and others; and a series of life portraits of Daniel Webster exhibit that most august and impressive of great men at close intervals from middle life to the year of his death. Some of the Webster portraits have never before been published; and all have interesting histories, which are set forth in notes by Mr. Charles Henry Hart. An article that everybody will read with eager interest is Ray Stannard Baker's account of the pursuit and capture of Booth, after his assassination of Lincoln, and of his death and burial.

The spectacle of a score of brilliantly uniformed horsemen chasing a bag of aniseed over fences and ditches is no doubt, at first sight, ludicrous; but there can now be no doubt that the sport is growing rapidly among people who are not liable to the charge of anglomania. In the May Harper's Caspar Whitney gives a brief history of drag-hunting, together with a plea for it, that goes far toward explaining why sensible people like it

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, MAY 15, 1897.

### Current Topics.

THE rejection by the senate of the proposed arbitration treaty between the United States and Great Britain, while to be regretted, need not be necessarily construed as a blow at either the principal or the application of arbitration. It is true that the treaty which the senate rejected was not the treaty which Secretary Olney had elaborated, which two presidents of the United States had endorsed and ratified, and which educated public opinion strongly favored. The treaty had been so altered, amended, and disfigured during its consideration by the senate as to have become, in its final form, a mere declaration of principle, and the application of that principle was left, in every case, to a special agreement between the two powers. Undoubtedly, the most potent factor in the mangling and final rejection of the treaty was the fear, groundless, but no less powerful, that approval of the convention might be construed by Great Britain as an alliance in case of a European war, or even in lesser complications. The facts should be noted that there was no division upon party lines, and that while, geographically, the opposition represented largely the south and west, sectionalism did not enter into the debate or the final vote. Despite the rejection of this treaty, let us hope that such disputes as arise between this country and the queen's government may be settled as peacefully, in accordance with the decisions of arbitral tribunals, as

VOL. 55 — No. 20.

they have been in the past, always remembering the sage remark that we can arbitrate a fact, but never a principle.

According to a recent decision of the United States Supreme Court, in the case of the steamship "Majestic," a notice containing conditions, on the back of a steamship passenger's contract ticket, but not referred to therein, except by the words, "See back," printed on the face of the ticket, does not form a part of the contract binding on the passenger as to the liability of the steamship company for baggage or otherwise, where the passenger's attention is not called to the condition, and there is no proof that he ever read or assented to them. The case came up on writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit to review an order to enter a decree in favor of the libellants, Grace Howard Potter et al. for the sum of \$48.60, and interest, in favor of each of them, which order was made on appeal from a decree from the District Court of the United States for the southern district of New York for the recovery, by the libellants, of the full amount of damage to their baggage, amounting to the sum of \$8,828.50, against the steamship "Majestic," etc. The baggage in question was not put in the hold proper, but stowed in compartment No. 3 of the orlop deck, where the mails were also. This compartment was about twenty-five feet in length, had watertight bulkheads at each end, was ordinarily a safe place for the baggage of passengers, and frequently so used. It had three or four portholes on each side, considerably above the water line, closed in the usual way with glass, covered over with an iron protector. In passing through some floating wreckage one of the ports was claimed to have been smashed, and the compartment flooded with sea water, and thus was raised the question, on the doctrine of implied exceptions, whether the injury in this case was not by the act of God, for which the company was not liable. The theory of the defense was that the breaking of the port was caused by floating wreckage, and, while that might possibly have been so, the court finds

there was no evidence directly tending to establish it as a fact. If the wreckage referred to was of a kind adequate to force open an iron cover, properly constructed and firmly secured down over the port, then it devolved upon the company to show why the ship did not steer away from the wreckage or slacken speed while passing through it; and this was not attempted. The doctrine is thus clearly laid down that a carrier has the burden of proving that injury to the baggage of a passenger was caused by an act of God, for which the carrier is not liable.

The New York Court of Appeals has, through a recent decision, dealt a hard blow at the business of loaning money at usurious rates of interest to people who are in need. This decision affirmed judgment rendered by the lower court in favor of Mary Braine, declaring a note which she gave to Julie Rosswog, and a chattel mortgage to secure it, usurious and void, and directing their cancellation and surrender. Though the business was carried on in the name of the defendant, the court holds, sustaining Justice Barrett, that she and her father were clearly acting in concert to evade the usury law. Applicants for loans were made to sign two papers, each person acknowledging that she had constituted Rosswog, the father, her agent to procure the loan; that she had agreed to pay him \$50 for his services, and that he had no interest whatsoever in the money to be procured by him.

The plaintiff asserted that she never knew she had signed any papers except the note and mortgage. She went to those parties by seeing an advertisement offering to loan money. The court says that the documents to which Rosswog secured the plaintiff's signature cannot avail against the real facts of the case, and that they really strengthened the plaintiff's case. "They are not such documents, as any innocent broker, dealing honestly, would present to a borrower. They are elaborate and specious, carefully drafted, and evidently printed for general use, with recurring forms. The object was clearly to cover up the real transaction, and to estop the victim from subsequently as-

serting usury. But the law here admits of no estoppel upon the truth. That must prevail as against all such devices to cover up usury. These documents color the evidence of the defendant and her father, and they lend additional force and meaning to all the facts disclosed. Parties cannot escape under such circumstances as these simply by keeping the hand that writes the check in the background."

Little Delaware is now added to the list of States having divorce scandals. In that State the power to grant divorces is still reposed in and exercised by the legislature, and sixty-one couples have already been separated by legislative acts, passed at the present session. Rumors of bribery in connection with the passage of these bills became so persistent that a legislative investigation was demanded. There was evidence tending to show that members of both houses had suggested to counsel in divorce cases that some compensation ought to be paid for the consideration of private bills, but the persons implicated in these charges stoutly denied their truth. Scandal in connection with such a system of granting divorces is inevitable, and the effect of the present agitation ought to be a speedy change of method, by a transfer of this power to the courts of law, where it really belongs.

Pennsylvania seems altogether likely to place upon her statute books this year a fair libel law, its assembly having passed, by the decisive vote of 131 to 32, a bill relating to criminal libel which, in the main, was proposed by the Pennsylvania Editorial and Publishers' Association. The text of the bill is as follows:

Section 1.—Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same that in all criminal prosecutions or indictments for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libelous is substantially true, and was published with good motives and justifiable ends, the defendant shall be acquitted; the

jury shall have the right to determine the law and the facts.

Section 2—In no case can the defendant, in any prosecution for libel, be indicted for the printing or publication of the same libel upon the same individual in more than one county of this State.

Section 3—All laws or parts of laws inconsistent with this act are hereby repealed.

As this journal has heretofore pointed out, the libel laws of many of the States, including New York, deny to publishers the reasonable privilege accorded in this bill. As a contemporary truly observes: "No matter whether a published allegation is true or not, accidental or not, retracted or not; whether contained in a midnight telegram from the uttermost part of the earth, or reported in the home news service of the paper publishing it, if libel is charged the publisher is held to have had malicious intent. The presence of libelous matter in print presupposes malice on the part of publisher, though he may be a thousand miles away and ignorant of individual or incident concerned. So the courts construe the law. Evidence is permitted in mitigation of damages, but though the matter charged as libelous be 'substantially true' and published with the best intent and without possible malice, there is no escape for the defendant. The jury must find him guilty, though it award but six cents damages."

If the Pennsylvania bill shall be enacted into law, the example might well be followed by all States in which it is desired to put fair libel laws in force, and do away with gross injustice as well as malpractice and scandal.

The appellate division of the New York Supreme Court, Third Department, recently passed upon the right of the legislature to abolish the office of justice of the peace. The opinion, which is complete and exhaustive, is by Herrick, J. The cases were those of *The People ex rel. Alonzo A. Burby v. Lansing M. Howland and Others*, composing the town board of the town of Fort Edward, and *People ex rel. Thomas Ryan, respondent, v. The Board of Supervisors of Washington County*. These were appeals

from orders of the Special Term directing the issuing of writs of mandamus in favor of the respective relators, and against the defendants. The main question involved seems to have been the constitutionality of chapter 22 of the Laws of 1896, providing for the election of a police justice in the town of Fort Edward. The relator, Burby, was elected a justice of the peace of the town of Fort Edward in 1894. That office is a constitutional office, and the term of office is fixed at four years. (Const. art. 6, section 17.) Justice Herrick says when the Constitution has fixed the term of office, and prescribed the cause for which and the method by which an incumbent of such office may be removed, such cause and method are exclusive, and it is beyond the power of the legislature to remove or suspend him from office for any other cause, or by any other method. There will be no dispute of the proposition that the legislature does not possess the power to abolish a constitutional office, and the court adds that it will also be conceded as a rule of construction, that what the legislature cannot do directly, it cannot do by indirection or evasion, no matter if that evasion be of the **express terms or of the spirit of the Constitution**. The opinion adds:

"A written constitution would be of little avail as a practical and useful restraint upon the different departments of government, if a literal reading only was to be given to it, to the exclusion of all necessary implication, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit should be sustained as not repugnant to it. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.)

"The office of justice of the peace is one of the oldest known to the English law. Originally it was merely a peace office, with no civil jurisdiction, but from a time long antedating our Constitution, it was an office with both civil and criminal jurisdiction, and had such jurisdiction at the time of the framing of our Constitution.

"While having both civil and criminal jurisdiction, the most important functions exercised by the incumbents have been those

of conservators of the peace, and administrators of the criminal law. While the powers and duties of the office have been conferred by statute, yet those statutes date so far back in the history of English law that they may be said to be common law powers, which were adopted by us from the English law, together with the office of justice of the peace, and to be inseparable from the office, like the powers and duties of sheriff.

"The Constitution does not in express terms say anything about the powers or duties of justices of the peace, but the framers of that instrument are presumed to have known the laws relating to them as they then existed, and to have provided for such office with reference to their then existing powers and duties.

"The power to create inferior local courts, conferred by art. 6, section 18, of the Constitution, is a power to create additional courts and magistrates to those specifically named in the Constitution, but not a power to create courts or magistrates, in place of, or as substitutes for, or in destruction of, those specifically named.

"Such courts as are provided for in the Constitution of the State can neither be abolished nor changed by the legislature. And whatever jurisdiction is entrusted to them by the Constitution is beyond the reach of the legislature; it can neither be added to, diminished, nor modified. But the manner of its exercise may be regulated by statute. (Black's Constitutional Law, 252.)

"But under the guise of regulation the legislature has no power either directly or indirectly to take away any part of the power or authority of a court or magistrate created or recognized by the Constitution.

"It must be obvious that if the legislature can by one act take away the criminal jurisdiction of a justice of the peace, it may in another take away all civil jurisdiction, and thus destroy the office. A constitutional office cannot thus be destroyed.

"The king may grant the office of sheriff *durante bene placito*, and, although he may determine the office at his pleasure, yet he cannot determine it for part, etc. Nor can he abridge the sheriff of anything incident

or appurtenant to his office." (Bacon's Abrid. vol. 7, page 310, Bouvier's ed.)

While the legislature may regulate and add to or diminish the duties or fees of a constitutional office, it has no power to create a new office for the performance of such duties or the principal part of them.

The court holds, for these and other reasons, that sections 19 and 20 of chapter 22 of the Laws of 1896 are unconstitutional and void, and consequently that the relators are entitled to their fees.

The Bar Association of Indianapolis has reached the conclusion that it has no jurisdiction over the case of Judge Baker, of the Federal Court, who was charged with uttering improper sentiments while sitting in a civil suit, which involved some transactions of Mr. H. Sellers McKee, of Pittsburg, with the affairs of the Citizens' Street Railroad Company. "So far as McKee is concerned," the judge was reported to have said, "it would be no injustice to him to hang him, if the truth is set up here in this bill." The committee, of which L. C. Walker was chairman, made report. It stated that Judge Baker used the language attributed to him substantially as taken down by a news reporter at the time, and published in the Indianapolis News of February 11 and 12; that he used it in the presence of four lawyers, representing the plaintiff and defendant, and of a reporter; that all the persons present understood him to speak "half in earnest" in what he said about hanging and lynching, and without any thought or intention of encouraging lawlessness. That he was speaking of persons who were not parties to the suit, nor before the court in any way, and that he gave judgment in favor of the lawyers whose clients, stockholders and promoters he was condemning, and one of whom he peremptorily ordered to "sit down," and spoke as he did in expressing his sorrow and indignation that the alleged scheme of rascality charged in the complaint had been so skillfully planned and so successfully carried out that he was powerless to give any redress to their victims. The report also stated that Judge Baker, while

treating the committee with courtesy, had refused to make any statement as to what he said or what he meant by the language he used. The committee declared the opinion that Judge Baker's conduct had not been unjust nor tyrannical, nor such as to interfere with the due administration of justice, and that, therefore, the Bar Association had no jurisdiction to take any action in the matter, and the subject should not receive any further consideration. Such an utterance from the bench as that complained of was certainly in very bad taste, and all fair-minded persons will agree that a repetition should not be tolerated. The spectacle of a judge advising resort to lynch-law is certainly not in accordance with modern precedents.

The measure pending in congress known as the Nelson substitute for the Teller bankruptcy bill, which is a substitute for the Torrey bill, is of sufficient importance to warrant the printing of the following summary of its provisions, for which we are indebted to the Louisville Courier-Journal:

Anybody other than a corporation who owes \$200 or more and cannot pay may ask the Federal Court of his district to release him as a bankrupt. He must give a list of his creditors and a schedule of his property.

His creditors can contest his right to a discharge on only three grounds. They must show:

First—That he has fraudulently concealed some of his property.

Second—That he has fraudulently put some of his property out of his hands or suffered some one to acquire a lien upon it since he became insolvent; or,

Third—That, being a banker, broker, merchant, trader, manufacturer or minor, he has given fraudulent preferences to particular creditors.

If none of these grounds of objection are proved, the bankrupt's estate must be sold and distributed by an assignee, except that part of it which is made exempt by the law of the State in which he resides. Then the bankrupt must be discharged from all further obligations for his debts. The act gives the usual preference to debts due to the United States and the several States and to servants and laborers—the latter taking precedence.

The assignee is allowed \$5 per day for his

services, but the total amount of his fees must not exceed \$100. No attorney's fees are allowed. All other fees are cut down to a minimum.

The provisions of the Teller substitute and of the original Torrey bill as to involuntary bankruptcy are left untouched by Mr. Nelson's measure.

These provide that when any banker, broker, merchant, trader or manufacturer who owes \$500 or more, and is insolvent, shall put any of his property out of his hands directly or indirectly, or incur any of it with liens with intent to defraud his creditors, he may be forced into voluntary bankruptcy, the court seizing all his assets, and after proper proof distributing his estate.

#### IMPRISONMENT FOR DEBT.

(Continued from last week.)

There is a Newgate prison scent in Edna Lyall's pretty novel, "In the Golden Days," dealing with the reign of Charles the Second. A sad picture is drawn of the bitter cold in the common debtors' ward. There is a flickering fire in the grate, and around this the prisoners gather for warmth, and to make preparations for dinner by cooking such scraps of meat or vegetables as they had been able to secure either with their own money or by the charity of the London shopkeepers. These latter were in the habit of placing bread and such bones and scrapings as they could spare, in the baskets provided for that purpose, with the appeal for "Some bread and meat for the poor prisoners in Newgate. For the Lord's sake pity the poor." On an inquiry in January, 1811, into the circumstances of imprisoned debtors, the testimony of the keepers of the King's Bench and the Fleet prisons established the fact that in those large prisons the debtors had no allowance except the produce of the begging-box, shared by those who made affidavit that they were not worth £5 in the world; and in the case of Mr. Culver, who died in the Marshalsea prison around this time, the coroner's jury returned a verdict of "Died for want."

Who can forget the poor chancery prisoner who had been in confinement twenty years? The mellow Mr. Pickwick makes some indiscreet reference to the man's "friends:"

"'Friends!' interposed the man in a voice which rattled in his throat, 'if I lay dead at the bottom of the deepest mine in the world, tight screwed down and soldered in my coffin, rotting in the dark and filthy ditch that drags its slime beneath the foundations of this prison, I could not be more forgotten or unheeded than I am here. I am a dead man—dead to society, without the pity they bestow on those whose souls have passed to judgment. Friends to see me! My God! I



have sunk from the prime of life to old age in this place, and there is not one to raise his hand above my bed when I lie dead upon it, and say, "It's a blessing he is gone."

This prisoner's death is affecting; and it is by the use of such affecting passages—a true method—that the reformer Dickens lashes the abuses of the system:

"I hope my merciful judge will bear in mind my heavy punishment on earth. Twenty years, my friend—twenty years in this hideous grave. My heart broke when my child died, and I could not even kiss him in his little coffin. My loneliness since then, in all this noise and riot, has been very dreadful. May God forgive me. He has seen my solitary and lingering death."

"He folded his hands, and murmuring something more they could not hear, fell into a sleep—only a sleep at first, for they saw him smile."

"They whispered together a little time, and the turnkey, stooping over the pillow, drew hastily back. 'He has got his discharge, by ——' said the man."

"He had, but he had grown so like death in life that they knew not when he died."

Stephano is truly made to say, in "The Tempest," "He that dies pays all debts."

Dickens proceeds to show the shamelessness of the system, and uses the word "murder." "The Pickwick Papers" were written in 1836, and the author felt that he was dealing with an existing abuse: "This is no picture. Not a week passes over our heads but in every one of our prisons for debt some of these men must inevitably expire in the slow agonies of want if they were not relieved by their fellow-prisoners."

It will be remembered that when Copperfield first knew Mr. Wilkins Micawber, the latter was in "the King's Bench prison in the borough," where he was characteristically employing the leisure thus afforded him in the composition of a florid petition to the house of commons praying for an alteration of the law relating to imprisonment for debt. Who can forget how the "umble" Uriah Heep evened up things by getting out his several writs for debt just upon the eve of Micawber's departure for Australia, based upon the latter's elegant "I. O. U.'s?" Uriah's great fondness for "Tidds Practice" is well justified, for the method of suing out a writ for debt is very explicitly set out in that old book.

I saw in the British Museum "An Oration on the Oppression of Jailors." \* \* \* "which was spoken in the Fleet prison on the 20th of February, 1730 (as advertised in the Daily Post of that day), and correctly taken in shorthand by one of the audience, who hopes he shall not incur the displeasure of the orator in publishing a thing so manifestly tending to the Good of the Publick." This "oration" was printed in a shop near the

Fleet ditch. The orator declaims against the infamous Bambridge; and the oration abounds with instances of the oppressions of creditors and jailors. We are told of a suicide whose last act was the writing of a letter to his ruthless, threatening creditor: "Herewith is my body; make dice of my bones." This orator is of such calibre that he is able to quote with familiarity and aptness from Mr. Thompson's "Winter."

There is a scattered fugitive literature concerning the imprisonment of debtors, much of it inaccessible, found generally in reference. "The Cruel Debttter," by W. Wager, a black-letter fragment, was published about 1566. This is the Wager who is famous for the line, "The longer thou livest the more foole thou art." One line from "The Cruel Debttter" is sufficient: "O, Syr, I beseech you to be mercyfull to me." And the books written in England on this subject, when not actually buried, have so much to say of the bad policy, the inhumanity and the evil tendency of the practice, and these things are so prominent in the text, and so bound up and involved therein, that a straightforward account of the rise and progress of the system itself is not available, and hardly would be arrived at unless one made his research a very serious business.

Imprisonment for debt, at the first instance, was unknown to the common law. The first law for such imprisonment was introduced in favor of the barons; the second in favor of the merchants. 52 Geo. III. C. 23, Stat. of Marlbridge, provided that bailiffs who failed to account to their lords, if they withdrew themselves, and had no lands or tenements by the seizure of which they might be distrained upon by common writ of attachment, might be attached by their bodies. And, after the Conquest, when the crown came into large possessions, and came to have numerous demands on the people—a great part of its revenues being in fines and forfeitures—the exchequer not only arrested the subject at the suit of the crown, but granted its *quo minus*, which did the same, in aid of all who held lands of or could prove themselves anyways bound to the crown; and thus *subject arrested subject*. In the great contest for the great charter an exemption from imprisonment at the suit of the crown was secured to the people, to which exemption the king consented in *Cap 8*. As the power of the exchequer was chiefly struck at, the twenty-eighth chapter further enacted that "no man should be put to his law on a bare suggestion." These two chapters were intended to break up the practices of the exchequer, regular and irregular, of imprisonment and false suggestion. This court soon reverted to its old bad practices, which reversion afterwards produced the eleventh of Edward I. towards their abolishment, the preamble of which act reads: "For as much as certain pleas were heretofore holden in the ex-

chequer which did not concern us nor our ministers there, no plea shall be so holden unless it do especially concern us or our ministers." The charter further provided (Cap. 29): "No freeman shall be taken or imprisoned" \* \* \* (but) "by the law of the land." The charter thus confirms imprisonment, meaning that (23rd Edw. III., Cap. 2, and 42, Cap. 3), "none shall be imprisoned but by process made by *writ original*, according to the old law of the land." The writ original did not arrest in the first instance — no *capias* was contained or directed in it whereby the sheriff could be authorized to arrest. Some have called the "Statute of Acton Burnel" (the "Statute Merchant"), passed in the celebrated reign of Edward I. (13 Ed. I.), "the first attack upon liberty." This is the first law that seized upon the liberty of a mere debtor. The statute had its birth in the king's wish to encourage trade; and it was made lawful by it for a merchant, whose debtor had acknowledged his debt before a certain magistrate, to apply after the day of payment for a warrant to sell his debtor's movables, or, if no buyer could be found, to have them delivered up to him at a reasonable price towards the satisfaction of the debt; and if the debtor had no movables whereupon the debt might be levied, the statute declared that his body should then be taken where it might be found, and kept in prison until he had made agreement, or his friends for him. There was one good thing about this statute — it obliged the creditor to take care that his debtor should have bread and water in prison. Two years, after the remedy was further extended, with much severity, by a new law, explanatory of the former, by which the debtor of a merchant was, after the date of payment, made liable to immediate imprisonment, without regard to his effects; but with express power to him at any time within a quarter of a year to sell his lands or chattels for the purpose of discharging the debt; and after expiration of that quarter all his lands and goods were to be delivered to the creditor, "by a reasonable extent," the debtor's body being still kept in prison till payment of the debt by means of his estate. It was declared that the benefit of this statute should not extend to the Jews.

Lord Coke, after commenting upon the destruction of the Jews by the Statute de Jadaismo, has this observation: "At the parliament, also, of this noble king" (Edward I.), "in the eighteenth year of his reign, another kind of Jews were severely punished, viz.: the judges of the King's Bench, of the Common Pleas, the barons of the exchequer, and the judges itinerant." These judges had proved corrupt — they could be "reached," to employ the slang of this day.

The preamble of this new law points out the peculiar object of the law in these words: "For as much as merchants which heretofore have lent

their goods to divers persons be fallen in poverty because there is no speedy remedy whereby they may shortly recover their debt at the date of payment, and for this cause many merchants do refrain to come into the realm with their merchandise to the damage of such merchants and of all the realm." \* \* \* "The Statute of Merchants" is the name given to these last-named statutes. Then the barons took another inning by the passage of 13 Ed. I., C. 11, which enacts that the bailiffs and receivers of the barons, upon being found in arrears by the decision of auditors (who were appointed by the lords themselves), should be immediately committed to the nearest prison, where the sheriff was to keep them in irons, and where they were to live at their own expense until they fully settled with their lords for the arrearages they owed. This law really operated but in a narrow circle, and against only debtors of the barons.

The law rested thus for about sixty years, helping barons who had been defrauded by dishonest stewards, and merchants, who required all the encouragement legislation could give. 25 Ed. III., C. 17, extended imprisonment to the action of debt. And — more indulgences to trade — along came "Statute Staple" of 27 Ed. III., and recognition of 23 Henry VIII. These statutes permitted imprisonment without writs original — the whole process from summons to distringas was smuggled. The practice shot into form in the reign of Henry VIII., and grew stronger in the next succeeding reign; and it flourished in Mary's reign. Mary was too busy with a reformation of religion to interest herself in any other reformation; and at the beginning of Elizabeth's reign the prisons were full of debtors. Then commissions were granted to examine into the state of prisons for debt; and a commission of bankruptcy was produced, founded on 1 Edw. III., Cap. 4.

The 13th, Car. II., Cap. 2, enacted that "No man should be arrested and held to special bail but where the true cause of action was expressed in the body of the writ or process." As no arrests could be had for breaches only of civil contracts, a method of outwitting the act was devised by making the writs read: "To answer to A. B. in an action of trespass, and also to a bill for £100 of debt." It will be observed that the courts, and not the legislature, were responsible for this extension. This was the course in the King's Bench and the Common Pleas, for it is to be remembered that without a charge of trespass, imprisonment or *capias* was no part of their process. The Court of Exchequer proceeded also in a similar manner. The jurisdiction of the exchequer was in its original nature strictly limited and entirely different. This court had, ministerially, management of the king's revenues and, judicially, the power to proceed in matters respecting his debtors. When, therefore, the exchequer meant to exceed its juris-

diction it *supposed* the plaintiff to be the king's debtor. Upon that false suggestion or fiction they issued their own writ against the defendant, averring that the plaintiff, as the king's debtor, *was thereby the less able to pay the king's debt*. The writ thus obtained was named a "Quo Minus," from the introductory words. Upon this fiction the debtor of the supposed debtor of the king was seized, imprisoned and brought into court; and then the fiction had done its office. An original writ from Chancery was *supposed*, proofs of prosecution or security against groundless and malicious suits were *supposed*, the notice to defendant was *supposed*, the sheriff's inquiry for goods was *supposed*, his answer or return that the defendant had no goods was *supposed*; and upon these various suppositions of important facts the writ for seizing the defendant's person issued on the instant: and, instead of being the very last, was the very first proceeding against him.

When the personal liberty of defendants became a lucrative subject of possession in the hands of ministerial officers of the law, the sheriffs and their followers let to farm the emoluments of their power. The consequences, as seen in the case of Bambridge, were dreadful. This had been too long the state of things until the passage of 23rd Hen. VI., C. 9, which provided that no such offices were to be let to farm, and persons arrested by the sheriff upon actions were, agreeably to the common law, to be set at liberty upon reasonable sureties or bail for their appearance. The preamble of this act expresses the situation: "The king, considering the great perjury, extortion and oppression which be and have been in his realm by his sheriffs, under-sheriffs and their clerks, coroners, stewards of franchises, bailiffs and keepers of prisons, hath ordained, by authority vested in him, eschewing all such extortions, perjury and oppression, that no sheriff, \* \* \*" etc.

Occasionally parliament would openly admit that insolvency was consistent with honesty, as witness the preamble to 22nd and 23rd, Car. II., C. 20: "Forasmuch as very many persons now detained in prison are miserably impoverished either by reason of the late unhappy times, the sad and dreadful fire, their own misfortunes, or otherwise, so as they are totally disabled to give any satisfaction to their creditors, and so become, without advantage to any, a charge and burden to the kingdom, and by noisomeness (inseparately incident to extreme poverty) may become the occasion of pestilence and contagious diseases, to the prejudice of the kingdom \* \* \*." We may be sure that the parenthesis was not inserted by the original draughtsman or mover. This preamble evidently follows the wording of some petition that had been prepared some time prior to the passage of the act. But this well-introduced act evidently failed in its object, since about 1717 we

find more petitions for relief preferred by the poor and distressed. The language of one petition of that period might well serve as a preamble to another and more effective act; and the parenthesis could honestly be dispensed with. The petition is addressed and reads (in part) thus:

*"The Knights, Citizens and Burgesses in Parliament Assembled:*

"Multitudes of Poor Prisoners for Debt that lie close confined in the King's Bench and Fleet, for and on behalf of themselves and many thousand others, the like prisoners, in the several prisons in London and Westminster, and suburbs thereof, and in the many prisons in this Kingdom, *Sheweth:*

"That your petitioners, by unavoidable losses of divers natures, especially the great abuse of the coin, and the late tedious War, and its Fate, both by Sea and Land, which were not to be prevented by human Prudence or Foresight, and having been reduced to Poverty, were, notwithstanding, by their merciless creditors forced into the prisons aforesaid, and there have lain, many of them, several Years, in Great Misery and Want, to the utter Destruction of Themselves and their Families, who, if your petitioners had been at liberty, might have paid their debts, and been useful and of benefit to the Commonwealth of this Kingdom, but now are a great charge and burden to the same \* \* \*."

The petition goes on to calculate that there were then 60,000 persons confined for debt in England, many of whom lived by "begging at the grate;" and an allegation of actual starvation is made, and there is a touching reference to gaol distemper.

Another petition of the same period states that several on the Masterside of the jail, who had been active in endeavoring to reduce exorbitant fees, and who had been unduly curious respecting the disposal of charities intended for prisoners, were "locked up without benefit of Air, Water or Divine Service."

The reference to "the late unhappy times," found in the foregoing preamble, is a reference to what Mr. Blackstone, and all good royalists, name "The Interregnum"—it was so hard to accept the dead Cromwell as a living fact. "The sad and dreadful fire is, of course, the London fire, "The Great Fire" of September, 1666, when even Magna Charta itself (then in the Cottonian Library, now in the British Museum) was charred and well-nigh destroyed.

While the prisoners were preferring petition after petition praying for enlargement, and while they were uttering "piercing cries" and "lamentations," and issuing "broad-sides," religious consolation was not denied them. Tracts innumerable were given them, and no doubt the charity-box itself was often lined with that kind of literature. Spiteful tracts informed the debtors that "the wicked borroweth and payeth not again," and they

were admonished to consider — "In the day of adversity, consider." The ordinary prison-tract, then as now, took its text from Matthew xxv., 36: "I was in prison and ye came unto me." The prisoners bettered this instruction, and called in the aid of Nehemiah, chapter 5, which treats of usury and bondage upon default in that connection, and made reference to other pertinent chapters of the good book, and in 1800 some helpful fellow published a prisoner's guide, "Every Debtor His Own Lawyer."

Mr. McMaster's new "History of the People of the United States" contains some very interesting references to the imprisonment for debt that existed in America in 1784. This historian applauds the change in our laws that has abolished imprisonment for debt with more strength than he uses when speaking of our increased physical comforts of better food, higher wages and finer clothes. For more than fifty years after the peace there was in Connecticut an underground prison, which surpassed in horrors the Black Hole of Calcutta. This was the Newgate prison, located in an old worked-out copper-mine in the hills of that State. To quote from the historian's text in this connection: "The only entrance to it was by means of a ladder down a shaft, which led to the caverns under the ground. There, in little pens of wood, were from thirty to one hundred culprits, their feet made fast to iron bars, and their necks chained to beams in the roof. The darkness was intense; the caves reeked with filth; vermin abounded; water trickled through from the roof and oozed from the sides of the cavern; huge masses of earth were perpetually falling off. In the dampness and the filth the clothing of the prisoners grew mouldy and rotted away, and their limbs became stiff with rheumatism. The Newgate prison was perhaps the worst in the country yet in every county were jails such as now would be thought unfit places of habitation for the vilest and most loathsome of beasts. At Northampton the cells were scarce four feet high, and filled with the noxious gases of the privy vaults through which they were supposed to be ventilated. Light came in from two chinks in the wall. At the Worcester prison were a number of like cells, four feet high by eleven long, without a window or a chimney, or even a hole in the wall. Not a ray of light ever penetrated them. In other jails in Massachusetts the cells were so small that the prisoners were lodged in hammocks swung one over the other. In Philadelphia the keeps were eighteen feet by twenty feet, and so crowded that at night each prisoner had a space six feet by two to lie down in. Into such pits and dungeons all classes of offenders of both sexes were indiscriminately thrust. Many of the inmates of the prison passed years without so much as washing themselves. Their hair grew long. Their bodies were covered with scabs and

lice, and emitted a horrible stench. Their clothing rotted from their bodies, tormented with all manner of skin diseases and a yellow flesh cracking open with filth."

The chronicler of this prison (R. H. Phelps, "A History of the Newgate Prison," 1844) says: "The system was very well suited to make men into devils, but could never make devils into men."

Into such places as these were thrust unfortunate debtors. A horrid picture is also drawn concerning the criminal intercourse and contamination of the inmates of these places. It is upon such facts and their results that arguments in favor of solitary imprisonment have been based. It may be here remarked that solitary imprisonment is now in vogue in the Belgian penitentiary, and it is there claimed that such a method weans beginners from a life of crime by furnishing time for meditation uninfluenced by contact with incorrigibles, and that the latter are certainly better in such confinement. "Evil communications corrupt good manners."

Undoubtedly such prisons as those described were somewhat worse than the ones then existing in England, but the reason shows that our forefathers were not necessarily excessively or unusually cruel. They did not have the English plant, the old apparatus, and criminals are thick in a new country. There were then no special prisons or places for poor debtors, for those were not the days of special appropriations. That happy moment that comes when dealing with a surplus had not then yet arrived. But for chains and mould, no excuses can be written. It is charitable to say that we should look at such matters with the eyes of another age. If this be so, eyes certainly change much in a hundred years.

This imprisonment, however, at this time, in this way, would seem to have an additional repulsiveness, since the horrors of the Jersey prison-ship, the Sugar-House prison, and the brutalities of the English provost-marshal, Cunningham, were yet recent and fresh in all patriot minds, and on all patriot tongues.

This was all under the old confederation, and at a period subsequent to a reckless contracting of debt, contracted not so much without thought of payment, as with no possibility thereof. Some of the delinquents were, no doubt, soldiers of the revolution, many of whom entered desolate homes at the close of that war. Macauley tells us that Cromwell's Invincibles were able to disperse to advantage upon their disbanding. The home-coming soldiers of the revolution confronted different and sterner conditions. Whittier, in "The Prisoner for Debt," speaks of a man who had fought on patriot fields being imprisoned for debt and sharing a cell and its bed of straw with a murderer. The "savage code" under which such things were possible the bard thus attacked:

"Down with the law that binds him thus.  
 Unworthy freemen, let it find  
 No refuge from the withering curse  
 Of God and humankind.  
 Open the prisoner's living tomb,  
 And usher from its brooding gloom  
 The victims of your savage code,  
 To the free sun and air of God.  
 No longer dare as crime to brand  
 The chastening of the Almighty hand."

Yet it would be wrong to charge the new nation with all the faults of such a system, since the States were but working with a borrowed code of laws, imperfectly developed as to them, and not adapted to a new republican country and its new men. A century's practice is not well changed in a day. The subject of debt, private as well as public, probably had the benefit of much wide general discussion when Hamilton's financial genius shown out; yet a prohibition of imprisonment for debt could hardly have been incorporated in the Federal Constitution upon its adoption in 1789, since the matter was one intimately connected with contracts and vested rights, and each State was at that time insanely jealous of its own sovereignty. The matter was one for State enforcement, and the States were left to work out their individual freedom in that regard.

Arrest for debt was abolished in New York State in 1831, and that State seems to have taken the initiative in this among the States of the Union. Moreover, she was thirty years ahead of England. It was six years after the abolition in New York that Charles Dickens was writing his harrowing description of English abuses.

Many interesting facts concerning the overcrowding of former prisons in this country are found in a book named "The First Century of the Republic" (Harper's, 1876). The matter in this book is taken from papers originally contributed to early numbers of Harper's Magazine. We are told that formerly a prisoner for debt was treated just as though he were a convicted felon — in forgetfulness of the truth of a remark once made in congress (which I have seen in some place) that "in an insolvent you as often see a defrauded creditor as a fraudulent debtor." What was said (in 1826) of the old Market Street (Philadelphia) prison may be said of all the early American prisons: "All ages and sexes are mingled: the trembling novice in crime, the debtor, the disgusting object of popular contempt, besmeared with filth from the pillory, the unhappy victim of the lash streaming with blood from the whipping-post, the half-naked vagrant, the loathsome drunkard, the sick and condemned criminal."

It is said that in 1831 there were in the Leverett Street jail, Boston, over one thousand debtors confined in the same crowded night-rooms with over a thousand criminals and vagrants; many

women, old men and black boys, idiots, lunatics, and drunkards, all mingled together in two buildings. No restraint was used to prevent gambling, lascivious conversation or quarreling. In the old prisons of Philadelphia, in 1837, prostitutes procured themselves to be imprisoned on fictitious debts that they might participate in the orgies of the jail.

It was estimated as late as 1829 that there were 3,000 debtors confined in Massachusetts, 10,000 in New York, 7,000 in Pennsylvania, and 3,000 in Maryland. In the Philadelphia prisons of that year there were imprisoned *for debts of less than one dollar* 32 persons. *One man was confined 30 days for a debt of 72 cents.* In New Jersey food, bedding and fuel were provided for criminals, but "for debtors, only walls, bars and bolts." Many unfortunates were arrested and imprisoned for rum debts.

In "Boswell's Johnson" (vol. i., p. 84, note) we find the following: "General Oglethorpe \* \* \* began his career as a reformer of prisons, and became chairman of a jail committee, which exposed and sought to remedy the cruel oppressions to which prisoners were then subject. In pursuance of this beneficent work, Oglethorpe conceived the design of forming in the new world a colony of ruined gentlemen who had become prisoners for debt in England. A charter was obtained for the colony in 1732, and it was named from the king, Georgia \* \* \*"

This charter was granted to a corporation for twenty-one years, *to be held in trust for the poor* (Ridpath, p. 238). The use of this tired and disheartened material for the purpose of original colonization may have been one of the reasons why Georgia was always the feeblest of the provinces. Mr. McMaster ("History of the People of the United States," vol. i., p. 27) takes pains to state that even so late as 1870 "the population of Georgia was, in round numbers, twelve hundred thousand souls, and the circulation of the newspapers less than fourteen and a half millions of copies. The population of Massachusetts was, at the same time, fifteen hundred thousand, but the newspaper circulation was far in excess of one hundred and a half millions of copies." Might all this not be due to what may be regarded as the inauspicious institution of the colony? And might not the 1870 Georgians have been inheritors of the "tired feeling" of their ancestors of 1732? Why, therefore, does Mr. McMaster blame the 1870 Georgians?

In these days more commercial accomplishment is possible, partly because the fear in connection with a default in payment need not extend to a deprivation of the debtor's liberty. Ambitious men always did, and always will, lean out for effects which are really beyond the reach of the longest arm. In our times, however, honest failure, no matter how overvaulting the ambition,

need only fear a civil suit and a judgment against property. As the ages advance, any, the least, personal restraint is felt with a greater keenness, and liberty is more jealously guarded. There is the modern tendency to deal in a larger way, commercially; and men have been heard to express themselves to the effect that small debts should have no legal process whatever appropriated to their enforcement; and it is, at least, very certain that any argument in favor of imprisonment for debt would now be entirely ignored, and pass without the courtesy of an answer.

MARSHALL VAN WINKLE  
(of the New Jersey Bar).

**MUTUAL BENEFIT SOCIETY—NON-LIABILITY OF INDIVIDUAL MEMBERS FOR AMOUNT DUE ON POLICY.**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO—DEPARTMENT 7.

EDWARD A. BELCHER, Judge.

BRYDEN, Plaintiff, v. HINDS ET AL., Defendants.—  
No. 6775 J. C.

SECTION 322 of the Civil Code provides, among other things, that: "In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities," etc. B., a member of an incorporated mutual benefit society, died. The society refused to pay B.'s beneficiary the amount of his benefit policy, whereupon the beneficiary commenced an action under the statute above quoted against certain of the members of the corporation for their proportion of the sum due on the policy.

*Held:* That the lodge is the sole forum for the assessment of its members. *Semble*, if the legislature by the provision quoted intended to provide a plan by which the beneficiary under a policy of insurance issued by a mutual benefit society may proceed directly against the members *pro rata*, for the amount due on the policy, then the statute is obnoxious to the provisions of art. I, sec 11 of the Constitution of California providing that: "All laws of a general nature shall have a uniform operation."

OPINION.

This is an appeal from the Justice's Court.

There are twenty-five defendants, and judgment went against them in the court below. The case is presented here on demurrer, and the decision turns on questions not discussed by counsel. The plaintiff alleges that at all of the times mentioned the "Fraternal Life Association" was a corporation having no capital stock, formed and existing under the laws of this State for the purpose of insuring the lives of its members in favor of cer-

tain beneficiaries to be named by them; that the principal place of business of the corporation is in this city and county; that on the 27th day of October, 1894, the husband of the plaintiff was a member of said corporation and had his life insured therein in her favor for the sum of \$2,000, which sum the said corporation was to pay to her in the event of her husband's death; that on said day the plaintiff's said husband died; that at the time of his death he had kept and performed all of the conditions which upon his part he had agreed to keep and perform toward the said corporation; that the plaintiff has demanded payment of the said sum from said corporation, but payment has been refused; that at the time of the death of the plaintiff's said husband the said corporation "consisted of and had ninety-five members, including the defendants," who were all members of said corporation; and that demand has been made upon each of the defendants for the payment of his proportion of the plaintiff's said claim and demand, to wit: \$21.00, and payment has been refused. The prayer is for judgment against each of the defendants for \$21.00 and for costs.

The action is under that portion of section 322, C. C., reading as follows: "In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered." It will be noticed that the liability of the members is a present liability, and not a liability like that of stockholders determinable by the amount of shares held by the stockholder at the time the debt or liability was incurred.

The Constitution of this State provides (art. 12, sec. 3) that: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." Section 322 of the Civil Code contains the legislation had pursuant to that constitutional provision. That portion of said section 322 which provides that the members of a corporation having no capital stock shall be liable for their proportion of its debts and liabilities, is entirely extra of the constitutional provision, and is therefore independent legislation.

The Constitution of 1849 contains substantially the same provision touching the liability of stockholders in corporations as the provision of the present Constitution, and the courts of this State have uniformly held that the liability of stockholders, so fixed, is primary and original. Stock-

holders were not so liable at common law. At common law no individual liability was imposed upon the members of a corporation. (French v. Teschmaker, 24 Cal. 541.) But the Constitution does not make the members of corporations having no capital stock liable for corporate debts or liabilities, and the reasoning of all the cases does not apply to the case at bar.

In the case at bar, the Fraternal Life Association—a mutual benefit association—declined to pay the plaintiff's benefit policy, and in this action the court, in place of the lodge, is asked to assess the members named to make up the sum, *pro tanto*, due on the policy. At the time of Bryden's death there were ninety-five members of the corporation, and the assessment to be levied on each member to make up the amount of the insurance would be twenty-one dollars and a fraction; and the assessment to be levied against the defendant Hinds would be twenty-one dollars and a fraction. The action is to collect that sum, less the fraction, from him and an equal sum from each of his co-defendants. The working out of the plan whereby the court is to sit as the lodge and assess the members *pro rata* is not without interest. As we have seen, there were ninety-five members of the organization at the time of Bryden's death. Say that the defendant Hinds were to survive his co-members and thus become the last member of the organization; when death shall have reduced the membership of the organization to one person, and Hinds is left as the last survivor, his assessment for the latest death will be two thousand dollars, and upon his own demise, being the last member of the organization and there being none to assess, his beneficiary can receive nothing. From the time of Bryden's death Hinds' payments on account of benefit policies will have rapidly progressed in amount, and at the time of the death of the last member except himself he will have paid on account of benefit policies upwards of nine thousand dollars. Upon his own death his beneficiary will receive nothing. There does not seem to be much mutuality about that scheme. But though the result is startling, it is the logical outcome of the plan proposed if Hinds is liable, in this action, to pay at all. In my opinion Hinds is not liable in this action. The proceeding must be against the lodge; and the lodge is the proper forum for the assessment of the members, and not the court. If, by the enactment of the statute in question the legislature intended to make it possible for the holder of a benefit policy issued by a mutual benefit society to proceed directly against the members, *pro rata*, for the amount due on the policy, then the statute is obnoxious to art. 1, sec. 11, of the Constitution, which provides that: "All laws of a general nature shall have a uniform operation." As said by Ch. J. Sanderson, in French v. Teschmaker: "The Constitution knows

no distinction between persons, and the legislature cannot discriminate or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation; that it to say, it must operate equally on all persons and upon all things upon which it acts at all." It is true, of course, that to be general, a law need not include all classes of individuals in the scale, but to be a valid law it must operate uniformly upon the whole of the class that it does include. (Abell v. Clark, 84 Cal. 227; Turner v. Co. of Siskiyou, 109 Cal. 332; Bloss v. Lewis, Id. 493; Marsh v. Supervisors, 111 Cal. 368; Summerland v. Bicknell, Id. 567.)

If the statute in question is applicable as contended, then it is not equal and uniform in its operation, and tested by the constitutional provision referred to cannot stand.

The demurrer is sustained and the case dismissed.

April 27, 1897.

#### MERELY EXPLETIVE.

#### THE KENTUCKY LAWYER'S EXPLANATION OF HIS LANGUAGE TO THE COURT.

**A**MONG the new members of the house is Thomas Y. Fitzpatrick, of Kentucky, or "Tom" Fitzpatrick, as everybody calls him at home. Tall, graceful, broad-shouldered, thin-flanked, he would attract attention in any company. Swart as a Spaniard, he has the laughing eyes—the fine, gray, the Irish eyes—that make an Irish beauty the loveliest of women, that make an Irishman the best of good fellows. Fitzpatrick is a delightful story-teller, and already he is companion in that cloak-room set dominated by Amos Cummings, John Allen and Mark Smith.

The other day, after the somewhat involved leadership of the minority had completed the regular week's washing on the floor, a party of good fellows were congregated around Fitzpatrick, who was relating stories of a famous character, who lived in the mountains of Kentucky. The continuity of discourse that led up to him as a subject was an analysis of the expletive as a part of English speech. Fitzpatrick discoursed about as follows:

"John H. Hazelrigg was a lawyer and editor in my section of Kentucky. He was a genius, a poet, a student and an orator. He was what Tom Marshall would have been had that wonderful man been a mountaineer. One day he was making an argument before a jury in a common-law case, and was drawing a parallel between the party to the suit on the opposing side and one of Dickens' immortal miscreants. Always emphatic and always wrapped up in his client's cause, he was more than usually so on this occasion. It so happened that he forgot the name of the character out of Dickens he proposed to cite, and turning to his associate

a very young lawyer, he asked in a voice of thunder: 'What was the name of that damned scoundrel who broke old Dombey?' A roar went up from the bar and from the auditorium. Even the judge smiled when he commanded order.

"Hazelrigg turned to him and made a most eloquent and ingenious apology, something like this: 'Your Honor, I frequently use strong language—stronger than I ought to employ—but your honor will acquit me of profanity. When I awake an expletive I do it as a matter of emphasis only, never in the sense of irreverence or blasphemy. If I may be pardoned for the immodesty of connecting myself in the slightest particular with Lord Chancellor Thurlow, I would cite your honor to the occasion when, in denying a petition of a committee of dissenting clergymen, he said: 'Get your damned religion established, and I will be for it,' and he did not mean to be disrespectful or irreverent, only emphatic. The committee so understood him, and I hope your honor so understands me.'" The judge smiled and took him at his word.—Washington Post.

#### KIND WORDS OF CONTEMPORARIES.

**T**HE wave of progress has at last struck the old conservative ALBANY LAW JOURNAL, the current number of which greets its readers in an improved form, with tinted cover, enlarged in size, and in other respects notably altered for the better. Among other improvements it has begun the introduction of illustrations where admissible, as in its description of the English courts of justice; and the supplement gives an excellent portrait of Mr. Justice Peckham.—Albany Argus.

The ALBANY LAW JOURNAL, which has had an uninterrupted weekly publication for more than a quarter of a century, appears in an enlarged and much improved form in its issue for May 1. It is now under new editorial and business management, and its conductors promise that the good record of its past shall be improved upon in the future, and every effort will be put forth to make each new issue brighter and better than the preceding one. The table of contents of the present number is varied and interesting.—N. Y. Times.

The ALBANY LAW JOURNAL, always an excellent paper, has been improved. It comes out in new cover with the May number, with new editorial and new business management, and with a mass of most valuable and interesting material in its columns. The Evening Post is pleased to credit to the LAW JOURNAL the article relating to clashes between judges and lawyers, printed to-day.—Chicago Post.

That excellent legal periodical, the ALBANY LAW JOURNAL, presents itself greatly increased in size, sporting a handsome colored cover, and otherwise offering relevant, pertinent and competent evidence

that it is enjoying the prosperity and influence to which its many merits entitle it.—Rochester Democrat and Chronicle.

The ALBANY LAW JOURNAL appears to have prospered under the guiding hand of Charles J. Hailes, formerly editor of the Register. Since Mr. Hailes took charge the JOURNAL has boomed. Better paper and better matter all show the master hand of the Register's former chief. The latest number contains a fine picture of Rufus W. Peckham, Associate Justice of the United States Supreme Court, and a well-written account of his life, by L. B. Proctor, and a strong article on "Imprisonment for debt," by Marshall Van Winkle, of the New Jersey bar. Mr. Hailes is not only a conscientious and careful writer, but, what is necessary in his line of work, an excellent judge of writers, so that only the best finds its way into the columns of the ALBANY LAW JOURNAL.—Hudson (N. Y.) Register.

Under the management and editorship of Charles J. Hailes, Esq., the ALBANY LAW JOURNAL is winning golden meeds of commendation on all sides from members of the legal fraternity for its recent steady advance in progress and improvement. With its improved form, tinted cover, enlarged size, handsome illustrations and excellent subject matter, the current number of this magazine is an ideal copy of a law journal. In it can be found something of interest to all who find a pleasure in subjects of legality. Slowly but surely this journal is forcing its way into the van of the legal journals of the country, and winning honors for the editor and publishers.—Albany Times-Union.

The ALBANY LAW JOURNAL, of which Charles J. Hailes, formerly of Hudson, is the editor, appears in an improved form, and the change is appreciated by the readers of that medium as a vast improvement over the old style of make-up. The new editorial and business management has infused new life into this publication, which ranks as one of the best of its kind in the United States.—Hudson Republican.

The ALBANY LAW JOURNAL, which for more than a quarter of a century has stood among the foremost publications of its class in the world, has passed into new editorial and business control, under which it seems destined to still higher usefulness and prosperity. It appears in more popular form, embodying new and valuable features and retaining all the old ones which have contributed so largely to its success. The high character of this sterling periodical has given it an indisputable place in the favor of the legal profession, and there is ample assurance that its honorable position will be steadfastly maintained and strengthened by the new management.—N. Y. Mail and Express.

I have received a copy of the ALBANY LAW JOURNAL, in very attractive and rejuvenated form



The "Vagrant" has a great love for this excellent legal periodical, because on its staff he spent five years of his journalistic life. The current number reminds him of the days when Isaac Grant Thompson, Irving Browne, Robley D. Cook and John T. Cook wielded editorial pens. Now "Charley" Hailes is at the helm, and, judging from the excellence of the issue in hand, the great legal journal is passing through the channel in splendid form. It contains much of interest, and is handsomely embellished with a portrait of Mr. Justice Peckham, of the United States Supreme Court. The publishers have secured an able editor in Mr. Hailes.—Albany Evening Journal.

### BALKING A BEHEMOTH.

HOW THE JUSTICE OF THE PEACE OF CONNUBIAL CORNERS WON HIS FEE.

"Say, jedge, can a feller git married on tick here?" asked the young bark-peeler from Chipmunk Run, as he entered the court-room of Baldy Splicer, Esq., justice of the peace of Connubial Corners.

"Nope, not unless he puts up his ticker as security fer the tick," was the disheartening reply. "My jinin' fee is two dollars, invariably in advance."

"Pshaw! Jedge, that's hard luck," groaned the bark-peeler. "Couldn't do it fer a dollar jest once, could ye?"

"Not if it was the Turkey sultan an' was goin' to gi'me all yer trade."

"That's hard luck," repeated the visitor. "Ye see, two dollars is my hull pile, an' Jen down in the wagon is dead sot on seein' a blood-sweatin' behemoth. She won't marry me unless I spend a dollar takin' her to the show, an' I can't marry her if I do becuz I ain't got no ticker to put up fer the jinin' ceremony afterwards."

"Sorter between Silly an' Spareribdiss, hey?" classically observed the justice.

"An' I don't dast tell her I'm so nigh broke, becuz women nowadays seem strictly out fer the stuff."

"I don't blame 'em—so'm I," said Justice Splicer. "Tell her that if she'll marry ye now ye'll take her to the next circus."

"I did, jedge," but she gi'me the laff. She said she could get jined any time, but blood-sweatin' behemoths wasn't comin' her way every day, not much."

"Huh!" muttered Justice Splicer. "I've had a powerful lot of experience with matrimonial obstacles, but this is the fust time I've ever been up again a blood-sweatin' behemoth. She's promised to marry ye, has she?"

"Forty-'leven times, jedge."

"Stay yere, young feller, an' we'll see what we kin do fer ye."

Justice Splicer whispered a few words to Dave

Dugan, the constable, and that worthy hurried from the room. In a few moments he returned with Jen, who was short and plump, and in a flutter of alarm.

"Miss Jen," Justice Splicer began solemnly, "it has come to the knowledge of the court that, after sakerdly promisin' to marry this young feller forty-'leven times, ye refuse to marry the said feller unless he trots out fer yer inspeckshun a blood-sweatin' behemoth. Air ye guilty er not guilty?"

"Breach o' promise is a serious crime—a serious crime, Miss Jen."

The girl looked solemn.

"An' the crime of duress, to wit: holdin' a blood-sweatin' behemoth over the head of the said young feller is even seriouser."

The girl looked more solemn.

"He could make ye a lot of trouble if he wanted to. Ye wouldn't like to have him get a posse comitatus fer ye, would ye?"

"N-n-n-o, sir."

"Ner a duces tecum, ner a rus in urbe?"

"Oh! No!"

"Ye wouldn't like to have a constable huntin' ye with a nunc dittimus er a de lunatico inquirendo, would, ye?"

"Oh! No, no, no."

"Then ye better keep yer promise an' marry him right now, hadn't ye?"

"Y-y-yes, sir: I will, sir," whimpered Jen.

In five minutes the ceremony was performed, and, as the door closed upon the happy bark-peeler and his bride, Justice Splicer turned to the constable.

"All's well as ends well," he cried with enthusiasm. "Everybody's happy. Woman-kinds got a good lesson: he's got his girl: his girl has got him where she can get even an' I—I've got two dollars!"

"Yes, but how about the blood-sweatin' behemoth?" said the constable.

"Le's go down an' see the critter, Dave. Two dollars fer tickets an' peanuts an' pink lemonade! Haw. haw. haw!"—Truth.

### Legal Notes of Pertinence.

CHIEF Justice John A. Peters of the Supreme Court of Maine naturalized a Chinaman the other day, and the new American citizen has already come before him with an application for divorce.

The anti-cigarette bill passed by the last Maine legislature, and which went into effect May 1, contained no provision for its enforcement. Through an engrossing clerk's mistake, the game commissioners are having no end of trouble with the game laws, and other important errors have been discovered in various laws.

Judge Nathan Goff, of the United States Circuit Court of Appeals, is said to have been offered a place in the United States Supreme Court, to succeed Justice Field, who is expected soon to retire.

Professor H. B. Hutchins, dean of the Michigan University law department, will be acting president of that institution during the absence of President Angell as minister to Turkey. He will continue to serve as dean of the law department. Mr. Hutchins is a native of New Hampshire. He was graduated from Michigan University in 1871. He became professor of law there in 1884.

On a railroad siding four miles from Hollidaysburg, Pa., thirty-two Pullman palace cars, which cost \$400,000, have been going to decay for the past five years, because of being tied up in litigation. They are claimed by both the Pennsylvania road and the Pullman Company, but until in the slow course of the law a decision is rendered as to which corporation they legally belong, they must be left to rot, so that when there is finally an end to litigation the cars will be worthless.

The death of Charles E. Butler, which was announced on Monday, brought to a close the quiet career of one of the most successful members of the New York bar. He was distinctively an office lawyer, and hence not well known to active practitioners except by reputation; yet that reputation was so high that his name was always an element of strength even in the firm of exceptionally able men with whom he was associated. Mr. Butler was a Virginian by birth, and had nearly attained the age of 80. In the legal necrology of the week we regret also to have to record the name of Robert Sewell. His early life in New York resembled that of Mr. Butler in one respect. He came here as a poor boy, who had to earn his own living. Mr. Sewell was born in Ireland, in 1831, and arrived in America when he was about 18 years old. He became a prominent and successful advocate, especially in life insurance cases, and was the legal adviser of the Mutual Life Insurance Company. At one time he was in partnership with James F. Pierce, who recently retired from the office of superintendent of the insurance department. Mr. Sewell some years ago was a candidate for justice of the Supreme Court in this city on the Republican ticket.

Prof. Christopher G. Tiedeman of the University Law School, New York, has resigned from the faculty of that institution, to which he was appointed in the year 1891, and of which he has been a prominent and useful member. He gave instructions in the law of real property and the law of negotiable paper. Prof. Tiedeman is the author of a well-known work on real property law.

It will probably surprise many persons to learn that there can be any question under our naturalization laws in regard to the jurisdiction of the

Supreme Court, first department. That is, that the United States. The right to naturalize a citizen of Mexico, however, has recently been seriously disputed before Judge Thomas S. Maxey, of the United States District Court for the western district of Texas, upon the ground that the applicant was not a white person, nor an African, nor of African descent, but that his color was the color of an Indian. After long consideration, the objection was pronounced invalid, and the Mexican was allowed to become a citizen of this country.

A salutary proposition in regard to the liability to real estate brokers for commissions has recently been laid down by the appellate division of the Supreme Court, First Department. That is, that if you employ a broker to sell a particular piece of property to a particular person, and he fails to do so, the employment does not give him authority to sell to another person in your behalf, and render you liable to pay him a commission for the subsequent service. Under such circumstances if he collects any commission it must be from some one other than the seller.

Much interest has been excited in New York business circles by a decision rendered at a special term of the Supreme Court by Mr. Justice Beekman, in reference to the taxability of money invested in a seat in the New York Stock Exchange. The defendant was a resident of New Jersey, doing business as a stock broker in New York, and he insisted that the value of his seat in the exchange did not represent an equivalent money investment, and did not bring him within the provision of law which declares that non-residents doing business in this State "shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this State." The proof showed that he paid \$20,500 for the seat in 1890, and that the average price for a seat was \$18,000 at the time of the imposition of the tax. The court held that the value of the seat must be deemed money invested in the defendant's business here, and hence that he was subject to taxation thereon.

The New York Court of Appeals has just affirmed two judgments of conviction in case of murder in the first degree, and reversed two convictions for manslaughter and murder in the second degree, respectively. These reversals were in the case of Anna and Joseph Ledwon, who were convicted in Buffalo, in 1895, of having killed Anna's former husband five years before. An essential link in the chain of evidence to establish the guilt of the defendants was the testimony of a boy who was only eight years old at the time of the occurrences which he narrated; and the question whether a conviction necessarily based on the statements of this youthful witness should be allowed to stand has given considerable trouble to the courts. The judges were divided in the

perior Court of Buffalo; and in the Court of Appeals, Judge Gray dissents from the conclusion of his associates, and favors affirmance. From the opinions written when the case was at the general term it would seem that a new trial, with the boy's testimony excluded, would inevitably result in an acquittal.

According to statistics, to every fifty homicides committed in the United States there are only three committed in Great Britain.

One Jensen, at Wahoo, Neb., obtained insurance on his property from the Farmers and Merchants' Insurance Company of Lincoln, and afterwards transferred the property to his son, who then conveyed it to Jensen's wife. A fire occurred which destroyed the property, and the company refused to pay on the ground that Jensen had made a change in the title of the property, which was contrary to the provisions of the company. Jensen proved that he had an insurable interest in the property, and that the transfers to the wife and son were merely in trust. Judge Sedgwick, before whom the case was tried, held that the transfer did not void the policy, and directed a verdict for the plaintiff.

Two weeks of the recent term of the District Court at Webster, Iowa, was occupied at a cost of over \$2,500 to the taxpayers of the county with the case of *Hoffman v. O'Brien*, an appeal from a Justice's Court wherein judgment was given the plaintiff for \$26. In the costs of the court and the amount involved the case is similar to that of the Jones county calf case. The jury, after being out all night, gave a verdict to the defendant, who submitted a counter-claim.

A man who induced a St. Paul business firm to cash a bogus check, and then defended himself when charged with forgery, has written the county attorney requesting him to send to him at Stillwater (penitentiary) the \$10 allowed by the court to the attorney appointed by the State to defend a criminal.

William Haas and William Wiley were electrocuted, on April 20, in the annex to the Ohio penitentiary. These were the first electrocutions in the State.

### English Notes.

The lists of the recent bar examination, which have just been issued, show that 126 candidates presented themselves for examination, but that only 69 satisfied the examiners. Of the 57 who failed, 19 were so hopelessly ignorant that they were forbidden to present themselves for examination till the end of the year.

Messrs. Partridge and Cooper, of 191 Fleet street, will shortly publish an illustrated souvenir of the queen's diamond jubilee, entitled "Temple

Bar and State Pageants," an historical record of state processions to the city of London, and of the quaint ceremonies connected therewith.

Mr. George Henderson has communicated to the Times the welcome information that a nightingale has been heard, by himself and Mr. Eastwood, singing in Lincoln's Inn. We grieve to say that there are doubters, some of whom suggest that, according to Milton, "the wakeful nightingale" sings her "amorous descant," not in the afternoon, but "all night long." Others aver that the notes heard were not those of a nightingale, but the mellifluous tones of an official referee, not yet promoted, descanting upon a recent event. And others, again, basely hint at a small boy provided with suitable machinery in the shape of a tumbler of water and a piece of hollow wood. We think that these doubters should be silenced, and as an interesting fact in the annals of the inn verified and placed on record, by means of a joint-statutory declaration by the nightingale's auditors, to which it appears to be essential that there should be a nightingale's eggs-hibit.—Solicitors' Journal.

What will the criminal fraternity be doing on June 22? the timorous householder is asking, remarks the London Law Journal. From New York comes a hint of a salutary measure which might be adopted for the jubilee. In view of the General Grant memorial parade the chief of police is said to have ordered the arrest and detention for the day of every known thief in the city, and of every thief seen in the streets, whether disorderly or not. Such an interesting method of preventive arrest would save many purses; but it savors of what may be styled judicious illegality rather than of the slower measures of British justice. Here the police cannot lawfully arrest people for their past performances or bad character, and must confine themselves to persons who are loose, idle, and disorderly (an elastic expression often made an excuse for unjustifiable arbitrariness by the police), or who are loitering with intent to commit felony, and we are afraid that the lieges must be content to leave their watches and purses at home instead of trusting to any continental or American exercise of police powers.

The lord chief justice has recovered from the illness which prevented him from performing his duties during the latter part of Hilary term, and was among the judges who attended the courts on the opening day of the present sittings.

The appeal list is considerably smaller than it was at the beginning of the year. Then there were 127 appeals awaiting hearing; now there are no more than eighty-five. Thirty-eight of these appeals are from the Queen's Bench Division, thirty-one from the Chancery Courts, four from the County Palatine Court of Lancaster, two from the Admiralty Court, and two from the Bankruptcy Court. Of the chancery appeals, eleven are

from Mr. Justice Kekewich, four from Mr. Justice Romer, four from Mr. Justice Byrne, three from Mr. Justice North, and three from Mr. Justice Stirling.

The present list of house of lords appeals consists of sixteen cases, of which twelve are English, three are Scotch, and one is an Irish appeal. There are eight cases awaiting judgment, the first among them being Earl Russell's appeal, heard several months since, in which is involved the question as to what constitutes "legal cruelty" in a matrimonial sense, while the last is the trade union case of *Allen v. Flood*, heard a few weeks since.

### Legal Laughs.

WHEN it came to the cross-examination the witness, who had testified that he believed the prisoner demented, settled himself in anticipation of possible trouble.

"Have you any reason for wishing to send my client to a madhouse?" asked the lawyer.

"None," replied the witness.

"Well, what particular thing has he done that has tended to convince you that he isn't in his right mind?"

"Well," said the witness slowly, "look at the fool he made of himself in selecting a lawyer."

The crier of a county court was required, as is usual in the absence of a witness, to go to the court-house door and call out for Philip Logue, who was summoned in a certain case then pending. Accordingly he stepped to the door, and sang out at the top of his voice:

"Philip Logue!"

A wag of a lawyer who happened to be passing whispered in his ear: "Epilogue also."

"Epi Logue!" sang out the crier.

"Decalogue," said the lawyer, in an undertone.

"Deca Logue!" sang out the crier.

"Apologue," whispered the lawyer.

"Apo Logue!" reiterated the crier, at the same time expostulating with the lawyer: "You certainly want the whole family of Logues."

"Prologue," said the persevering lawyer.

"Pro Logue!" rang out again, attracting the attention of everybody, and the judge sent the sheriff to stop the crier from further summonses of the family of Logues.

The man stammered painfully. His name was Sissons. Especially difficult to him was the pronunciation of his own name. He had the misfortune to stay out late and uproariously one night, according to the *Illustrated American*, and to account for it before the magistrate at the police court next morning. "What is your name?" asked the court. Sissons began to reply: "Sss — ss — ssss — ss — sss" — "Stop that noise and tell me what is your name," said the judge, impatiently. "Siss — sss — sss — siss" — "That will

do," said his honor, severely; "officer, what is this man charged with?" "I think, your honor, he's charged with sody water."

Great Lawyer — What's the matter, old man?

His Partner (excitedly) — Our reputation is ruined. Some idiot has washed the windows. — *New York Journal*.

### Notes of Recent English Cases.

Factories and Workshops — Workshop Open on Sunday — Persons of Jewish Religion — "Open for Traffic on Sunday." — Sec. 51 of the Factory and Workshop Act, 1878, enables a person of the Jewish religion to employ, on certain conditions, young persons or women of the Jewish religion in his workshop or factory on Sunday, provided that the workshop or factory shall not be "open for traffic on Sunday." The appellant, whose business was to make button-holes for tailors, made arrangements with his customers to make button-holes on their garments for certain prices; and the garments were sent to his workshop, and fetched away when the work was done. Persons of the Jewish religion were employed in the workshop on Sunday, and the workshop was open on Sunday in order that customers might send or fetch away garments in pursuance of arrangements previously made, but it was not open for the making of arrangements with old or new customers, or for the receipt of work from casual customers, or for the payment or settlement of accounts. *Held*, that the workshop was not "open for traffic on Sunday" within the meaning of sec. 51. (*Goldstein, app., v. Vaughan, resp.*, L. T. Rep. vol. LXXVI, 262.)

Light — Photographic Studio — Interference with Access of Light — Mandatory Injunction. — The plaintiff, Lazarus, was the owner of a photographic studio, to which the access of light had been obstructed by the erection of another studio by the defendant company. The defendants had attempted to remedy the interference with the plaintiff's light, caused by the new building, by painting the latter red, so as to better reflect light. The evidence adduced showed that the light of the plaintiff's studio had been so interfered with as to render it useless for the purposes of the plaintiff's photographic business, and the attempted remedy did not, in fact, improve the light required for photography. It was also proved that the plaintiff had only used his studio for photography for the last ten years. This was a motion by the plaintiff to restrain the defendants from erecting any building or permitting any building to remain erected so as to interfere with the access of light to plaintiff's studio. Counsel for defendants argued that, as the plaintiff claimed to enjoy a light peculiarly suitable for the purposes of photography, he must show that he had enjoyed that special light for the period of twenty years. *Kekewich, J.*, after

referring to the case of *The Attorney-General v. The Queen Ann and Gorden's Mansions (Limited)* (37 W. R. 572, 5 T. L. R. 430), which was decided by his lordship, refused to come to any conclusion inconsistent with his former judgment, and decided it was not necessary that the light required by the plaintiff for the purposes of his photograph should have been enjoyed by him for twenty years. His lordship came to the conclusion that the interference with the plaintiff's light was such as to necessitate a mandatory injunction, which his lordship accordingly granted. (*Lazarus v. The Artistic Photograph Co. (Lim.)*, High Court, Chancery Division, April 27, '97.)

**Landlord and Tenant — Lease of Hotel — Covenant by Lessee Not to Buy Wines and Spirits Except from Lessor — Proviso for Abatement from Rent — Covenant Running with the Land — Severance of Ownership of Lessor's Business and Ownership of Reversion.**—A covenant by the lessee contained in the lease of an hotel that he will not during the term created by the lease buy, receive, sell, or dispose of, in, upon, out of, or about the premises any wines or spirits other than shall have been *bona fide* supplied by or through the lessor (a wine and spirit merchant), his successors or assigns, is a covenant which runs with the land, and is binding on the assigns of the lessee, even though such assigns are not mentioned. And where such covenant is coupled with a proviso for abatement from the rent so long as the lessee shall well and truly observe the covenant, the assigns of the lessee are entitled to the benefit of the proviso, and may claim the abatement, notwithstanding that the ownership of the business of the lessor and the ownership of the reversion have been severed by a sale of the business, while they continue to obtain wines and spirits from the purchasers of the business. (*White v. The Southend Hotel Company (Limited)*, Court of Appeals, L. T. R. vol. LXXVI, 273.)

### Notes of American Decisions.

**Mortgage — Receiver — Foreclosure.**—Where mortgaged property has been sold under a judgment against the mortgagor, and the purchaser is in possession and is solvent, a receiver will not be appointed, on the application of the mortgagee, to take possession of the property, and collect the rents and profits, pending a foreclosure. (*Warren v. Pitts* [Ala.], 21 South. Rep. 494.)

**Negotiable Instruments — Parol Evidence.**—In an action upon a note by the payee against the sole makers thereof, parol evidence is inadmissible to show that the makers executed and delivered the notes as collateral security only. (*Moore v. Prussing* [Ill.], 46 N. E. Rep. 184.)

**Notary Public — Contempt of Court — Punish-**

**ment.**—A notary public, with jurisdiction of a justice of the peace, without making himself or sureties on his bond liable to civil action, can punish for contempt a bystander, who, when the notary intimated that he should find guilty a person being tried before him for assault, interrupted with a statement that he knew two persons who saw the affair, and then refused to disclose their names. (*Coleman v. Roberts* [Ala.], 21 South. Rep. 449.)

**Principal and Agent — Authority of Agent.**—Where a general agent for loaning, collecting and reloading his principal's money takes a note payable to himself from a borrower, in payment of a matured note of the latter, without the knowledge or ratification of the principal, the borrower remains liable to the principal. (*Everts v. Lawther* [Ill.], 46 N. E. Rep. 233.)

**Principal and Agent—Brokers — Good Faith.**—A broker employed to sell stock forfeits his commission where, after finding a purchaser, he agrees with him and another person that the latter shall buy the stock in order that it may be obtained at a less price, and that the real purchaser shall not be disclosed to the owner. (*Hafner v. Hebron* [Ill.], 46 N. E. Rep. 211.)

**Railroad Company — Killing Stock.**—Where the evidence in an action for killing stock left it doubtful whether the stock entered on the right of way through defects in the fences, or through a gate erected for plaintiff's benefit, and left under plaintiff's control, it was error to render judgment for plaintiff. (*Missouri, K. & T. Ry. Co. of Texas v. Johnson* [Tex.], 39 S. W. Rep. 323.)

**Tender — Sufficiency.**—Where a tender is made and kept good by bringing it into court, and it is not accepted or taken out of court, and it is found on the trial that a larger sum is due, it operates as a payment on the sum finally recovered. (*Martin v. Bott* [Ind.], 46 N. E. Rep. 151.)

**Vendor's Lien.**—Where a balance due from a husband and wife on a contract for the purchase of a homestead was paid by a third person, to whom the property was conveyed, and who conveyed it to the husband, a vendor's lien retained in the deed securing notes taken from the husband for the money advanced is valid. (*Clark v. Burke* [Tex.], 39 S. W. Rep. 306.)

**BACK NUMBER WANTED.**—The Albany Law Journal will pay 50 cents for each copy of Vol. 52, No. 23, which is mailed to its address. Any subscribers who may happen to have copies of this number, which they can spare, will confer a great favor by sending them at once.

ALBANY LAW JOURNAL CO.,

Albany, N. Y.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, MAY 22, 1897.

### Current Topics.

MR. GEORGE MILLS ROGERS, of the Chicago Bar, in a pamphlet recently published under the title "Existing Methods of Trying Cases," advances a somewhat novel proposition, with reference to the defense of persons accused of crime. Mr. Rogers seems to think that an entirely erroneous idea as to what the duties of a State's attorney should be prevails. This official is looked upon, he says, only as a prosecutor, whose business it is to secure a conviction, if possible, and too often this is the attitude of the prosecuting officer himself, who becomes overzealous in securing convictions, under the notion that acquittals may mar his reputation. This is apt to be the case, particularly when some crime has aroused public prejudice by reason of its peculiar atrocity, or on account of the victim being a man of prominence. In such cases a fair and impartial trial is particularly desirable, but exceedingly difficult to obtain. No one is likely to dispute the proposition that every one accused of crime should be presumed to be innocent until proven guilty. Nor will it be disputed that the people ought to be as much pleased to find that the accused is innocent, as to be convinced that he is a thief or a cold-blooded murderer. Mr. Rogers' plan is to give to every man accused the same counsel whom the people have. In other words, he would have the State's attorney act in a dual capacity, whose duty it should be to find out all the facts, both

those for and against the prisoner. Under such circumstances, he thinks the accused would have no need of special counsel. If he is innocent he can establish his innocence just as well through the people's attorney; if he is guilty he should not have the privilege of seeking the aid of his own special lawyer to defeat the ends of justice. If such a system as this were practicable—which we greatly fear it is not—it would undoubtedly result in a great saving of time and expense, besides making it almost impossible for the defendant's friends to make up a perjured defense. But Mr. Rogers seems to have anticipated the radical defects of his plan, especially with reference to the protection of the rights of accused persons on appeal, by conceding that he "would allow the accused, in case of conviction," to employ special counsel to conduct his appeal through the higher courts, if he so desired," and he would also "allow him to employ special counsel to represent him in an appeal to the court for protection, or such action as should be necessary, in case he should be unfairly represented by the people's attorney." This looks very much like a tacit acknowledgment in advance that the plan proposed would be a failure. It does not seem possible to make the same officer in effect a public prosecutor and a public defender at the same time, and there would appear to be no way to prevent an accused person from employing special counsel to defend him, if he possessed sufficient means or influence to do so. Mr. Rogers' scheme seems to be only a variation of Mrs. Clara Foltz's public defender idea, heretofore fully referred to in these columns. That it would work successfully in practice we very much doubt.

The Illinois Appellate Court, first department, recently decided an interesting question as to the right of a prisoner to recover money found upon his person when arrested, and taken from him by a United States marshal. It was in the case of James E. Stuart v. Le Roy Harris, being an appeal from the Superior Court of Cook county. Upon the trial of the case below, it appeared

that the plaintiff, by means of post-office orders by him forged, had obtained from the United States government a large sum of money; that he had been convicted of such crime, and at the time of the trial below was in the penitentiary. When searched by the United States marshal and the defendant, there was found in the waistband of his pantaloons, stitched tightly between the two buttons to which his suspenders were attached, between four and five hundred dollars in money; and there was found on his right foot, underneath, between the stocking and his bare foot, money attached to the sole of the foot, and in his sock were two or three small rubber bands, which were broken. The money was taken from his foot with some difficulty without tearing it, as it was sticking to the foot. The bills that were on his foot were stuck together; the upper bills were worn through on the ball of his foot, where the ball of the foot would rest, and also on the heel. The bill next to his foot was worn through. There was also an offensive odor on the bills from the smell of his feet. The plaintiff stated that the money had been where it was found for some time. The prisoner being charged with forgery of post-office orders, and with having obtained by means thereof a large sum of money, it was clearly the duty of the United States marshal and his assistant to take from the prisoner such money as they reasonably believed to have been connected with the crime of which the prisoner was supposed to be guilty. Whether the prisoner, the plaintiff, was, at the time of the commencement of this action, entitled to have the money so taken from him restored, was another question, which the court did not find it easy to decide. The contention of the plaintiff substantially was, that if one by robbery or other crime obtain a sum of money and deposit in bank, he may immediately thereafter withdraw in other money the sum deposited, and that thereby the other money which thus comes into his possession becomes his, so that as against the person from whom he obtained the money he deposited, he may, in an action to recover, recover the

money which he drew from the bank. The court said:

"I do not think that the law goes to the extent claimed by the plaintiff. It is clear that in a court of equity a person having obtained property by criminal means will be held to hold the fruits of such offense as a trustee for the use and benefit of him from whom the property feloniously taken was obtained."

Mr. Justice Waterman, after quoting numerous authorities in point, said: "In the present case it is, in my opinion, a question of fact to be left to the jury to determine whether the money found upon the person of the prisoner and taken from him, was the fruit of the crime for which he was arrested and has been convicted; and in determining this fact, evidence of the prisoner's pecuniary circumstances prior to the commission of the crime, the money he had in bank, as well as deposits made by him after the commission of the crime, or other property obtained by him subsequent to the crime, may be introduced; that thereby may be ascertained whether the property now claimed by him is the fruit of the money he feloniously obtained from the United States government, or otherwise, and if the money so taken from the prisoner is found to be the fruit of that which he criminally obtained from the United States, then he cannot recover in this action. By fruit of crime is not necessarily meant the very property stolen."

The members composing the legislatures of many of our western States are men taken from the agricultural districts, and their knowledge of things judicial is, as a consequence, somewhat limited. The legislature of M—— were no exception to this rule, and they had been troubled not a little by the Supreme Court of that State pronouncing many of the laws passed by them as being unconstitutional.

So it came to pass that when the legislature reassembled the subject of unconstitutional laws was the first thing to be brought up, and the subject was discussed rather fully. It was agreed that the august judges composing the Supreme Court were a pretty

hard body of men to go by, so it was left to Mr. Blank, a country member, to "bell the cat," so to speak. He proposed that the first thing they do was to pass a law requiring the Supreme Court to pass upon the constitutionality of any law that the legislature might have under consideration, before its final enactment, and in this way none but laws that were good, so far as that objection was concerned, would be passed. Then Mr. Blank made a draft of his law, entitled "House bill number one. An act to cause the judges composing the Supreme Court of M — to pass upon the constitutionality of proposed legislation." It was reported favorably and sent to the judges of the Supreme Court for approval, as the first to be passed upon under its own provisions.

Of course no one can ever know what actuated the court, whether it was a desire to avoid the responsibility of passing upon the new laws as they were ground out by the legislative mill, or what. But, in the course of a day or two "House bill number one, an act, etc.," came back and endorsed upon it: "We the judges of the Supreme Court of the State of M —, are unanimously of the opinion that house bill number one is unconstitutional."

And so the cat is still without the bell.

The question as to whether the naming of the baby belongs, as a matter of right, to the baby's father or to the baby's mother is raised in a queer law-suit originating in Eastkill, in the heart of the Catskill mountains. The plaintiff is Ole Halverson, a Swede, who cultivates a small farm on the mountain side. He has sued for damages the Rev. J. G. Remerton, a German Lutheran minister of the same place, and the pleadings set forth the following state of facts: Mr. and Mrs. Halverson have a son of tender years. The former desired that the boy should be called Oscar, after the present monarch of Mr. Halverson's fatherland. Mrs. Halverson dislikes the name of Oscar, and was determined that the baby should not be burdened therewith. Mr. and Mrs. Halverson took the baby to the clergyman to be christened. Mr. Halver-

son requested the minister to name the child Oscar, but Mrs. Halverson had already talked the reverend gentleman over, and to Mr. Halverson's surprise and indignation, the boy was christened not Oscar, but something else, whereby Mr. Halverson suffered serious disappointment, loss of authority in his household, laceration of feelings, etc., for which he prays damages. The clergyman's defense is that he christened the child in accordance with the wishes of its mother, whose rights in the premises he considered paramount. The case brings up a novel question in jurisprudence, the decision of which will be regarded with interest in thousands of families throughout the land.

The New York City Bar Association, at a meeting recently held, took important action with reference to the selection of an attorney for the grievance committee, whose duty it shall be to take the initiative in cases of alleged misconduct on the part of members of the profession, who are also members of this association, or of the State Bar Association. The action referred to is embodied in the following amendment to the by-laws, which was adopted by a practically unanimous vote:

"The executive committee shall from time to time appoint a member of the association to be the attorney of the grievance committee, whose duty it shall be to investigate, when his attention shall be called thereto, any matter touching the administration of justice, upon which the committee is by this by-law authorized to act, and all cases (1) of misconduct of a member of the association in his relation to the association or in his profession, (2) of alleged fraud or unprofessional conduct on the part of any member of the bar of this State, practicing his profession in this judicial district, whether a member of this association or not, and (3) of persons pretending to be attorneys or counselors-at-law, but not regularly licensed and admitted to practice.

"Where the said attorney shall deem that there is sufficient ground therefor, and no complaint or specific charge in writing shall have been made by any other person, it shall



be his duty to act as the complaining party, to formulate and present to the grievance committee a complaint or charges in writing, and to prosecute the same before said committee by presenting the evidence in support thereof. If, upon the report of the grievance committee, upon such complaint or charges, the executive committee shall appoint a member or members of the association to conduct a further investigation or prosecution in relation thereto, it shall be the duty of such attorney to assist the member or members so appointed in such investigation and prosecution.

"The said attorney of the grievance committee shall receive such compensation as the executive committee may provide, to be paid out of the general fund of the association."

The importance of this action can hardly be overestimated. It is wise, as well as practical. It is a step in the right direction, a movement for the purification of the profession, which has already been too long delayed. Whatever objection there may be on the part of some members of the profession to that feature of the plan which provides for the institution of a paid attorney for the grievance committee is pretty certain, on reflection, to be promptly removed, for in no other way are needed prosecutions likely to be undertaken. It is unfair as well as unjust to ask any man to personally undertake a thorough and systematic investigation of charges of unprofessional conduct against a fellow-member, when that work really belongs to the entire organization, and it is a source of satisfaction that this tangible provision has been made for the exercise of one of the most important functions for which the Bar Association exists. The report of the committee recommending the change in the by-laws in question cogently supports it in the following language:

"Few individuals having knowledge of the facts care to constitute themselves prosecutors and to assume the burden of collecting and prosecuting the evidence before the committee for the sole purpose of elevating the moral tone of the profession. This asso-

ciation, however, has a duty imposed upon it by its constitution 'to maintain the honor and dignity of the profession of the law' and 'to increase its usefulness in promoting the due administration of justice.'

"Your committee believes this duty cannot be adequately discharged by confining the investigation of offenses to those cases which someone may be public spirited enough to present and prosecute before the committee on grievances. In the opinion of your committee the time has arrived when the association should provide the means for fully investigating and vigorously prosecuting cases tending to bring the profession of the law into disrepute and to interfere with the proper administration of justice."

The ALBANY LAW JOURNAL fully endorses this view, and confidently looks forward to important results in the detection and weeding out of the professional black sheep.

The Supreme Court of the United States has sustained the validity of the celebrated Berliner patent for certain improvements in the combined telegraph and telephone, which has been the subject of litigation between the government and the American Bell Telephone Company since 1894. In that year the United States brought a suit in the Circuit Court for the District of Massachusetts, asking that the patent be declared void on account of Berliner's action in delaying the issue by the patent office, and also because it was identical with another patent previously issued to him. Berliner's application was filed in 1877, and the patent was not issued until 1891. The patent substantially covers the device known as the microphone. The case was heard before District Judge Carpenter of Rhode Island, sitting in Boston, and he directed the cancellation of the patent on both grounds. On appeal to the United States Circuit Court of Appeals, in May, 1895, that tribunal, composed of Circuit Judges Colt and Putnam and District Judge Nelson of Massachusetts, reversed the original judgment and upheld the patent. The opinion was written by Judge Putnam, who found that, although Ber-

liner acquiesced in the delay in the patent office, there was no deceit, collusion or corruption in the matter; and he also held that the patent could not be cancelled because of its alleged identity with an earlier patent, when it was not clearly manifest to the commissioner of patents that the inventions were the same. This decision has been in all respects affirmed by the Supreme Court at Washington. The Berliner patent now belongs to the American Bell Telephone Company. The opinion is written by Mr. Justice Brewer, with whom all his associates concur, except Justices Gray and Brown, who did not sit, and Justice Harlan, who dissents.

A question of importance to persons interested in the distribution of estates in the Surrogate's Court has recently been passed upon by the New York Court of Appeals in the matter of the estate of Harvey Randall. The case arose in Washington county. Two claimants for the same distributive share of the estate of the decedent presented themselves in the Surrogate's Court, one asserting the right to receive it as next of kin, the other producing an assignment of this very share purporting to have been executed to him by such next of kin. The surrogate ignored the assignment on the ground that it had been obtained by misrepresentations, and directed that the property be distributed just as though the assignment had not been made. This the Court of Appeals holds he had no power to do. "When, upon an accounting in the Surrogate's Court," says Judge Vann, "the same distributive share is claimed by two persons, one by original title and the other by an assignment apparently valid, resort must be had to a court of equity to settle the dispute, for the surrogate is without power to determine the question."

Robert M. Mitchell, who was recently appointed city assistant prosecuting attorney of Chicago, is one of the best known colored men in the State. In 1877-8 he was deputy collector of taxes for the South Town of Chicago; for seven years a deputy clerk of the Criminal Court; three years chief clerk

of Harrison street police station; for four years deputy collector and chief clerk of gaugers, and storekeeper. Mr. Mitchell's mother was a slave; his father was a distinguished Confederate general, who gave up his life fighting for the lost cause. Mr. Mitchell was admitted to the Illinois bar March 26, 1895.

The Hamilton county (Ohio) Circuit Court, first circuit, recently laid down the correct doctrine that a citizen not only has the right, but it is his duty, to communicate to the appointing power whatever he knows for good or ill concerning one who is an applicant for a position as teacher, and when such communications are made in good faith the citizen is protected, even though the statements contained in the communication be not true.

#### ATTORNEY AND CLIENT.

##### NEGLIGENCE IN PASSING TITLE.

#### NEW YORK SUPREME COURT — APPELLATE DIVISION.

##### Second Department.

May, 1897.

PRESENT: HON. WILLIAM W. GOODRICH, P. J.; EDGAR M. CULLEN, WILLARD BARTLETT, EDWARD W. HATCH and GEORGE B. BRADLEY, JJ.

EDWARD G. BYRNES, Respondent, v. WILLIAM D. PALMER and ANNIE S. HOFFMAN, as executors of the last will and testament of Arthur T. Hoffman, deceased, Appellants.

Appeal from an order of the Special Term granting a new trial on case made and exceptions.

J. A. Young for Appellants.

Albert G. McDonald for Respondent.

CULLEN, J. — This action is brought to recover damages for the negligence of the defendants' testator, who passed the title to certain lands in Westchester county, examined by him at the instance of the plaintiff, who became the purchaser thereof. The plaintiff was ousted from the possession of his lands by the judgments in two actions of ejectment brought against him by Hawley D. Clapp and Nelly V. B. Clapp. The report of the decision of these two cases on appeal is found in 3 App. Div., at p. 284. The defect in the title and the question of its effect were previously decided in Clapp v. McCabe (84 Hun, 379). The difficulty with the title is this: One Hawley D. Clapp, in 1861, was seized in fee of a tract of land including

the premises purchased by the plaintiff; he mortgaged the tract for ten thousand dollars to Rachel S. Rogers; the mortgage was subsequently assigned to Elias H. Van Brunt; in August, 1863, he released to Clapp a portion of the mortgaged premises. Just here is the source of all the difficulty. Instead of particularly describing the premises released, the instrument releases "all the said mortgaged lands and property described in said mortgage, except the lands, premises and property hereinafter mentioned and described, which are not released or intended to be released by this indenture, and which lands and premises and property not released or intended to be released by this indenture are described as follows, viz.: All that certain piece, parcel or lot of land," etc. That is to say, the instrument described by metes and bounds, not the premises released, as is usual in instruments of the kind, but the premises retained as subject to the lien of the mortgage. Afterwards Huldah H. Clapp, the wife of the mortgagor, became the assignee of the mortgage and also the owner of the portion of the lands still remaining subject to its lien. Hawley D. Clapp, the mortgagor, died in 1880, seized of the premises released from the mortgage, and by his will devised them to his widow and six children, share and share alike. In 1884 Huldah H. Clapp, the widow, instituted a foreclosure of the Rogers mortgage, making her children and the executors of her husband parties thereto. At this time Mrs. Clapp or her legal adviser must have fallen into the same error as that into which subsequent examiners of the title had fallen, and, misled by the form of the release, have believed that the premises of which a description by metes and bounds was given in the instrument were released from the mortgage, while the fact was the exact reverse, and those were the only premises still subject to the mortgage. This is obvious, because at the time she owned both the mortgage and the premises described by metes and bounds in the release, and hence there could have been no occasion for a foreclosure. The material portions of the complaint in that foreclosure action, and also of judgment entered therein, will be found in the report of the case of *Clapp v. McCabe* (*supra*), and therefore will not be repeated here. Under the decree of foreclosure the plaintiff in the suit, Huldah H. Clapp, purchased the premises sold. Subsequently the title acquired by Huldah H. Clapp was vested in Mortimer R. Clapp, and from him the present plaintiff made his purchase. The defendants' testator was employed and paid for examining the title on this purchase. He made an abstract of the title, the last deed in which is the deed from Mortimer R. Clapp to the plaintiff. Following this is the statement: "Conveys the premises in question, and vests a good and perfect title of record in Edward G. Byrnes, Arthur T. Hoffman, Mamaroneck." On the trial of the action, at the close of the plain-

tiff's case, the court dismissed the complaint, on the ground that the plaintiff had not established negligence on the part of the attorney. A motion for a new trial on a case and exceptions was subsequently made and granted. From such order this appeal is taken.

There can be no question that an attorney is liable to his client for negligence in the discharge of his employment causing that client injury. "An attorney is also liable to his client for the consequences of his negligence and ignorance in matters not in litigation \* \* \* and particularly the searching the title of property offered to his client for purchase, or as security for a loan" (2 *Shearman & Redfield on Negligence*, § 574). The defendants' counsel does not challenge this proposition, but he asserts that the error of the defendants' testator in misconstruing either the description in the judgment of foreclosure, or incorrectly determining the binding effect of that judgment, was not negligence. It is undoubtedly true that an attorney is only bound to exercise the ordinary reasonable skill and knowledge of his profession, and is not liable for every error of judgment or opinion as to the law. "No attorney," said Abbott, C. J., "is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." This principle was held in *Bowman v. Tallman* (3 Abb. Ct. App. Dec. 182). It is also true that the same rule that applies to the liability of an attorney in the conduct of a litigation is applicable to his liability in examining titles. He is certainly not a guarantor that the titles to which he certifies are perfect. He is only liable for negligence or misconduct in their examination. But in determining the question of negligence on the part of an attorney in examining a title, it is necessary to bear in mind the marked difference between proper conduct in that employment and in a litigation. In a litigation a lawyer is well warranted in taking chances. To some extent litigation is a game of chance. The conduct of a lawsuit involves questions of judgment and discretion as to which even the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable. But passing titles, as a rule, is of an entirely different nature. A purchaser of real estate is entitled not only to a good, but to a marketable title; that is, a title free from reasonable doubt (*Cambrelleng v. Purton*, 125 N. Y. 610; *Fleming v. Burnham*, 100 N. Y. 1). In *Jordan v. Poillon* (77 N. Y. 518) the Court of Appeals refused to compel a purchaser at a judicial sale to take title. Though the objection presented a mere

question of law, the court declined to pass upon it, and determine it in the absence of parties interested who would not be concluded by the decision. It is, therefore, the duty of a conveyancer to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk and is willing to accept it. A careful lawyer might readily advise a client that he was entitled to a piece of real property and that it was proper to bring an action for its recovery, while at the same time he would unhesitatingly reject a title which involved the same question as to which he had advised a suit.

In this view of the duty of an attorney examining titles we proceed to consider the question of law presented by the title of the plaintiff. There can be no question but the release showed distinctly what property was released by it, and that by the release the plaintiff's premises were discharged from the lien of the mortgage. Therefore, no title to those premises can be traced through the foreclosure of the mortgage, unless the judgment granted in that foreclosure was a binding adjudication of the right of the plaintiff to have the premises sold for the satisfaction of the mortgage, despite of the fact that the mortgage no longer covered the premises. The complaint in the action clearly did not include the plaintiff's lands, for it alleged that Van Brunt had released a portion of the premises therein described from the lien of the mortgage, as would appear by reference to the release, the date and place of record of which were set forth. It was, therefore, only the lands still subject to the mortgage, a sale of which was sought. I am inclined to differ from the learned referee who decided *Clapp v. McCabe*. He thought that a decree directed a sale of the lands described in the complaint and subject to the mortgage. I think it directs a sale of the lands exempted from the mortgage, instead of those subject to the mortgage; at least, that that is the proper construction of the description of the premises, except so far as that construction is modified by the reference in the decree as to the release itself. I shall assume this to be the correct construction of the decree, for that is the most favorable view to the defendants. The case then presented is the effect of a decree directing the sale of certain lands, where the action is brought solely for the sale of other and different lands. The general rule, as stated by Mr. Freeman, is: "The effect of every judgment or decree as an estoppel is restricted to such matters as might have been litigated under the pleadings. Thus, if plaintiff, in an action in relation to real estate, avers no title beyond his own life, the judgment rendered in his favor is not conclusive as to any greater title than he put in issue. The agreement of the litigants that matter not in issue may be given in evidence, and may be determined by the verdict of the jury,

will not enlarge the effect of the judgment as an estoppel" (1 Freeman on Judgments, 271). In *Campbell v. Consalus* (25 N. Y. 613) it was held that to make the judgment in another action conclusive, it must appear by the record that the matter decided was put in issue by the pleading in that action; and that even an agreement between the parties would not enlarge the operation of a judgment on such verdict by the way of estoppel. In *Woodgate v. Fleet* (44 N. Y. 1), it is said by Judge Earl: "A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and, although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto." (See also *People v. Johnson*, 38 N. Y. 63). The affirmance by the General Term, in *Clapp v. McCabe*, proceeded on this ground, that the judgment could not be conclusive to matters not embraced within the pleadings nor litigated. The very able opinion there delivered by Justice Brown reviews the leading authorities on the question and clearly shows that the judgment was ineffective to authorize the sale of any lands other than those described in the complaint. I think that it appears, from the cases cited and from the doctrines laid down by the text writers, that the law, as to the effect of the judgment in foreclosure, was substantially settled prior to the time that this title was passed, and that the attorney was properly chargeable with knowledge of it. But assuming that in this I am in error, to say the least, the question was involved in the gravest doubt, and a careful attorney should not have assumed to pass a title involving so serious an objection.

Moreover, I think that a jury might have found from the evidence that the error of the attorney was not in his construction of the terms of the judgment or mistake as to its binding effect, but in his failure to read attentively the release of mortgage. The abstract made up by the attorney was in evidence. The following is the reference made to the deed of the referee in foreclosure:

Deed, referee.

"Nelson H. Baker, referee,	Date, Feb. 1, 1862.
to	Ack. Feb. 1, 1862.
Huldah H. Clapp.	Rec. Feb. 1, 1862.
	Liber 1020, p. 189.

"Conveys the premises in question by virtue of a sale under the above judgment, and excepts therefrom the part released from said mortgage by Elias H. Van Brunt, and described in Liber 508 of Mortgages, page 229."

This deed has precisely the same description as that contained in the decree of foreclosure. Under the construction of that description I have given it, this statement as to the premises conveyed by it is

entirely erroneous, for it conveyed the released lands, not the mortgaged lands. If the description is to be construed as conveying the lands not released, then it did not include the plaintiff's purchase, and was not part of his chain of title. It thus appears that whichever view the attorney took of this description, he must have been under the belief that the lands described in the release by metes and bounds were those released from the mortgage, not those retained by its liens. This evidently was the foundation of his error, and could have only occurred from a careless reading of the instrument of release. I think it can hardly be denied that a fault of this kind would constitute negligence. There is nothing in the abstract to show that the question at law, as to the effect of the judgment, was ever considered or decided by the attorney.

The objection that the plaintiff's motion for a new trial was made too late would have been good had it not been waived. The intention of the limitation prescribed in section 1002 of the Code of Procedure is to prevent the unsuccessful party having any longer time in which to review an adverse judgment by a motion for a new trial, than he would have by an appeal from the judgment. But the defendants admitted "due and timely service of notice of the motion." This operated as a waiver of the objection that the motion was made too late. In *Stevenson v. McNitt* (27 Hun, 335), it was held that the right to dismiss an appeal brought after the expiration of the time allowed by law, was waived by laches in moving to dismiss. In *Staats v. Garrett* (21 Weekly Digest, 39), a notice of appeal was served too late, but the respondent subsequently gave an extension of time to serve case on appeal. It was held that the right to dismiss the appeal was waived. In *Stubbs v. Stubbs* (11 Weekly Digest, 244), a failure for two terms to move to dismiss an appeal brought too late was held a waiver of the right to dismiss. The case before us is much stronger for the respondent than those cited. An objection that the time to move for a new trial or to appeal has expired does not go to the jurisdiction of the court, but only to the regularity of the proceedings (*Hill v. Burke*, 62 N. Y. 111).

The order appealed from should be affirmed, with costs.

All concur.

#### ILLINOIS SUCCESSION TAX ACT CONSTITUTIONAL.

THE Supreme Court of Illinois, in an opinion filed May 11, has declared the succession tax act of 1895 constitutional. The case in which this important question was decided is *Daniel H. Kochersperger, Collector of Cook County, v. Executors and Trustees of the Estate of John B. Drake, deceased*. Justice Phillips wrote the opin-

ion, Justice Craig dissenting. Following is the text of the opinion:

On November 12, 1895, John B. Drake, a resident of Cook county, Ill., died, leaving a last will and testament, in and by which Josephine C. Drake, Timothy B. Blackstone and the Illinois Trust and Savings Bank were appointed his executors and trustees. Under the provisions of the will property in excess of \$20,000 passed to Josephine C. Drake, widow of John B. Drake; \$5,000 each passed to Fanny D. English, Mrs. Sallie Sausser and Ella Drake, nieces of the said John B. Drake; \$1,000 each passed to Samuel W. Parker and Henry Morgan, and \$500 each passed to John Gabriel and Bridget Hughes, strangers to the blood and in no wise related to the said John B. Drake. That property in excess of \$2,000,000 passed to the said executors, to be held in trust for the use and benefit of the said wife and children of the said John B. Drake.

A petition was filed by the county treasurer of Cook county, asking for the appointment of an appraiser to appraise said estate, under "an act to tax gifts, legacies and inheritance in certain cases, and to provide for the collection of the same," approved June 15, 1895, in force July 1, 1895. To the petition in this case a demurrer was interposed on the part of the executors and trustees, which was sustained by the court, and the petition dismissed and a judgment entered for costs. The judgment of the court was that the act was unconstitutional.

The question presented by this appeal involves the constitutionality of the act entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same," approved June 15, 1895."

The existence of the common law within the State of Illinois results from the provisions of Ch. 28 R. S., which declares that the common law of England and all statutes of a general nature made prior to the fourth year of James I. shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. By that authority, Ch. 39 R. S., entitled "An act in regard to the descent of property," and Ch. 148, entitled "An act in regard to wills," were enacted, which in effect repeal the common law in reference to inheritances, and also repeal the statute enacted prior to the fourth year of James I. in reference to devises.

There is not in force in this State, under Ch. 28, any law providing for the descent or devise of property. The law of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State. The right to inherit and the right to devise being dependent on the legislative acts, there is nothing in the Constitution of this State which prohibits a change of the law with reference to those subjects at the discretion of the law-making power. The law of descent and devise

being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death and the ownership of which the State then provides for by the law of descent or devise.

The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the State to impose such a burden or condition is to deny the right of the State to regulate the administration of a decedent's estate.

When, by the act of June 15, 1895, for the taxation of gifts, legacies and inheritances in certain cases, the legislature prescribed that a certain part of the estate of the deceased person should be paid to the treasurer of the proper county for the use of the State, it was in effect an assertion of sovereignty in the estate of the deceased persons.

Whether to be levied and determined as a tax or penalty, the principle is that where one owning an estate dies that estate is to be assessed in accordance with those provisions of the act and the tax to be paid for the right of inheritance. The amount reserved to the State from the estate of a deceased owner is not a tax on the estate, but on the right of succession.

By the provisions of the Constitution of 1870 it is provided in article 9:

"SEC. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, venders of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct, by general law, uniform as to the class upon which it operates.

"§ 2. The specifications of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

Under these provisions of the Constitution it is insisted that the levy of the succession tax, which, under the above provisions, is required to be made by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and that such law shall be uniform as to the class upon which it operates, is defeated by the provisions of the statute above

quoted. That statute provides certain classes of property which was a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property, some of which shall pay \$1 per \$100, others \$2, others \$3, and others \$4, and still others \$5, and again others \$6 per \$100, six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property. The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to the class, and there is no provision of the Constitution which precludes legislative action from assessing a tax on that particular class.

By this act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise. The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited, and is not inconsistent with the principle of taxation fixed by the Constitution, and is clearly within the sections of the Constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statutes, and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown.

Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina and other States. They have been held invalid in New Hampshire and Ohio, and some other States. We are not disposed to enter into an analysis of these cases and a consideration of the principles on which they have become decided. The broad principle presented is that the legislature may create new classes of property with reference to estates under which they may regulate the right to inherit or devise or take under devise, and such right existing, such classes may be created, and as created may be uniform, and the assessment by valuation when declared to operate equally on the right of succession to such classes is not a violation of the provisions of the sections of article 9 of the Constitution of the State of Illinois.

We hold the act entitled "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same, approved June 15, 1895," to be one not inconsistent with the

Constitution of the State of Illinois. The County Court erred in sustaining a demurrer to the petition, and its judgment is reversed and the cause remanded, with directions to appoint an appraiser to appraise the estate and assess a tax under that statute.

Reversed and remanded with directions.

#### WHAT CONSTITUTES NEGLIGENCE.

**I**S it negligence to step off the pavement in a street without looking to the right to see if the way is clear on the near side? Formerly a pedestrian might with tolerable safety have trusted to his ears to find out if there was any vehicle close to him; but now that the bicyclist is ubiquitous, common prudence suggests that for his own security a foot-passenger should look in both directions before he crosses the road. The safety of the bicyclist does not count with the majority of non-riders. He is not altogether unreasonably regarded as a nuisance where there is much traffic; yet he is entitled to pursue his way along a thoroughfare, and in regard to him the foot-passenger has duties as well as rights. In a case which was before the Court of Appeal on Wednesday, the facts were that a butcher's boy with a knife in his hand stepped suddenly off the narrow pavement of a street without even a glance to the right, and came at once into collision with a bicyclist, who, as the jury found, was riding along carefully and at a reasonable speed. The result was that one of the unfortunate rider's hands was struck by the knife and seriously hurt, and he brought an action to recover damages for his injuries. The jury found that the occurrence was a "pure accident," and the court were unanimous in saying that they would have come to the same conclusion. It seems to us, however, that the jury would have been justified in finding that the butcher's boy, who admitted that if he had looked he would have seen the bicyclist, and waited for him to pass, was guilty of negligence. On the other hand, it may be that a street is so narrow or so crowded that a bicyclist is not justified in riding through it, or that he ought, at any rate, to ring his bell continuously, irritating though the tinkling may be to himself or to the people within earshot. These points, however, are wisely left for the determination of a jury.—London Law Journal.

With characteristic enterprise the law-publishing house of Banks & Brothers, Albany and New York, issued the Liquor Tax Law, with the 1897 amendments, on the day of the final adjournment of the legislature. The work of editing was skillfully and carefully done by Amasa J. Parker, Jr., former counsel for the Albany excise board. The pamphlet, for which, as may be imagined, the demand was and is great, embraces ninety-six pages, including a copious index.

#### NEW YORK COURT OF APPEALS ABSTRACTS

##### JUDGMENT OF CONVICTION REVERSED — INSUFFICIENCY OF EVIDENCE FOR SUBMISSION OF CASE TO JURY.

**I**F the evidence in a criminal case does not come up to the standard which the law requires in quantity and quality to justify or warrant a conviction, it is the duty of the trial court, upon request, to direct an acquittal. The defendant, in such a case, is not confined to any particular form of words in presenting to the trial court the question of his right to be acquitted.

The same strictness with respect to exceptions does not prevail in criminal as in civil cases, but the court will look at the substance rather than the form with a view to promote justice. A motion, in form, to discharge the defendant or dismiss the indictment may be regarded as, in substance, a request to direct an acquittal, and the denial of such a request, when the evidence falls below the standard necessary to rebut the presumption of innocence, is legal error, reviewable by this court.

Generally, where there is a conflict as to the facts, or the proof is open to opposing inferences, the question of the defendant's guilt is for the jury; but a mere *scintilla* or even *some proof* is not sufficient to warrant the submission of the case to the jury. (May 4, 1897, *People, respondent, v. Joseph Ledwon and Annie Ledwon, appellants.*)

1. Civil Service Clause of the Constitution. The provision of the Constitution (art. 5, § 9) that "appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness," is mandatory; but the execution of the subsequent provision: "to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive," is, as to the machinery necessary for the conducting of competitive examinations, dependent upon the statute.

2. Counties, Town and Villages. In the absence of legislation providing the machinery for conducting competitive examinations for the civil service of counties, towns and villages, the provision of the Constitution in reference to such examinations for those civil divisions of the State remains ineffectual.

3. State and Cities — Constitutionality of Civil Service Law. The existing civil service law (L. 1883, ch. 354, as amended,) provides the necessary machinery for carrying into effect the provisions of the Constitution in the case of the State and cities, and, with the exception of certain provisions relating to veterans, appears to be in harmony with the Constitution.

4. Practicability of Competitive Examinations. The provisions of the Constitution and of the statute, requiring competitive examinations so far

as practicable, contemplated the existence of positions for which a competitive examination is not practicable.

5. **Determination of Practicability of Examination.** In order to determine whether the examination of a candidate for an office is practicable, the court must first ascertain the nature and character of the duties of the position; and when that has been done, the question of exemption becomes one of law.

6. **Exemption of Confidential Positions.** Within the meaning and intention of the Constitution and of the statute, competitive examination is not practicable for positions of a confidential relation to the appointing officer.

7. **Definition of Confidential Position.** Where the duties of the position are not merely clerical, and are such as especially devolve upon the head of the office, which, by reason of his numerous duties, he is compelled to delegate to others, and the performance of which requires skill and judgment, trust and confidence, and involves the responsibility of the officer or the municipality which he represents, the positions should be treated as confidential.

8. **Confidential Position Not Necessarily Secret.** Positions included in the confidential class are not limited to those which are strictly secret.

9. **Statutory Exemptions from Examination.** The provisions of the statute, exempting from examination officers elected by the people and the subordinates of any such officer for whom he is financially responsible, the heads of city departments, applicants for employment under the educational department of a city, and any subordinate officers having custody of public moneys or securities, for the safekeeping of which the head of an office is under bonds, furnish a satisfactory rule as to the positions for which, in addition to confidential positions, competitive examination is not practicable.

10. **Cities — Effect of Exempt Classification by Mayor.** A classification of positions exempt from civil service examination (schedule A), made by the mayor of a city, presumably in the conscientious discharge of his duty under the statute, although it may be voidable is not void; and until judicially determined to be erroneous it is a protection to the subordinate heads of departments and employes acting thereunder, and, until the proper classification has been made, appointments made thereunder must be deemed valid.

11. **Remedy for Improper Classification by Mayor.** If the mayor of a city refuses to do his duty in making classifications of civil service positions, or if he does it improperly, he may be compelled by direct proceeding, as by mandamus, or perhaps in some cases by certiorari; instituted by any resident citizen, to do it in accordance with the requirements of the Constitution and of the

statute; but a taxpayer's action to restrain the payment of salaries earned by appointees is not the appropriate remedy.

*Chittenden v. Wurster*, 14 App. Div. 483, reversed.

(Argued March 23, 1897; decided April 20, 1897.)

*Chittenden v. Wurster*. Opinion by Haight, J. Dissenting opinion by O'Brien, J.

#### NATIONAL GUARD — ARMORERS AND JANITORS OF ARMORIES—COMPENSATION A COUNTY CHARGE.

1. Armorers and janitors of armories of the National Guard, appointed under the provisions of the Military Code, are in the military, and not in the civil, service of the State.

2. The provision of the Constitution of 1894 (art. 11, § 3), that "it shall be the duty of the legislature at each session to make sufficient appropriation for the maintenance" of the militia, was not intended to make the entire maintenance of the militia payable out of the State treasury, and does not have the effect of prohibiting the enactment of general laws imposing upon localities the expense of maintaining armories within their jurisdiction.

3. The provision of section 179 of the Military Code, as amended by chapter 853, Laws of 1896, declaring that the compensation of employes in armories, including armorers and janitors, shall be a county charge upon the county in which the armory is situated, is not repugnant to the Constitution. (*Matter of Goedel v. Palmer*, 15 App. Div. 86, affirmed.)

(April 20, 1897. In the *Matter of the Application of Charles E. Bryant*, respondent, for a writ of *Mandamus v. George W. Palmer*, as Comptroller of the City of Brooklyn, appellant. Opinion by Bartlett, J.)

#### PRIVATE CHARITABLE INSTITUTIONS — EFFECT OF NEW CONSTITUTION UPON STATUTORY LOCAL AID FROM PUBLIC MONEYS.

1. The Constitution of 1894 did not, of itself, annul and render inoperative mandatory provisions in existing statutes requiring the payment by localities of public moneys to private charitable institutions, by force of the new provision (art. 8, § 14), that such payments "may be authorized, but shall not be required by the legislature;" but its effect was to leave such statutory provisions in force until superseded by subsequent legislation.

2. The above provision of the Constitution is a mere limitation on future legislative action, and was not intended to forbid the operation of existing laws.

3. The above provision of the Constitution did not abrogate the purely administrative duty imposed upon the comptroller of the city of Brooklyn by chapter 169, Laws of 1877, of paying a portion of the excise moneys to the Inebriates' Home for Kings County, a private charitable and reformatory institution.



4. The new provision of the Constitution of 1894 (art. 8, § 14), that no payments of public moneys by localities to private charitable institutions shall be made for any inmate who is not received and retained "pursuant to rules established by the State board of charities," operated presently, so that from the time rules should be established by the State board on the subject, no payments would be justified for inmates received or retained, in contravention of the rules of the board.

5. The courts will not compel the payment to a private charitable institution of public moneys, authorized to be paid only for the current support of inmates during the period when the fund accrued, where it appears that the institution had to a great extent ceased its operations and had not, except to a limited extent, performed the service which was the consideration of the payment to be made out of the public funds. (*People ex rel. Inebriates' Home v. Comptroller*, 11 App. Div. 114, affirmed.)

(April 20, 1897. The People of the State of New York ex rel. The Inebriates' Home for Kings County, appellant, v. The Comptroller of the City of Brooklyn, respondent. Opinion by Andrews, Ch. J.)

TAX — REVIEW OF ASSESSMENTS — APPEAL — CONSTITUTION, ART. 6, § 9 — UNANIMOUS DECISION OF APPELLATE DIVISION — PROCEEDINGS TO REVIEW ASSESSMENT — UNANIMOUS AFFIRMANCE — FINDINGS OF FACT — ELEVATED RAILROAD — ASSESSMENT — RAILROAD LEASE — TAXATION OF FRANCHISE, ETC.

1. While the writ prescribed by the act "for the review and correction of illegal, erroneous or unequal assessments" (L. 1880, ch. 269) may be a writ of review and, hence, properly called a writ of *certiorari*, it may also be in the nature of a *venire de novo*.

2. It seems, that the provision of the Constitution (art. 6, § 9), that "no unanimous decision of the Appellate Division of the Supreme Court, that there is evidence supporting or tending to sustain a finding of fact, \* \* \* shall be reviewed by the Court of Appeals," applies to special proceedings as well as to actions, and to implied findings as well as to those written out *in extenso*.

3. The restriction imposed by the Constitution upon the review of a unanimous decision of the Appellate Division, that there is evidence supporting a finding of fact, applies to an order of affirmance in a statutory proceeding to review an assessment, in which a trial *de novo* has been had at Special Term, upon new evidence, as to the value of the relator's property, resulting in a confirmation of the assessment and a dismissal of the writ of *certiorari*.

4. The effect of a unanimous judgment or order of affirmance by the Appellate Division is a decision that there is evidence supporting the findings

of fact as expressed or necessarily implied. It is not necessary for that court to specify what findings of fact are sustained by evidence, when it intends to sustain them all, or to repeat the language of the Constitution and apply it generally to all the findings of fact.

5. The annual report of an elevated street railroad company to the State railroad commissioners is competent evidence, as in the nature of an admission, for the assessing officers to act upon in assessing the company under the act "in relation to the assessment of taxes on incorporated companies" (L. 1857, ch. 456), and for the Special Term in reviewing the assessment.

6. The lease of a railroad necessarily includes the use of the franchise of the company owning it, and the cost of such lease necessarily embraces to some extent the value of the franchise.

7. Franchises cannot be included in an assessment made under chapter 456, Laws of 1857.

8. It is erroneous to include in the basis of assessment against an elevated railroad company under chapter 456, Laws of 1857, the cost of leases of roads operated by it, without deducting the value of the franchises included in the leases. (*People ex rel. Manhattan R. Co. v. Barker*, 6 App. Div. 356, reversed.)

(April 20, 1897. The People of the State of New York ex rel. The Manhattan Railway Co., appellant, v. Edward P. Barker et al., as Commissioners of Taxes and Assessments of the City and County of New York, respondents. Opinions by Vann, J., and O'Brien, J.)

COVENANT OF HUSBAND IN DEED OF WIFE'S PROPERTY — POSSESSION OF REALTY BY MARRIED WOMAN — ABSENCE OF POSSESSION IN HUSBAND — COVENANTS IN DEED.

1. The rule that the covenant of a stranger to the title is personal to the covenantee and incapable of transmission by a mere conveyance of the land applies, in the absence of special facts and circumstances, to covenants of a husband in a deed by his wife of her own land, joined in by him.

2. When possession of realty, to which she holds the legal title, has been once delivered to a married woman, it is not lost or impaired (in the absence of any question of fraud) by permitting her husband to exercise acts of care, management or agency with respect to the property, or by his occupancy of it, as head of the family, for the family residence.

3. The facts that the sale of realty in the possession of a married woman holding the legal title was negotiated by her husband, and that he executed a written contract of sale in his own name and delivered their joint deed, receiving a check to his own order for a part of the purchase-money and taking back a bond and mortgage running to his wife for the balance, do not prove, as against the terms of the deed and testimony of the hus-

band disclaiming any interest in the property, that the wife had surrendered to her husband possession or any interest in the land sufficient to carry his covenants of warranty and quiet enjoyment down through successive conveyances to remote grantees. (*Mygatt v. Coe*, 12 App. Div. 245, affirmed.)

(April 20, 1897. Sarah Matilda Mygatt et al., appellants, v. Edward P. Coe, as Executor, etc., respondent. Opinion by O'Brien, J. Dissenting opinion by Bartlett, J.)

#### COULD NOT SENTENCE HIS SON.

"ONE of the most tragic scenes I ever witnessed," relates an Illinois judge, "occurred in a court-room in a small town in one of the new western States. That is to say, it was new then, but that has been forty years ago, and I was out there growing up with the country and showing people how much law a youngster of 21 or 22 has at his finger ends. The judge was a man of 60 or more, and in addition to a most venerable and dignified appearance, he was the saddest-faced man I ever saw. He had come to our town ten or a dozen years before from the east, and we knew little of him except he was an able lawyer and jurist, and his wife, who was the only other member of his family, and himself had some great sorrow which they had sought some escape from by going into a far country.

"Ours was a quiet town, and the judge and his wife seemed to live serenely enough, but they were evidently growing old and feeble ahead of their time. One night our town was all torn up by a robbery and murder, and the capture of the killer and thief almost in the act. For a wonder, he wasn't lynched then and there, but he wasn't, and as soon as daylight came, proceedings were instituted against the prisoner, and I was appointed, with another youngster, to defend him.

"Really there wasn't any defense, and I was frank enough to tell him that he might be thankful if we could save him from lynching. He was a stranger in the town, evidently led there by some stories he had heard of an old miser we had among us, and was a man of perhaps 33 or 34, with a most unprepossessing appearance, greatly accentuated by a week's growth of rough whiskers, years of dissipation and hard living. In those days and in such cases the law's delay was not much in force, and by 6 o'clock of the second day the prisoner was standing before the judge to receive sentence. As he stood there that day a harder-looking customer I think I never saw.

"'Have you anything to say why sentence of death should not be pronounced upon you?' said the judge, after all the preliminaries were over.

"'I have, your honor, if you are to pronounce that sentence,' replied the prisoner, with an air of

almost impertinence. 'At least,' he added, half-apologetically, 'possibly under the circumstances you might not care to pronounce it.'

"This was entirely out of the ordinary, and I touched my client on the arm, and was about to remind him of the customs of the court, when the judge requested me to leave the prisoner to him.

"'Will you be kind enough to explain?' he said, in a strangely excited tone.

"'Well, your honor,' responded the prisoner, without a quaver of voice, 'as I'm your only son —'

"But the judge heard no more. It was evident that he knew the prisoner was telling the truth, for with a groan he threw up his hands and fell forward across the desk in front of him, dead, and a little stream of blood trickled from his lips. The excitement was terrific, and in the midst of it the prisoner dashed through a window, and would have escaped, but a timely shot from a rifle in the hands of a man on the outside settled him forever. And, best of all, his mother never knew. She lingered a few months after her husband's death, and the entire population of the town considered it to be a sacred obligation to lie to her about the whole affair."

#### RIGHTS OF ILLEGITIMATE OFFSPRING UNDER WILLS.

THE courts seem to be less inclined to punish the children for the sins of their parents, and are slowly, but surely, coming to deal more tenderly with the interests of illegitimate offspring under wills, says the London Law Times. Some sixty-seven years ago, in *Bagley v. Mollard* (1 Russ. & M. 581), Sir John Leach, M. R., came to the conclusion that, under a residuary gift to grandchildren, an illegitimate child took no share. Since then the trend of judicial opinion has inclined to favor such offspring, and the doctrines now held are well illustrated in *Seale-Hayne v. Jodrell* (65 L. T. Rep. 57; [1891] A. C. 394), where the house of lords had to construe a will in which residuary estate was given to "cousins" and "nieces." Some of the former were children of an illegitimate brother, and the latter were in fact his wife's nieces. It was then held that the residuary clause embraced the illegitimate children. In *re Parker*; *Parker v. Osborne* (noted ante, p. 578), Mr. Justice Kekewich had to review the decisions in a case where an illegitimate nephew of a wife claimed a share of residue with legitimate nephews and nieces. The will gave to the illegitimate nephew ("my said wife's nephew, J. W. R.") certain silver, and then ultimately gave the residue to "the nephews and nieces of my said wife." Mr. Justice Kekewich held that a wider view could now be taken by reason of the change of judicial opinion, and that J. W. R. was entitled to a share. It will be seen that the earlier refer-

ence to this child afforded a key to the meaning of the testator, and enabled the court to include him among the true nephews. The cases go to show that illegitimate children are *prima facie* excluded, unless, as here, the testator's will is a dictionary of the meaning of his words where circumstances prevent a possibility of legitimate children. At p. 246 of Mr. Theobald's work on Wills (4th edit.) the effect of the cases is summarized. It seems, as he says, difficult to reconcile the decisions with principle—a fact doubtless due to the transitions of judicial thought.

#### BEFORE THE FINAL BAR.

THE HON. JOHN LOWELL, ex-judge of the United States Circuit Court, died last week at his residence in Newton, Mass. Judge Lowell had been unusually free from illness all his life, and attended to his business until a very recent period. His last illness began about the middle of March, and until within the last two or three weeks he had been able to see his friends, and attend church, and be about, though it was evident he was failing rapidly. The deceased was born in Boston October 18, 1824. He was the son of John Amory Lowell and Susan Cabot Lowell, the daughter of Francis C. Lowell, for whom the town of Lowell was named, coming from a family which has not only been eminent in the law, but which has been for generations distinguished for its championship of human rights. Judge Lowell was the leading authority in the United States on all questions of bankruptcy and insolvency, and he had in preparation a text-book on this branch of the law, which was to have been published had the Bankruptcy bill passed in his lifetime. He was consulted more often than any other lawyer of the present time on all difficult questions of law by his fellow-members of the bar, and his death will be a personal loss to many who had become accustomed to rely upon his judgment and knowledge in difficult cases.

Since he left the bench he has been in active practice with his son, John Lowell, Jr., in Pemberton square, having an office in the old building formerly occupied and owned by his wife's father, Mr. George B. Emerson.

He did not try jury cases, but confined his work to cases before a single judge in equity, admiralty, etc., and to arguments before the appellate courts of the United States and Massachusetts. He also heard many cases as referee and commissioner. There is no one whose loss will be more felt by every one who knew him, and no one had a larger acquaintance. He was deeply respected by all his brother members of the bar, not only in Massachusetts, but throughout the United States, as his business brought him in contact with most of the leading lawyers and judges of the country. His decisions were of the best, and in several instances,

when he was a judge in the United States Circuit and District Courts, they have led the Supreme Court of the United States to reverse former decisions.

#### Legal Notes of Pertinence.

The annual address before the Law Academy of Philadelphia was delivered at the hall of the Historical Society of Pennsylvania, No. 1300 Locust street, on Thursday evening, May 20, 1897, by Mr. Justice Dean, of the Supreme Court, who selected for his subject "The Jury."

Common Pleas Court No. 1 in Philadelphia is known as the "Court of Busy Bees," because of its hard-working judges—Biddle, Bregy and Beitler.

The case of the City of St. Louis v. The Western Union Telegraph Company, which involved the right of the city to tax telegraph poles in the streets at the rate of \$5 per annum each, was recently decided for the second time by the United States Supreme Court. The decision of the Circuit Court for the eastern district of Missouri, which was in favor of the telegraph company, was affirmed on the ground that the questions raised by the city are not presented by the record. The court did not, therefore, go into the merits of the tax law at all.

A decision of importance to druggists was handed down by the Indiana Appellate Court at Indianapolis at the last term. A druggist sold a quart of whiskey on a physician's prescription reading, "R. Whiskey, one quart, for medicinal use," and was fined for selling intoxicating liquor on Sunday, but attempted to justify the act on the ground that he filled the prescription of a reputable physician. The court holds that the presentation of a prescription that does not request that the sale be made on Sunday, nor to whom it shall be sold, nor the manner in which the liquor shall be used, is not authority for selling on Sunday, and that the burden of proof is on the druggist to show that the liquor was used for medical purposes.

The attorney-general of New York has already begun action to test the efficacy of the new Anti-Trust laws.

Judge McClure, of the Circuit Court, at Anderson, Ind., on the 2nd inst., held the new Indiana penal law unconstitutional. Three weeks ago one Lawson was sentenced under the new law to a term in the Jeffersonville Prison, which is now called the Indiana Reformatory. Under the new law the duty of the jury is only to find whether the accused is guilty or not and also ascertain his age. He is then sent to the reformatory if under 30 years, and his length of time depends upon his conduct. If the warden sees fit he can let him go after the minimum has been passed, which in this case was one year. Lawson could have been held the full limit, five years, if the warden had thought

his conduct unsatisfactory. Judge McClure gave Lawson a new trial under the old law, holding that the curtailing of jurors' power in not fixing definite sentence is unconstitutional.

Governor Pingree has vetoed the bill passed by the Michigan legislature making boys under 17 years of age liable to imprisonment for smoking cigarettes. He says it is a parental, not a State, duty to correct bad habits in children. It is also a parental duty to correct criminal habits in children, but the State imprisons juvenile as well as adult offenders against its laws.

There is now pending in the Pennsylvania legislature a bill, which, if it becomes a law, will increase from two to four per cent. the tax which insurance companies of other States or foreign governments must pay upon the gross premiums of every character and description received from the business done within the Commonwealth.

Judge Smith, of the Sullivan County (N. Y.) Court, has rendered a decision of much interest in a case in which the prerogatives of the pastor of a church were involved. It appears that a temporary injunction had been issued in chambers, restraining the dominie from erasing the names of several members from the parish register on the ground that they neither attended divine service themselves nor contributed of their worldly substance to aid in maintaining the material interests of the church, so that others could worship in comfort. The learned judge decided that the court was without jurisdiction, either to determine who were communicants or to supervise or control the rector of a parish in his manner of keeping the register of his parish.

The Hon. Albert R. Savage, of Auburn, Me., has been appointed associate justice of the Maine Supreme Court, to fill the vacancy caused by the retirement of Judge Charles W. Walter after 37 years of faithful service on the bench. Judge Savage, who comes of an old New England family, was born in Ryegate, Vt., in 1847, and graduated from Dartmouth College in 1871. The appointment gives great satisfaction throughout the State.

The New York Court of Appeals has taken an adjournment for three weeks, and will reconvene for the summer term at Saratoga June 7.

A dispatch from Rutland, Vt., says it is reported that after the disbarment of Joseph C. Jones, ex-State attorney, for malfeasance in office and collusion with liquor dealers, the Supreme Court will commence disbarment proceedings against ex-State Attorney Fred S. Platt, P. M. Mildon and George L. Rice, founded upon their testimony in the Jones hearing and their participation with Jones in his acts; and that Governor Grout will also be asked to relieve the city judge, James A. Merrill, of his office. The commission appointed by the Supreme Court to find the facts in the proceedings to disbar ex-State Attorney Jones of this county filed their report on Thursday.

## Legal Laughs.

Lawyer (to timid young woman) — "Have you ever appeared as witness in a suit before?"

Young Woman (blushing) — "Y-yes, sir; of course."

Lawyer — "Please state to the jury just what suit it was."

Young Woman (with more confidence) — "It was nun's veiling, shirred down the front, and trimmed with a lovely blue, with hat to match."

Judge (rapping violently) — "Order in the court."

TEXAS TECHNICALITIES.—Bronco Pete — "Yep, dat new lawyer got Ike off pretty slick for manslaughter."

Texas Tom — "How'd'e do it?"

Bronco Pete — "Wy, jes' 'fore de case went to de jury, he discovered dat several pages of de county Bible was torn out. Uv course dat made de book invalid; uv course dat made de swearing invalid; en of course dat made de testimony uv seventy-eight witnesses invalid; fer, uv course, de jury couldn't convict Ike on no sech song-enance testimony ez dat."

When Judge Pendleton grows reminiscent he is always interesting. Court was short this morning, and when Mr. Henry Tompkins walked in he said: "Mr. Tompkins, your cousin, Louis Garth, was the only bully I ever saw who was a brave man. He was the most overbearing man I ever saw. He was in a poker game in camp with Lieutenant Forrest, and he called Forrest a liar. Forrest pulled his pistol, a double-barreled weapon, and placing it to Garth's breast, he pulled the trigger. The cartridge failed to fire, and Garth spat out a chew of tobacco, and, without moving a muscle, said: 'Lieutenant, you had better try the other barrel.' Forrest put his weapon up, and said: 'Garth, you are a brave man, and I will not shoot a brave man.' They were inseparable friends forever afterward." — Owensboro (Ky.) Enquirer.

Chauncey M. Depew was among the first speakers at the first annual banquet of the Westchester (N. Y.) Bar Association the other night, and told the following story:

"I was attorney for the Harlem Railroad a long time ago. We had run down a farmer, paralyzed him and killed his team. I expected the verdict would be \$10,000. It was \$700. I was paralyzed. The next day the foreman of the jury of Westchester farmers came into my office. I recognized him at once as an active politician of the third Westchester district, whom Robertson and Jim Husted and I had always used on critical occasions. 'Chauncey,' said he, 'those galoots wanted a verdict of \$4,000. I stuck out till we got \$700. What do you think of a pass for five years?' Then I knew that trial by jury was the palladium of our liberties."

### English Notes.

The Dublin correspondent of the Times announces the death of the Hon. Stearne Ball Miller, one of the judges of the Irish Bankruptcy Court. He represented Armagh in parliament from 1857 to 1859, and again from 1865 to 1867, when he was elevated to the bench. He was generally regarded as a sound lawyer and an impartial and courteous judge.

The present list of house of lords appeals, says the Times, consists of 16 cases, of which 12 are English, three are Scotch, and one is an Irish appeal. There are eight cases awaiting judgment, the first among them being Earl Russell's appeal, heard several months since, in which is involved the question as to what constitutes "legal cruelty" in a matrimonial sense, while the last is the trade-union case of *Allen v. Flood*, heard a few weeks since.

Necessitous members of the solicitors' profession, and their families, will have good reason to remember the present year, says the Solicitors' Journal. The Victoria pension fund for their benefit, instituted by the council of the Incorporated Law Society in commemoration of the queen's jubilee, has now reached the sum of £5,183, and is being constantly added to by subscriptions, by solicitors in all parts of the country, ranging from one guinea up to 100 guineas. No better mode of commemoration—and, we may perhaps venture to say, probably no mode more acceptable to her majesty—could be devised than the establishment of a permanent fund for the assistance of hard-working professional men who have fallen on evil days.

The bench and the bar have long been famous for the generosity with which they have recognized the services of their clerks. To the long list must now be added Mr. Justice Collins, who has just presented his clerk, Mr. Thomas Davis, with £1,000 in lieu of a legacy in his will.

His Honor Judge Snagge corrects the popular impression that County Court commitment is imprisonment for debt. He describes it as a means of attaching the moneys in the pockets of debtors, who surrender them when they hear the clang of the prison doors behind them. Is this equitable execution, or what? We should say, with Sir R. Reid, that it is imprisonment for debt, whatever it may appear to the imagination of a judge. — *Law Times*.

A somewhat novel point was decided in the case of *In the Goods of Crofton* (*Times*, 2nd May). The testator had executed a will in 1893, and in 1896 executed a joint codicil with his wife. On the death of the testator, application was made for the admission to probate of both the documents, but this was refused on the ground that the widow was still alive. Barnes, J., however, held that both could be admitted without waiting for the decease

of the widow. According to *In the Goods of Stacey* (1 Jur. N. S. 1177), probate will be granted of a joint will on the death of either party, for to all intents they are two distinct wills, being joint and not mutual. However, where two persons who were partners in a business and joint tenants in certain freeholds, executed a will containing devises and bequests which were not to take effect till after the decease of both, Sir C. Cresswell held that probate could not be granted of such an instrument till both parties were dead. (*In the Goods of Raine*, 1 Sw. & Tr. 144.)

Mr. Justice Cave favors the administration of the oath by the method of the uplifted hand. In a case tried recently he said to a witness, "Why do you not be sworn according to the Scotch system? I like to see it much better than kissing the book, as even the inside of the book becomes dirty, as it generally opens at one place. Some witnesses think judges object to their not kissing the book; I have not the slightest objection, and like to see witnesses sworn in the Scotch fashion." But some judges do not like it at all. One of them sarcastically described the oath taken in Scotch fashion as "the sanitary oath."

Must a solicitor pay the medical witnesses though he be not supplied for the purpose with money by his client? The lord chief justice said a short time ago that when a solicitor takes up a case for a poor person he is bound to consider the risks attached to the position, and must be prepared to undertake its responsibilities, including the payment of the fees of medical witnesses. He is not bound to incur any extravagant expenditure, but he fails in his duty if he omits to do anything that is necessary.

Rt. Hon. Charles Robert Barry, lord justice of appeal, Ireland, since 1883, who, as solicitor-general for Ireland in 1868, prosecuted the so-called Fenians, is dead. He was born in 1825, was admitted to the Irish bar in 1848, was made a queen's counsel in 1859, was member of parliament for Dungarvan from 1868 to 1870, and was attorney-general from 1870 to 1872.

In a negligence case tried on the 2d of May, before the lord chief justice of England, a doctor was called to testify to the injuries suffered by the plaintiff. Upon taking the stand the witness objected to giving his evidence until his fees were paid. He had received half a crown with his subpoena, and had been offered a guinea more, but as he had been in attendance three days, he thought he ought to have a fee for each day. Lord Russell held that under the circumstances he was not bound to testify, but suggested that he might see fit to do so, inasmuch as he was already in court. The witness, however, said that he must persist in his refusal, in the interest of the medical profession, and the case was closed without his testimony.

**Notes of American Decisions.**

**Accident Insurance — Murder of Insured.**— Under a provision in an accident insurance policy that "this insurance does not cover death resulting from intentional injuries (inflicted by insured or any other person), "the company is not liable for death by murder. (*Johnson v. Travelers' Ins. Co.* [Tex.], 39 S. W. Rep. 972.)

**Adverse Possession — Possession of Guardian.**— One W. left his wife and children in Germany, and came to Oregon, where he married another woman, and had other children. Upon his death one S., who had acted as W.'s agent in the management of his real estate, caused himself to be appointed guardian of W.'s Oregon children, and, as such, held possession of the real estate, and applied the rents to the support of these children until their majority, when he turned the property over to them. In the meantime the German children, who had been informed of their father's remarriage, and one of whom had come to the United States, and lived there many years, made no attempt for over 20 years to assert any interest in their father's property. *Held*, that even if S., at the time of W.'s death, knew of the existence of the German children, and if he could then have been charged with a trust in their behalf, his possession of the real estate as guardian of the Oregon children was adverse, and any rights of the German children were barred by their delay. (*Westenfelder v. Green*, U. S. C. C. [Oreg.], 78 Fed. Rep. 892.)

**Arrest — Assault and Battery.**— A peace officer commits an assault and battery when he uses unnecessary violence in making an arrest. (*Wallace v. State* [Miss.], 21 South. Rep. 662.)

**Assault and Battery — Self-defense.**— Every person has the right to resist an assault with such force as is necessary to protect himself, and, where the evidence showed that defendant struck plaintiff on the head with a stick, it was error to charge that, to justify the striking on the ground of self-defense, defendant must have had reasonable ground to believe, and must have believed, that he was in danger of death or great bodily harm from the assault. (*Thornton v. Taylor* [Ky.], 39 S. W. Rep. 830.)

**Attachment — Damages.**— In an action for damages, actual and exemplary, for wrongfully and maliciously attaching plaintiff's goods, defendants could plead, in mitigation of exemplary damages, that they had offered to redeliver the goods. (*Billingsley v. Hewett* [Tex.], 39 S. W. Rep. 953.)

**Beneficial Associations — Beneficiaries.**— A sister, who does not live with her brother, and is not dependent on him for support, is not a member of his family, within St. 1882, ch. 224, § 1, authorizing beneficial association organized under such statute to pay benefits to members and their "families."

(*Smith v. Boston & Maine Railroad Relief Assn.* [Mass.], 46 N. E. Rep. 626.)

**Bills and Notes — Promissory Note — Conditions.**— Where a note is executed with an agreement that a new one shall be substituted when the exact amount of the debt is ascertained, a subsequent delivery of the new note to the payee renders the original note unenforceable in the hands of one who purchased the same after maturity with notice of the agreement. (*Murray v. Reed* [Wash.], 48 Pac. Rep. 343.)

**Carriers — Failure to Furnish Cars.**— A carrier, for breach of contract to furnish cars to plaintiff, made with knowledge that he had a contract to deliver to others grain on board the cars at a certain price, is liable for the profit which he would have made but for such breach. (*Gulf, etc. Ry. Co. v. Hodge* [Tex.], 39 S. W. Rep. 986.)

**Chattel Mortgages — Construction.**— Where a partnership owning personal property situated in two different States executes two instruments, each transferring the property in one State, they are to be construed separately, each in accordance with the laws of the State, where the property conveyed is situated, and the fact that one operates as a general assignment cannot affect the construction of the other. (*Dunham v. McNatt* [Tex.], 39 S. W. Rep. 1016.)

**Constitutional Law — Taxation.**— A city water-works plant is not "public property used for public purposes," within Const. § 170, exempting such property, and only such, from taxation; and therefore Special Act May 1, 1886, exempting from taxation the water-works of the city of Covington, was repealed by implication by Const. § 170, and St. § 4026, enacted thereunder. (*City of Covington v. Commonwealth* [Ky.], 39 S. W. Rep. 836.)

**Contract — Parol Evidence to Vary.**— The contract disclosed by a bill of sale, reciting the transfer of a half interest in a partnership for a stated price, and a note given by the purchaser for the balance of the price after paying a part in cash, cannot be varied by parol evidence that the purchaser, as part consideration, assumed the seller's share of the firm debt. (*Thompson v. Bryant* [Miss.], 21 South. Rep. 655.)

**Contract to Facilitate Divorce.**— An agreement by a wife not to defend a pending action for divorce is against public policy, and will not support a contract by the husband to pay her a stipulated sum in lieu of alimony. (*Smutzer v. Stimson* [Colo.], 48 Pac. Rep. 314.)

**Criminal Law — False Pretenses.**— A false representation by one that he has extraordinary and supernatural power to cure is as to an existing fact, and is not impaired by making simultaneously a promise to exercise the alleged power in the future to cure the person to whom the representation is made. (*Jules v. State* [Md.], 36 Atl. Rep. 1027.)

**Damages — Contracts.** — Loss of profits to be realized from an enhancement of real estate values by the completion of a railroad within a certain time is too remote and speculative to be recovered as damage for breach of a contract to complete the road within such time. (*Coos Bay, R. & E. R. & Nav. Co. v. Nosler* [Oreg.], 48 Pac. Rep. 361.)

**Deed — Reformation.** — In a suit to correct a defective certificate of acknowledgment to a deed, the court may, under its authority to grant "any relief consistent with the case made by the complaint, and embraced within the issue" (Code Civ. Proc., § 580), correct defects in the certificate other than that specified in the complaint, if evidence thereof is introduced without objection. (*Poledori v. Newman* [Cal.], 48 Pac. Rep. 325.)

**Habeas Corpus — Remand of Prisoner.** — An order dismissing the writ, and remanding the petitioner to custody, was not erroneous where it appeared that the petitioner, though holding a consular office under a foreign government at the time the writ issued, had been removed from office at the time the order was entered, as a prisoner is not to be discharged for defects in the original arrest, where sufficient ground for his detention is shown at the time of the hearing. (*Iasigi v. Van De Carr* [U. S. S. C.], 17 S. C. Rep. 595.)

**Insurance — Policy Payable to Mortgagee.** — Where a policy on mortgaged property taken out in the name of the mortgagor provides that the loss shall be payable to the mortgagee as his interest may appear, and the mortgage debt exceeds the amount of the policy and the value of the property, the mortgagee may sue on the policy in his own name. (*Lowry v. Insurance Co. of North America* [Miss.], 21 South. Rep. 664.)

**Judgments — Mortgage Foreclosure.** — Where a chattel mortgagee of notes secured by real estate mortgages foreclosed both mortgages by action, purchasing the notes and real estate at the foreclosure sales by permission of court, an action will not lie to enforce a trust in favor of the mortgagor as to the excess of the amount bid at the sale over the chattel mortgage debt, since the decrees in the foreclosure suits are conclusive, in a collateral proceeding, as to the rights of the parties. (*Dubuque v. Stich* [Wash.], 48 Pac. Rep. 344.)

### Notes of Recent English Cases

**Husband and Wife — Petition for Permanent Maintenance and Allowance for Child — Agreement in Former Suit Set Up in Bar — Matrimonial Causes Act 1857 — Matrimonial Causes Act 1866 — Registrar's Report — Motion — Report Varied — Leave to Appeal — Terms.** — The petitioner (wife) brought a former suit against the respondent, but withdrew that petition upon the following

terms: "The petitioner agrees to accept 130*l.* per annum by way of permanent maintenance, this sum to include the maintenance of the child. The said allowance to be paid by \* \* \* the respondent by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. \* \* \* The petitioner is to have the custody of the child." The respondent subsequently committed adultery, and was also guilty of statutory desertion, and, upon these grounds, the petitioner obtained a decree dissolving her marriage, and an order for the custody of the child. The husband continued to pay the allowance, which, was, in fact, the amount allotted by way of alimony *pendente lite* in the first suit. Upon petition for permanent maintenance and for an allowance for the maintenance and education of the child, the respondent set up the agreement, and the registrar held it to be a bar. The high court reversed the decision of the registrar, and ordered the inquiry as to means to proceed. The court, with considerable reluctance, gave the respondent leave to appeal, but upon terms that the petitioner's costs up to date should be actually paid, and that security should be given for the petitioner's costs upon the appeal. (*Bishop v. Bishop*, L. T. Rep. vol. LXXVI, 28.)

**Marriage Settlement — Covenant to Settle Wife's After-Acquiring Property — Investments Representing Accumulations of Income.** — By a settlement made on the marriage of C. D. with J. D., it was provided that, if C. D. (the wife) or J. D. (the husband) in her right should, during the coverture, "become seized, possessed of, or entitled to any real or personal property of the value of £200 or upwards for any estate or interest whatever except jewels," etc., such property should be vested in the trustees of the settlement as being subject to its trusts. Under the will of her father, C. D. received income amounting to £630 a year. The income received by her under the settlement amounted to £650 a year. C. D. from time to time invested, in her own name, considerable sums, being part of the income derived by her under the will and settlement, and accumulations of income derived by her from such investments. Upon a special case being stated by the trustees for the opinion of the court as to whether the investments representing income and accumulations of income were subject to the trusts of the settlement: *Held*, that, it being clear that the income received by C. D. was not subject to the covenant in the settlement, it could make no difference in principle that she had not chosen to deal with it as income, but had invested it, and that the investments were not subject to the trusts of the settlement. (*Finlay v. Darling*, H. C. of J., Ch. Div.; L. T., Apr. 10, '97.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, MAY 29, 1897.

### Current Topics.

THE complete *resumé* of the work of the Statutory Revision Commission of the State of New York, which is given in this issue of THE ALBANY LAW JOURNAL, cannot fail to be of interest and value, particularly to members of the legal profession. This commission, at first somewhat tentatively authorized, has abundantly demonstrated the value of its labors and the necessity for its existence. Created eight years ago, for the purpose of revising certain laws, its duties have been, since that time, greatly enlarged. In addition to assisting members of the legislature in drafting and revising bills, and in advising the governor with reference to the constitutionality of proposed legislation, the commission has, during the past year, prepared and presented to the legislature nine bills embodying general laws, and forming a considerable part of its comprehensive scheme of revision, seven of which have been enacted into law and have received the approval of the executive. This work of revision, while not entirely completed, is so far advanced that the commission has been able to devote considerable attention to the exceedingly important and difficult work of code revision, and it is confidently expected that the whole, or, at all events, a considerable portion of the code will be ready for submission to the next legislature, which convenes in January. With reference to the statutory revision work, which will be subjected to the test of practical experience, it is

VOL. 55 — No. 22.

but just to say that remarkably few criticisms have been passed upon it, thus far, while commendation has been frequent and evidently spontaneous on the part of high legal and judicial authority. The peculiarly difficult nature of this work will perhaps be best appreciated by trained and experienced lawyers, particularly those who have attempted to frame definitions, avoid superfluity, reconcile contradictory and conflicting provisions, scattered through many statutes, and while simplifying without sacrificing substance, frame a general statute which should be harmonious, comprehensive and free from ambiguity. Perfection is not claimed for the work of the commission, which has invited suggestions, many of which have been received and acted upon, from persons, officers or departments directly interested, but it is quite within bounds to say that this work has been carefully and conscientiously performed by scholarly and able men. It is exceedingly gratifying that so large a measure of success has been achieved, as is indicated by the very favorable criticisms already passed upon their labors. While some future amendments will undoubtedly be necessary, as time and experience shall indicate, it will be far better that they should be made to general laws than to attempt to deal with each individual case by separate statute. If the commission shall be as successful in the more difficult work of framing a new code of procedure, as it has been in revising the laws, there will be additional cause for congratulation.

Governor Black's veto of the Inheritance Tax bill, the preparation of which, as well as passage through the legislature, created much discussion, *pro* and *con*, is undeniably a strong and trenchant state paper. The executive had convictions on the subject, and possessed the courage of them. The veto is based upon a number of reasons, the force of which may be denied, but can hardly be broken by any impartial friend of a proper and equitable tax system. The bill rejected the American principle of proportionality in taxation, and adopted the progressive principle. Estates which under the existing law



are liable to a tax of five per cent. might, under the amended law, pay a tax of fifteen per cent. It was at this feature, so skilfully defended by State Comptroller Roberts, the author of the measure, that Governor Black aimed his sharpest arrows. Admitting Comptroller Roberts' claim that personal property largely evades taxation, and that proportionality is thus destroyed, he utterly refuses to assent to the proposition that a progressive tax is the proper remedy for the evil. Personal property is subject to taxation, and if the law is not enforced, the fault is with the officers, rather than with the law. Moreover, he holds that the progressive tax law would punish the innocent and the guilty alike, and would impose double taxation on those who honestly pay their share of the tax on personalty. But in the view of Governor Black, the strongest objection is the deliberate departure of the bill from the traditional principle of uniformity. He is unable to see any reason why the rich man's dollar should pay more than the poor man's dollar; why the last million should pay more than the first million. Such discrimination, in his opinion, is not a tax, but a penalty. Without going into any further detail, it may be said, without fear of contradiction, that the more the governor's reasons for vetoing the bill are considered by thoughtful men, who are free from the influence of socialistic views, the stronger will they become.

Delaware's constitutional convention, which has been in session for some months, engaged in the important work of amending and revising the organic law of that Commonwealth, has about completed its labors, and the new instrument only awaits final revision before being given to the public. Some of the provisions of the new Constitution are worthy of notice, and it may be said that, as a whole, it marks a distinct advance in governmental methods. The present Constitution, which was framed nearly a century ago, and has remained unamended for sixty-five years, may be said to have been clearly outgrown. A noteworthy change has been made in the composition of the legislature, the members of which will be

chosen by districts, instead of by counties, as now. There will be seventeen members of the senate and thirty-five members of the house, a total of fifty-two members, being an increase of twenty-two over the old legislature. The senators will be elected for four years, and the representatives for two years, and regular sessions will be held biennially. The governor is to be chosen for four years, and a lieutenant-governor is provided for, who will preside over the senate, and succeed to the governorship in case of the death or disability of the governor, thus doing away with the present anomalous situation, which permits the acting governor to exercise the functions of chief executive and at the same time vote in the senate. As to the qualifications of voters, a distinct advance is made, in the provision that no native voter coming of age, or alien naturalized after January 1, 1900, can vote unless "he shall be able to read this Constitution in the English language and write his name." This wise provision will do much to banish ignorance in Delaware. The constitution of the judiciary, the duties of the legislature, the governor and other State officers, and the methods of raising revenue are all carefully prescribed. The provision in regard to local option is probably peculiar to Delaware. It provides that "when a majority of all the members elected to each house of the legislature by the qualified electors of any district shall request the submission of the question of license or no license to a vote of the qualified electors in said district, the legislature shall provide for the submission of such question to the qualified electors in such district at the next general election." In other States a vote on local option is taken on the petition of a certain percentage of the electors themselves. Other improvements are in taking away from the legislature the right to grant divorces and placing it in the hands of the courts, and in giving the governor the privilege of vetoing any item or items in any bill making appropriations of money.

The reforms of the judiciary consist in five law judges instead of four; they are appointed for twelve years, and not for life, and must be confirmed by a three-fifths vote of

the senate; three out of the five law judges shall belong to one political party; courts must be held by three judges, if possible, but two are a quorum, except in the Oyer and Terminer and the "Supreme Court," which title takes the place of the clumsy one of "Court of Errors and Appeals;" in no case shall a judge who sat in the cause below sit on appeal in the Supreme Court, as is the case at present; two sessions of each court may be held at the same time, excepting of the Oyer and Terminer and the Supreme Court; an associate judge is added to the chancellor in the Orphans' Court, from which an appeal lies to the Superior Court of the county; justices of the peace are appointed for four years. An appeal lies from the Court of Oyer and Terminer, dealing with human life, to the Supreme Court, which is not the case now. For a man convicted to be hanged there is no appeal in Delaware to-day, except to the clemency of the executive. No decision has yet been reached as to whether the new Constitution shall be submitted to the vote of the people or not. The Wilmington News advises against such a course, and urges the convention to declare the Constitution at once as the organic law of the State, or take a recess for a few months, and obtain the views of the people on the subject; then meet again, and, after making such amendments as may be deemed wise, declare the instrument in force. It would seem, however, that a popular vote on the subject would be advisable, and, on the whole, most satisfactory all around.

Theosophy is not a religion, according to the decision of Judge Sheldon, in the equity session of the Superior Court of Boston. One effect of this ruling, which particularly displeases the disciples of Blavatsky, Judge and Tingle, is to deny to Theosophists in Massachusetts exemption from taxation of real estate, such as is accorded to other religious denominations. The Boston Theosophists, who are quite numerous, and apparently growing numerically as well as in influence, have a fine house at No. 24 Mt. Vernon street, Boston, which has been held

by them for about three years. They have paid taxes on it under protest, with the understanding that when they were ready a test case would be brought to recover the amount paid by them in taxes, and incidentally to fix their official status among the other religious sects. This is the suit which has just been decided against them. It is certain that the Theosophists will not allow the matter to rest here, for the attorney of the society has already filed a bill of exceptions, which will be argued later before the full bench of the Supreme Court. It is also possible that, in the event of the decision of the lower court being sustained, the matter will be brought before the Supreme Court of the United States, and that high tribunal asked to define just what constitutes a religious denomination. The Boston judge may have ruled correctly, but in a country which knows no established church and recognizes absolute freedom of worship, it is not easy to determine what forms, ceremonies, rituals or beliefs constitute religion.

The term of the Appellate Division of the New York Supreme Court, Third Department, which began on the 4th inst., ended this week after a session of unusual length and importance. It is a noteworthy, as well as a creditable fact, that of the 128 cases on the calendar for the term, but sixteen remained to be argued on Saturday last, with the prospect that most of these would be disposed of before adjournment. This is a record of which the court has every reason to feel proud.

The indeterminate sentence law which was recently placed on the statute-book of Illinois has been declared constitutional by the Supreme Court of that State. In the opinion of the judges constituting that high tribunal, there is nothing in the Constitution of Illinois which entitles a prisoner to a definite term fixed by a jury of his peers, and that the parole arrangement does not constitute a delegation of judicial power to the prison board. The law which is now upheld provides that juries shall, in cases of conviction, bring in a verdict of guilty only, without naming any term of imprisonment, and in

sentencing the prisoner the court names the minimum and maximum term of imprisonment, leaving to the prison board the decision as to what length of time shall be served by the convict. Friends of the parole system will congratulate themselves upon the decision, and join in the hope that the results of the new law may prove, upon fair trial, all that its promoters have predicted. It is worthy of note that Judge McClure, of the Circuit Court, at Anderson, Ind., has decided the indeterminate sentence law of Indiana to be unconstitutional, as curtailing the power of the jury. The Indiana law is almost an exact copy of the Illinois statute, which the Supreme Court of that State has upheld. It may be, if the Indiana law shall be reviewed by the Supreme Court there, the decision of Judge McClure will be reversed.

Does the absence of the judge from the court-room for a considerable time during the arguments of counsel to the jury, during a trial, without the consent of the parties, constitute reversible error? This question was decided by the Supreme Court of Wisconsin, in *Smith v. Sherwood* (70 N. W. Rep. 682). The court takes the ground that when the trial judge is absent, there is in reality no person or officer who can certify to the higher court as to what took place during that absence, and that, therefore, there remains a hiatus in the case. Herein is the vice of the matter. The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. During such an absence grave errors or abuses of privilege may occur, and the Appellate Court may be left to the conflicting affidavits of over-zealous attorneys or parties in interest in determining what actually took place. The Supreme Court adds: "This court is not organized nor authorized to try such questions, and we do not propose to do so. It avails not to say that error must be affirmatively shown. This is true; but where the trial court has disabled itself from informing us as to what occurred, how is error to be shown save by affidavit? We cannot but re-

gard this long absence from the bench during an important part of the trial as an error which calls for a new trial. We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses, and break down one of the most valuable safeguards to litigants."

In *Hess v. Preferred Mut. Acc. Association of America*, decided by the Supreme Court of Michigan, it was held that a banker who, while in a sawmill to get some boards sawed for a cabinet, to be used in a bank, operates a saw to cut off some pieces for handles, is not controlled by the provisions of an accident policy declaring it void as to accidents occurring when engaged in any profession, employment, or exposure not rated in the policy as a preferred occupation, he not being engaged in sawing as a business. The court referred to a number of cases cited by the defendant, in support of his contention that the insured "was engaged in a profession, employment or exposure not rated as a preferred occupation in the policy," all of which, it said, were distinguishable from the case here, except the case of *Knapp v. Association* (53 Hun, 84; 6 N. Y. Supp. 57). This case, it was conceded, does sustain the contention of the appellant, but it is held to be contrary to the great weight of authority. The language of the policy, the court holds, has reference to the employment, not to an individual case. This is its reasoning: "If the company intended to say to the assured that if he did any act which did not strictly belong to his occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, in such event he could claim nothing under his policy, it was easy for them to do so in plain language. Such a stipulation would obviously be one of a very important character, and we would expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of this indorsement will bear no other interpretation. If the terms used

are imperfect or ambiguous, it is the fault of the defendants. It is their contract, and the construction of it must be strongly against them." It was therefore held that the plaintiff was entitled to recover.

The Anti-Vaccinationists of Illinois have obtained at least a temporary victory in the decision of the Supreme Court of that State, recently handed down, which denies to the State board of health the right to enforce vaccination rules. The board had made vaccination a requirement for the admission of children to the public schools. A citizen of Lawrence county refused to allow his children to be vaccinated, and brought suit to compel the officials to accept the children as pupils. The Supreme Court decided the suit in his favor, holding that the State board of health is without authority to prescribe conditions upon which citizens may exercise rights guaranteed to them by law, and as the right to send children to the public schools is one of those so guaranteed, the rule of the board is arbitrary and illegal. Of course, this decision does not necessarily render the enforcement of vaccination impossible. All that it establishes is the necessity of a general State law empowering the board of health to impose the condition it has attempted to enforce without the authority of a statute. A bill has already been introduced in the Illinois legislature with this object in view. It may be added that there is nothing in the decision of the Supreme Court of that State, referred to, to point to the conclusion that such an enactment would be declared to be unconstitutional.

An interesting decision as to what constitutes negligence was recently rendered by the Supreme Court of Pennsylvania, in the case of *Donahue v. Kelly*. From the facts brought out on the trial, it appeared that while a customer of a restaurant was waiting for change at a counter, a flame was noticed by the waiters, in a recess, caused by a lighted match falling upon the floor into gasoline which was flowing from a defective lamp; the flames grew larger, and efforts were made by the waiters to put them out.

The customer waited several minutes for the change, not knowing what had happened. Without warning him, a waiter picked up the burning lamp and threw it toward the door. The lamp immediately exploded, and struck the customer, who was severely burned. In an action brought by the customer, to recover damages, it was held that the proximate cause of the injury to the customer was the result of the throwing of the lamp, and not any negligence of the waiters in endeavoring to extinguish the flames in the recess; that the throwing of the lamp, under the circumstances, by the waiter, was an act of self-preservation. The doctrine was enunciated that one who, in a sudden emergency, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. Though a mistake, such faulty act or omission is not carelessness. An innocent third person who is injured by an act done in self-defense, or self-preservation, has no higher right to recover damages than for accidental harm proceeding from a lawful act. The court further held that it is not negligence, *per se*, to have gasoline about a building.

The first prosecution under the so-called Garfield corrupt practices act will be commenced soon in Toledo, Ohio, an order to this effect having been issued by Attorney-General Mounett. The alleged guilty person is a member of the board of education in that city, the charge made against the defendant being that he made a false report of expenses attending his campaign for nomination and election, and expended more than the law permits. The charge is also made that the defendant promised certain electors of his ward, in consideration of their services in his behalf, that he would secure positions for them or their friends in the public schools of the city. The outcome of the suit, which is made mandatory upon the prosecuting attorney, will be watched with unusual interest.

Two important rulings have just been made by Judge Reeve, the solicitor of the

treasury. In one of these he holds that members of boards of pension examining surgeons appointed by the commissioner of pensions are not United States officials, and are therefore not entitled, as such, to offices in government buildings. This opinion appears to be in conflict with the views of the civil service commission, upon whose recommendation these boards, receiving a compensation of over \$300 a year, were placed under the civil service rules as officials of the government.

In the other opinion referred to, the solicitor holds that American citizens who become subjects of a foreign government are aliens, within the meaning of the immigration laws of the United States.

#### WORK OF THE STATUTORY REVISION COMMISSION.

THE New York State Statutory Revision Commission, composed of Charles Z. Lincoln (chairman), William H. Johnson and A. Judd Northrup, has made good progress in its work during the past year. In addition to the preparation of the table of amended and repealed laws published in the session laws (which table was suggested by the commission in 1895, and has been incorporated in the session laws each year since), the preparation and publication of its annual report for 1896, and the completion of the printing of the colonial laws, the commission prepared and presented to the legislature nine bills, seven of which, namely, the State Finance law, the Village law, the Labor law, the Lien law, the Navigation law, the Partnership law, and the Personal Property law, were passed by the last legislature, and are now laws. The commission also introduced a pawnbrokers' bill, but it was not passed. It also introduced a Commercial Paper law. Senator Lexow introduced a negotiable instruments bill, prepared by the commission, on uniform legislation of the several States, and this bill, with some amendments incorporated from the commission bill, was passed. It was rearranged by the commission so as to conform to its plan of laws, and given a general law number. This nearly completes the scheme of revision. The principal subjects left for consideration are education, civil service, prisons, pawnbrokers, cities and political divisions. Some of these will receive attention before the next session of the legislature.

The revision commissioners were also appointed code commissioners in 1895, and in addition to the preliminary report published that year,

have given considerable attention to the revision of the Code of Civil Procedure. This subject will soon receive further attention, and it is expected that a part or all of the code will be submitted for the consideration of the next legislature.

The commission was created in 1889 for the purpose of revising certain laws, and has continued its work since that time without interruption. Its functions and powers have been materially enlarged, partly by statute and partly by custom, so that now it acts as counsel to the legislature, and, in addition to its own general revision bills, prepares and revises a large number of bills during each session. It is required by law to draft bills for members of the legislature, and many members avail themselves of this privilege. During the last session of the legislature it drafted or revised about 300 bills for members, and, in addition to its other work, its opinions are constantly sought in reviewing legislation at different stages. By custom, the chairman of the commission is *ex officio* confidential legal adviser to the governor, and this necessarily brings the commission into intimate relations with the executive department. When a bill is delivered by either branch of the legislature to the governor, a record is made of it by the military secretary, who acts as bill clerk in the executive chamber, and it is then delivered to the Statutory Revision Commission, where it is examined to see that it is properly certified by the presiding officer of each house, and if it is a city bill, to ascertain whether it has been sent to and acted upon by the city affected; and, generally, that the facts exist which give the governor jurisdiction of the bill. It is then examined upon technical grounds to see that it is not in conflict with other statutes, or, if an amendatory bill, that it amends the proper law, and also to see that no defects exist which would introduce confusion in the statutes if the bill were approved. Defects are frequently discovered here for the first time, and bills are often recalled at the suggestion of the commission for amendment. After this preliminary examination, the bill is ready for consideration upon its merits. During each of the last three years, the legislature has passed about thirteen hundred bills, and the examination of them, together with the work of drafting bills by the commission, and the attention necessary to its own general revision bills, has kept it very busy during the legislative period, so that during that period little could be done in general revision work. The commission has become an important auxiliary to the legislature and the executive department. The time is probably not far distant when it will be made permanent. Even after the revision scheme is completed, the commission will be found useful, if not indispensable, as an aid to the legislature and the governor in the preparation, revision and examination of bills.

In preparing a revision bill, the commission

uses all available means of information, and takes special pains to communicate with persons, officers or departments directly interested. In the preparation of the Village law, circulars were sent, in October last, to the president of each village, asking for suggestions. Many were received and adopted. The proposed draft of the bill was sent to each village before the legislature met, with a further request for suggestions. Hearings were had before legislative committees, and every effort was made to prepare a bill that would be not only satisfactory to the villages, but embody a reasonable and elastic scheme of village administration. So, in the preparation of the Labor law, suggestions were invited, through the press, and a preliminary draft of the bill was sent to all the public departments and offices affected, and also to more than two hundred labor organizations. This bill was fully considered in committee, and passed the legislature unanimously. The Lien law was also submitted to various organizations, unions and societies interested in the subject, and was considered and heartily endorsed by the Bar Association of the City of New York, which sent a representative to Albany to urge its passage.

No effort has been spared to give the utmost publicity to the work of the commission during its progress, so that every lawyer, public officer or other person interested in the work of revision could have an opportunity to know what the commission proposed, and to suggest amendments. The first print of each bill submitted to the legislature by the commission contains ample notes, showing the source of the proposed law and the changes, if any, made in existing law. This enables the members of the legislature and others having occasion to consider the bill to trace the history of the proposed legislation, and thus to discover whether any serious changes in the law are contemplated.

The following is a synopsis of the laws proposed by the commission and passed at the late session of the legislature:

#### THE LABOR LAW.

The Labor law, constituting chapter 32 of the general laws, is a revision of all the laws regulating the employment of labor and relating to the protection of employes, collection of statistics, and the settlement of differences between employers and employes. The important subjects embraced in the revision are: (1) The hours of labor in a legal day's work; (2) the payment of wages of employes; (3) the payment of persons employed in the erection or repairing of buildings; (4) the powers and duties of the commissioner of labor statistics; (5) the maintenance of free public employment bureaus; (6) the regulation of the sale of convict-made goods; (7) the inspection and regulation of factories, mines and bakeries by the factory inspector; (8) the manufacture of tene-

ment-made articles; (9) the settlement of disputes between employes and employers through the State Board of Arbitration and Mediation; (10) the employment of women and children in mercantile establishments; (11) the examination and registration of horseshoers.

The substance of the former laws is not materially changed in the revision. Statutes treating of the same matters are consolidated and grouped under the same headings. The language of the several acts revised is condensed, and many superfluous words and expressions have been eliminated.

The sections of the old laws making a punishment of the several acts a misdemeanor are not re-enacted in the Labor law, but are included in a law amending the Penal Code. The Penal Code thus contains all necessary provisions for the punishment of violations of the Labor law.

#### STATE FINANCE LAW.

The State Finance law, constituting chapter 10 of the general laws, is a revision of all statutes relative to the fiscal affairs of the State, and the powers and duties of the comptroller and treasurer, in respect to the care, management and disposition of State finances, and such other statutes of a general nature as provide for the management of such funds, the investment of their capital, and the disposal of their incomes.

Article 1 contains, among other things, a statement of the general powers and duties of the treasurer and comptroller; the deposit of moneys and the forms and rendition of accounts by State officers, and foreclosure of State mortgages.

Article 2 applies to the general fund; article 3 to the canal fund and the canal debt sinking fund; article 4 to the education funds, including the care and management of the United States deposit fund, and article 5 relates to the military record, the mariners and the chancery funds. Slight changes have been made in the control of State mortgages. Under the former law the attorney-general executed the laws relating thereto. Under the present law the comptroller is empowered to institute proceedings for the foreclosure of such mortgages, and to enforce all the provisions of law relating to the sale of the mortgaged lands. This change is made upon the theory that it is more in accordance with the present financial system of the State, and that the comptroller should possess all the administrative powers relating to this species of property.

Many of the cumbersome provisions of chapter 150 of the Laws of 1837, relating to the care and management of the United States deposit fund, have been omitted. The office of loan commissioner is retained; but all moneys received by the commissioners on account of this fund shall be paid by them to the comptroller, who is empowered to invest such money in the same manner as other funds. This has been the practice of the

comptroller for many years under his general power to regulate the management of State funds. The mortgages belonging to this fund are to be foreclosed in conformity with the practice in cases of foreclosures of other mortgages, and many sections of the former acts providing a method of foreclosure are not, therefore, re-enacted.

Sections 17-21 contain provisions relating to the forms of accounts of State departments and institutions, the accounts of public officers, vouchers, inspection and supplies furnished to State institutions, and the entry of the purchase of such supplies, the deposit of money received by such institutions in banks to be designated by the comptroller, and annual inventories of all articles of maintenance on hand in the several State institutions. Provisions similar to these have been contained in each annual appropriation and supply bill for a number of years. A like repetition in future appropriation or supply bills is hereafter unnecessary.

Section 80 of the revision changes somewhat the method of disposition of the income of the common school, the literature and the United States deposit funds. It combines the various school funds under the name of the "education fund," and provides for apportionment and distribution by the superintendent of public instruction and other disbursing officers.

#### THE LIEN LAW.

The Lien law, constituting chapter 49 of the general laws, is a revision of all former statutes relating to mechanics' liens on real property, liens on personal property for services rendered to the owner thereof, and mortgages on chattels, including contracts of conditional sale. It includes the following subjects: (1) Mechanics' liens for the improvement of real property and the construction of public works in State and municipal corporations; (2) liens on vessels; (3) liens on monuments, gravestones and cemetery structures; (4) liens for labor on stone; (5) liens for services of stallions; (6) liens on personal property on account of services of artisans, inn-keepers, factors, warehousemen, livery stable-keepers, agisters and the enforcement of such liens by the sale of the property; (7) chattel mortgages and sales of goods and chattels under conditional contracts.

Article 1 is a revision of all prior statutes relating to mechanics' liens on real property. It includes all the substantial part of chapter 342 of L. 1885, relating generally to mechanics' liens; chapter 669 of L. 1872, providing a lien for labor and materials furnished in the construction of wharves, piers and bulkheads and bridges; chapter 392 of L. 1875, relating to liens of railroad employees; chapter 315 of L. 1878, providing a lien for work performed and materials furnished to contractors in the construction of public works; and chapter 44 of L. 1880, relating to liens on oil

wells. All the material features of the act of 1885 have been retained and applied, as far as possible, to all liens on real property.

In section 2 the terms "improvement," "owner," "real property," "lienor," "contractor," "sub-contractor," "laborer" and "materialman" have been defined. The use of the terms in the present law in place of all that they represent has divested the statute of a great number of superfluous words. The application of the provisions of the act of 1885 to liens on oil and gas wells has changed the law relating to such liens as contained in chapter 440 of L. 1880; mechanics' liens on oil wells are similar to mechanics' liens on real property, and there is no apparent reason why the same provisions should not be applicable thereto.

The revision provides that the notice of lien may be served at any time after the filing thereof, and that until such service has been made the owner is protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of the lien. This provision is new.

The former laws, while recognizing the validity of an assignment of a lien, did not specifically provide for it. Section 14 of the revision authorizes the assignment of a lien, and provides that the assignment shall be filed in the office where the notice of lien assigned is filed. Unless such assignment is filed, a payment made by the owner of the real property subject to the lien assigned, to the original lienor on account thereof, is valid and of full force and effect.

In section 16 it is provided that the lien shall cease at the expiration of one year after the filing of the notice, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record, or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed. Under the former laws the notice of pendency was only required where the action was brought in a court of record.

These are the principal changes relating to the creation of a mechanics' lien which are made in this revision.

Article 2 relates to the creation of liens against vessels, and is a re-enactment of the substantive part of chapter 482 of the Laws of 1862.

Liens on monuments, gravestones and cemetery structures are considered in article 3. Several changes are made, mainly for the purpose of disposing of the constitutional objections to the former law. By chapter 543 of the Laws of 1888 the notice of lien on monuments, gravestones and cemetery structures was given by the superintendent of the cemetery or burial ground. That law contained no provision for the determination of the amount of the claim due on account of such monument, gravestone or other structure. The

result was that the property might be taken without notice to the owner of the monument, etc., without a judicial determination of the issue, and therefore without "*due process of law*." As the law now stands, the notice must be served upon the owner by the lienor, and the action must be had in a court of competent jurisdiction to determine the amount and validity of the lien.

Article 4 is a re-enactment of chapter 738 of the Laws of 1896, without material change, and creates a lien on sandstone, granite, bluestone or marble in favor of a person employed thereon in a quarry, yard or dock.

Article 5 is a re-enactment of chapter 458 of the Laws of 1887, by which a lien was created upon a mare and its foal for services of a stallion in favor of the owner thereof. The present law does not materially modify the former law.

Article 6 contains a revision of all the present statutes relating to liens of inn-keepers, factors, warehousemen, livery-stable keepers and agisters. Section 70 declares the common law lien of an artisan for services rendered in the manufacture, repair or alteration of personal property. Section 71 provides for the creation of liens of hotel, inn, boarding-house and lodging-house keepers. Liens of inn-keepers have never before been specifically declared by statute in this State. Chapter 253 of the Laws of 1894 recognized the inn-keepers' lien and extended it to the property of boarders at inns or hotels. All the present statutory law relative to such liens is re-enacted in this section, without change.

In article 7 a method of enforcement of a lien on personal property by a sale of the property, if legally in the possession of a lienor, is provided. The right of sale of personal property to realize the amount of a lien thereon is recognized at common law, where such lien is dependent upon the possession of the property. There has been no previous statute in this State regulating the enforcement of such lien by the sale of the property, except as contained in chapter 530 of the Laws of 1879, relating to the sale of property in the possession of inn or hotel-keepers to satisfy a lien, and in chapter 336 of the Laws of 1879, authorizing warehousemen to sell at public sale property in their possession upon which they have a lien. All the former statutes relating to mortgages on chattels and contracts for the conditional sale thereof are included in articles 8 and 9 of this revision.

All parts of acts relating to mechanics' liens on real property and vessels which prescribe the procedure for the enforcement of such liens are contained in an amendment to the Code of Civil Procedure, which inserts two titles in chapter 22 thereof. There has been no change made in the method of enforcing a mechanic's lien on real property. The procedure for the enforcement of a lien on vessels has been somewhat modified. Under the former law the enforcement was by a

summary sale of the vessel without the judicial determination of the validity of the lien. Such sale could be prevented by the execution of an undertaking, and thereupon the action was transferred from the vessel to the undertaking. In such action the lien could be contested. The theory of that procedure was that a failure on the part of the owner or other person interested therein to give an undertaking was an admission of the validity of the lien. Under the revision the right is given to contest the lien before the sale takes place. It is provided that an order to show cause shall issue from the justice granting the warrant, directed to the owner or other persons interested, requiring them to appear before him and show why the vessel seized by virtue of the warrant should not be sold. Upon the return of such order, after due service thereof, the claim of the lienor may be contested by any person interested in the vessel. After the hearing of the questions raised, and a determination of the validity of the lien, an order of sale may be granted. The provisions of the former law regulating the distribution of the proceeds of the sale are retained, as are also the provisions relating to a discharge of the warrant by an undertaking to the owner or other person interested in the vessel. The code amendments, together with the Lien law, are a revision of all the laws relating to liens and their enforcement.

#### THE VILLAGE LAW.

The Village law is a complete revision of all the general laws of the State relating to villages, and is the most important administrative act presented to the legislature this year by the Statutory Revision Commission. It furnishes a complete scheme of government for 289 villages now subject to either the general law of 1847 or of 1870, and is applicable to 125 villages having special charters, in so far as it is not inconsistent with their charters. The population of municipalities subject to its provisions is between eight and nine hundred thousand. The law is divided into fourteen articles, as follows: Incorporation; officers and elections; general duties and compensation of officers; finances; streets, sidewalks and public grounds; the police department; the fire department; water; light; sewers; cemeteries; re-incorporation under this chapter; miscellaneous provisions; effect of chapter; repeal. Many changes are made, among which the following are perhaps the most important: A new plan for the incorporation of villages is provided by article 1 whereby all questions relating to the size of the territory, the requisite population and other matters of substance are settled before an election is held to determine upon incorporation. Villages are classified into four classes, based upon population, as follows: First class, containing a population of 5,000 or more; second class, 3,000 and less than 5,000; third class, 1,000 and less than 3,000, and fourth class,



less than 1,000. A person is not qualified to vote upon a proposition, unless he or his wife is the owner of property assessed upon the last preceding assessment-roll; an official year is fixed by the bill, ending with the 31st day of March; the annual election in all general villages is to be held on the third Tuesday in March, unless a town meeting is held on such day when it is to be held on the Wednesday following the third Tuesday in March; each village is to have an even number of trustees, so that, with the president, the board of trustees will always consist of an odd number of members; the election of trustees by wards is only authorized in villages of the first class; each village is authorized to have a separate board of fire, water, light, sewer, or cemetery commissioners, or a municipal board possessing the powers of two or more of such boards, and if no separate or municipal board is appointed, the board of trustees possesses all its powers; many other additional powers are conferred upon the board of trustees; village finances are placed upon a business-like basis; separate funds are established for the various departments; a village may determine not to impose a poll tax; a village of the third or fourth class may determine to adopt the town roll as a basis of assessment, and taxes and local assessments are made a lien upon the property; no specific limitations are fixed as to the amount of taxes authorized to be raised, except as a per cent. of the assessed valuation of the taxable property of the village; a new, and, it is believed, a simpler, plan for the improvement of streets is substituted for the provisions of the law of 1870, which had been declared unconstitutional; an enumeration is required to be taken in each village in 1898, and in each fourth year thereafter; women are authorized to institute proceedings and take appeals; a simple proceeding is provided for the reincorporation under the Village law of villages now governed by special charters; and all general laws relating to villages are repealed.

#### THE NAVIGATION LAW.

The Navigation law, constituting chapter 30 of the general laws, is a complete codification of the general laws of the State relating to the subject of navigation. It is divided into six articles, covering the following subjects: First, general provisions; second, Hudson River navigation; third, other waters of the State; fourth, port of Albany; fifth, rivers and streams as public highways; sixth, laws repealed, when to take effect.

Article 1 embraces 29 sections, most of which are new, and provide for the following subjects: Sections 3 and 4 relate to the duty of the superintendent of public works in the administration of the law, including the appointment and removal of inspectors. Sections 5-8 prescribe the duties of the inspectors in making the examination of the hulls of vessels and tests of their boilers, and the issuing

of certificates of inspection, and also prescribe the number of passengers a licensed vessel may carry. Sections 9 and 10 prescribe the manner in which the vessels shall be constructed so as to guard against loss of life by fire, and the keeping unobstructed the stairways and gangways of all passenger vessels. Section 11 provides for a system of sailing rules to be observed by all vessels navigating the inland waters of the State. Section 13 provides that all steam vessels licensed to carry 100 passengers or more shall be provided with a good steam fire pump. Section 15 prescribes the kind and number of life preservers every passenger vessel shall carry. Section 16 provides for a penalty for the unlawful interference with the safety-valve of a steam vessel, and, in addition thereto, § 359a of the Penal Code makes such a violation a misdemeanor. Section 17 provides for the licensing of persons employed as master, pilot or engineer on board of a steam vessel or a vessel propelled by machinery carrying passengers for hire or towing for hire. Section 29 states what vessels must comply with the provisions of article 1. Article 2 relates to the navigation of the Hudson River, and re-enacts without change all existing law on that subject. Article 3 relates to the removal of buoys in the Niagara river, and the removal of gravel and sand from the shores of certain waters in the county of Suffolk; to the deposit of dead animals or other offensive matter in the waters of Lake George and the St. Lawrence river; the preventing of ice gorges in the River St. Lawrence, and the deposit of certain substances in the Oswegatchie and St. Regis rivers. Article 4 relates to the port of Albany, and re-enacts without change the substance of the law of 1837, chapter 356, and L. 1866, chapter 374, amending the same. Article 5 relates to the use of rivers and streams as public highways for the purpose of driving and running lumber and logs down the same, and re-enacts without material change the law of 1880, chapter 533, and the acts amendatory thereof. Article 6 relates to the laws repealed and the time of taking effect of the chapter.

#### PERSONAL PROPERTY LAW.

The Personal Property law, constituting chapter 47 of the general laws, re-enacts without substantial change all of the existing provisions of the Revised Statutes and supplemental acts relating to personal property. It is divided into three articles, and covers the following subjects: First, future estates, accumulation of income and trust estates; second, agreements not in writing, without consideration, fraudulent; third, laws repealed, when to take effect.

The Real Property law of 1896, chapter 547, included and repealed the former part of the Revised Statutes relating to estates and trusts in real property, and also included that part of the Statute of Frauds relating to the same, but omitted therefrom

all of the provisions which related solely to personal property which are now included in the Personal Property law. This chapter fitly supplements the Real Property law, and completes the scheme of the revisers in dividing parts of the Revised Statutes into the subjects of real and personal property.

#### THE PARTNERSHIP LAW.

The Partnership law, constituting chapter 51 of the general laws, is a revision of the Limited Partnership law of 1827 and supplemental acts. It is divided into four articles, and covers the following subjects: Article 1, general provisions; article 2, business and partnership names; article 3, limited partnerships; article 4, laws repealed, when to take effect. It re-enacts without change the present law on the subject of limited partnerships.

#### CONTEMPT CASES.

CONTEMPT cases may be interesting, but they are rarely funny. It is a summary proceeding, and a man's liberty is involved as a rule. His purse is threatened as a certainty. The Wisconsin case, decided recently, has brought up the general subject of contempt cases. And there have been some in Chicago that will not soon be forgotten by the older lawyers, and which some of the younger lawyers might profit by reading, says the Chicago Post.

One of the most interesting was that of Wilbur F. Storey, tried in 1875. Mr. Storey was the owner and publisher and also the editor-in-chief of the Chicago Times. He was a combative man, with a habit of saying slashing things in his editorial columns and with a style of journalism that would not be tolerated now anywhere outside of New York, where it is called the "new journalism." He had been indicted by a certain grand jury, and had said some rather tart things of the grand jury as a body and about the private lives of some of its members, and the judge of the Circuit Court fined Mr. Storey for contempt of court.

There was a beautiful fight over the case, but the editor won it, and it was decided that matter published in a newspaper relating to a grand jury, even if it should be libelous, must be treated as an individual affair of the members themselves, and not as an act of which the court could take cognizance.

There is another story back of this contempt case. It is said by one who knew the field thoroughly that Mr. Storey had achieved the ill will of Judge Williams, who presided on the bench, and who made the rule in the case mentioned, by attacking him for another of his acts. It is said the judge paid no attention to the published articles that affected him, at the time of their publication. But as soon as he had a chance—and this incident

of accusing the grand jury was the chance desired—he paid his respects to the editor. All this appears in the 79th Illinois, page 45.

There was another rather celebrated contempt case reported in 30 Appellate Court Reports, on page 309, which was interesting for more reasons than one.

Sumner C. Welch had been accused on affidavit of having tried to bribe a jury before which was a personal injury case, touching the interest of the Chicago City Railway. A rule was entered against him, citing him to show cause. It was a law proceeding, and under the advice of his counsel Mr. Welch came in and made oath that he was not guilty. He swore that he had not spoken to the jurymen, and did not know him, and fully "purged" himself by denial under oath. The rule of law is that he must in such case have his discharge. But Judge Hawes, who had issued the rule, is said to have declared, when Lawyer C. M. Hardy read the authorities, that if that was the law he would not be guided by it. Welch was sentenced to jail.

He went there for one night. But meantime his lawyer had prepared his case so well that a *superseas* was granted by the appellate court, and Welch was liberated pending a decision by the court of review. Justice Gary wrote the opinion of the appellate court some months later, and reversed the rule in Judge Hawes' court.

A funny phase of the case is that Judge Moran, who was on the appellate bench at the time, concurred in the decision, but added the confession that he had at one time made the same mistake of which Judge Hawes was guilty, and had sent a man to jail in spite of his affidavit of innocence. Judge Moran's confession is about as neat a bit of law writing as there is to be found in the books.

It should be added that there is another way to get at a person accused in such case, and that is, if he shall swear falsely and the fact can be proved, he may be held for perjury and punished on conviction. If it had been a chancery case, witnesses might have been heard, and the accused might himself have been put on the stand, and the court might further have "searched his conscience." But this was a proceeding in law. And there was but one thing to do when the man came in and made affidavit of his innocence. He must have his discharge.

Nothing more remarkable than that case of the Wisconsin judge will be heard of in a long time. A candidate for reelection, he had been opposed by a certain lawyer, an adherent of a rival for the honors of the bench. As is not uncommon in political contests, some phases of the private life of the candidates had been brought into the controversy. It was contended by the opponents of the sitting judge that all they did was within the limits of legitimate question of his fitness for the office of judge. He took another view of it, and fined the

offenders for contempt of court, and sentenced them to thirty days in jail. They went to the Supreme Court and secured a stay pending the final determination of the matter in that tribunal. Then the circuit judge held them for contempt for asserting in their affidavit on which the application for a stay was based that they were unfairly adjudged in the court below. The lower court held that that affidavit constituted a new contempt. The logic of that ruling was that they had a right to ask for a stay, but they committed a new contempt of court in doing so. But the Supreme Court held that they were not guilty of a new contempt in the affidavit, and that they had a right to make the statements and publish the articles questioning the fitness of the judge for reelection. It was a complete defeat—perhaps the most notable in recent record—of a court being rebuked for the intemperate use of the power lodged in a judge; a too great willingness to use his official position for the expression of his private animosities.

Out in Kansas there used to be an editor of a weekly paper whose name need not be mentioned. He had a quarrel with Judge William Campbell of the District Court of that State, and invariably referred to the court as "bilmil." He was so persistent with the warfare that friends of the court often urged the employment of a contempt proceeding. But Judge Campbell let the whole matter go until one Saturday night, when he met the editor in the post-office, unexpectedly, and before he had time to put his emotions under control he had hammered the editor into a state of permanent and lifelong respect.

There is an old story of Tom Marshall, and a fine for contempt. It seems the famous lawyer was arguing a case when he was interrupted by the court with a statement that he had unfairly presented the evidence. Marshall was one of the fairest of men, and one of the most just.

"It's an outrage!" he cried. "The court has no right to tell me I have perverted evidence."

"Record a fine of \$10 against Mr. Marshall for contempt of court, Mr. Clerk," said the judge.

Mr. Marshall promptly borrowed a \$10 bill from one of his brethren of the bar, paid the fine, and then proceeded with his argument as calmly as if he had never been in the least ruffled.

And there is a story about Daniel W. Voorhees, formerly United States senator from Indiana. He was a famous advocate in his day, and one of the most striking personalities to be met with in all the west. It is not saying an ill thing of the senator, who died recently, to say that he was slightly given to bombast.

One day he was arguing a case before an Indiana court, and was displeased with a ruling. He expressed himself as astonished that a man should have ever succeeded so far in beguiling

his fellow citizens as to secure their commission to sit on a bench for the trial of causes.

"The court will fine you \$10 for contempt of court, Mr. Voorhees," said the court.

Mr. Voorhees' retort was quick and crushing.

"May it please the court, your honor will have to name a sum far in excess of that if the court wishes to make the fine at all commensurate with the degree of contempt I feel."

To be a perfect story it should stop right there. But in the cause of truth it must be recorded that Mr. Voorhees later apologized, and the fine was remitted.

There is a story of a quarrel that ran on for years between two lawyers in a Pennsylvania rural county. One bore the common name of Brown. The other signed himself "Wise." The latter was a little given to basking in the smiles of women, and there was a widow named Bramble in the town, who was not precisely in the class with Cæsar's wife, but who was still admitted to the good circles of the place. She was a clever woman and beautiful; and she had so fascinated Lawyer Wise that he paid her fervid court—not dropping her even when the matrons of the town found they could not well receive her any more, because of the persistent talk against her. What aggravated the case was that Mrs. Bramble was as regardless of the sentiment of the town as she was of the wind's direction.

One day Brown, the lawyer with whom the gay Lothario was perpetually quarreling, wrote and printed in the local paper the following lines:

There was a man in our town, and he was wondrous Wise.

He jumped into a Bramble bush, although it cost his eyes.

While people were laughing about it the judicial convention came along, and Wise was nominated for the circuit bench. He was elected. And about the first thing he did after taking his official position was to marry the pretty Widow Bramble.

The next morning the following quatrain was found pasted on the bulletin board at the door of the court-house, where notices of sheriff sales and such things were usually posted:

And when he found his eyes were out,

He laughed with might and main,

And picked the pretty Bramble up,

And started on again.

"And for that Brown was fined for contempt of ative of a good joke to pay the fine, and let the whole matter drop.

#### A PLEA FOR DIVORCE REFORM.

THERE is now unfolding in Trenton a case which, aside from its deplorable personal and social complications, presents an unanswerable argument for the adoption of a national law as to

divorces, says the New York Mail and Express. An outline of the melancholy affair is indispensable to a correct understanding of the lesson which it teaches.

A man of great prominence in the business and political affairs of New Jersey deserted his wife and family, and went to Oklahoma, where he procured a divorce in the territorial courts, which virtually sell decrees to any person who will pay the cash price for them. The wife of one of his confidential employes did the same thing about the same time. The two then returned to New Jersey and contracted a marriage, and are now living in Trenton in the mansion formerly occupied by the man and his first wife. The latter, deserted and dishonored for no known reason, is living in a neighboring cottage with her children, where they are involuntary witnesses of the shameless perfidy which has wrecked their home and brought scandal upon two households.

It is needless to go into the shocking details of this brazen conspiracy against social order and the sacredness of the marriage relation. They are revolting, cruel and outrageous, but they are overshadowed by another aspect of the case, which concerns the welfare of the whole community. The man who figures in this affair is, nominally at least, a person of large means. By law and justice his first wife is entitled to certain rights of dower in his estate. Her interests are superior to those of any other creditor, and in liquidation under ordinary processes her claims would be preferred to the exclusion of others. The question, therefore, is whether the courts of New Jersey will destroy these rights and deprive the deserted wife of her vested interests by affirming the legality of the Oklahoma divorce. To do that would declare in effect that the property rights of married women in New Jersey could be put to destruction by a divorce court in a distant territory. It would punish the deserted wife for the sins of the faithless husband, and render mothers and children powerless to protect themselves and their property from conspiracy and robbery.

This is the one point in the whole scandalous affair in Trenton which excuses reference to it in the columns of a reputable newspaper. If the Oklahoma divorce is upheld by the courts of New Jersey it will mean that married women have no property rights in the estates of their husbands which the law is bound to respect. We do not believe it will be upheld. The principle of it is wicked, unjust and repugnant to every sense of fairness and honesty.

But the whole case forcibly emphasizes the inconsistencies, the looseness and the dangerous possibilities inherent in our present complex system of divorce laws. These evils could all be done away with by the adoption of a uniform code of National law to regulate divorce proceedings.

With such a system the rightful interests of all citizens would be amply protected, injury by collusion or conspiracy would be made difficult, if not impossible, and cases like that in Trenton, in which a deserted wife is threatened with the loss of her dower because of her husband's villainy, would be unknown.

#### SOME OLD LAW BOOKS.

LAW books are certainly among the things that have kept pace with the population. It is especially true of legal treatises that of the making of them there is no end; and there is scarcely a lawyer who would not add that much study of them is a weariness of the flesh. Although law books were amongst the earliest works that issued from the printing press in England—the statutes of Henry VII. were printed by Caxton himself—yet Coke, writing some 250 years ago, could not count more than fifteen treatises on the law. Now the libraries in the inns are scarcely less spacious than the dining halls, and the text-books, to say nothing of the reports and statutes, are to be numbered by their thousands. Copies of all the ancient works mentioned by Sir Edward Coke may be found in the libraries of the inns, and, though most formidable in appearance, some of them possess an interest for the general reader as well as the legal student. To Ranulph de Granville, who was chief justice in the reign of Henry II., belongs the distinction of writing the first treatise on the law. He combined with the learning of the lawyer the valor of the soldier, and he is known to fame not only as the father of legal literature in England, but also as the captor of the King of Scots at the battle of Alnwick. Among the most precious volumes in Lincoln's Inn Library is a MS. copy of his treatise more than 500 years old. A peculiarity of Britton's work, which is believed to have been written under the direction of Edward I., is that the words are put into the mouth of the king. This treatise was written in French, in which language law books continued to be written for nearly four centuries. During the same reign the commentary on English law called "Fleta" was written. Nothing is known of the author except that he commenced and completed the work while he was confined in the Fleet Prison, a fact which explains its curious title. Littleton, who bears among Cook's fifteen authors the most familiar name, was a judge of Common Pleas in the time of Edward IV. His celebrated work, the first edition of which was printed in 1481, is devoted to an explanation of the law as to the tenure of land. Its fame has, of course, been largely preserved by the remarkable commentary of Coke, which, according to the enthusiastic and eloquent Fuller, will be admired "by judicious posterity, while Fame has a trumpet left her and any breath to blow therein."

A modern legal writer, who arranged his work in the form of a dialogue, would be regarded as frivolous. Yet this was the form in which two of the old jurists cast their work. Fortescue, who wrote his treatise in the reign of Henry VI., while in exile in France with the Prince of Wales and other members of the Lancastrian party, representing himself as conversing with the young prince on the laws of England, and proving their superiority to those of other lands. "Doctor and Student," which was written early in the sixteenth century by Christopher Saint Germain, of the Inner Temple, is a series of dialogues between "A Doctor of Divinity and a Student in the Laws of England, concerning the Grounds of those Laws." Perhaps the most interesting fact about this quaint production is that it was cited as an authority by the judges at the trial of Hampden. On a fly-leaf of the Lincoln's Inn copy of Fitzherbert's "Grand Abridgment of the Law" is the following curious inscription: "Of your charity pray for the soul of Robert Crawley, sometimes donor of this book, which is now worm's meat, as another day shall you be that now are full lustye, that remember, good Christian brother. Farewell in the Lord. 1534." The first edition was printed in 1516, and this is the date in the copy in Lincoln's Inn Library, which is singularly rich in ancient volumes. It would appear that the producers of law books in Fitzherbert's days were gifted with a greater love for art than is possessed by the authors of modern law books. Some of their title pages were adorned by the most elaborate designs. The first part of "Fitzherbert" contains a woodcut of the king on his throne, whilst the second is ornamented by a wonderful collection of the royal arms, a dragon and a greyhound, two angels, some scrolls, and a rose. It would be difficult for an illustrated law book to command the serious attention of lawyers in these days, even though its artistic embellishments came from Sir Frank Lockwood.

After speaking of such writers as Bracton and Littleton, one hesitates to describe Blackstone's Commentaries as an old law book. It was first published at Oxford 137 years ago. But legislation moves so fast that, to glance at an early edition of the famous work, is to believe that it is older than it actually is. No law book has ever enjoyed so great a measure of popularity. As many as twenty-one editions were published before any alteration was made in Blackstone's text, and innumerable attempts have since been made to adapt it to the ever-changing law. How far these endeavors have been successful may be judged from the fact that the value of the Commentaries is now solely historical. As was once said, "The cannonade which has been playing on the Commentaries, exposing, as they do, so wide a front, has rendered them, as they were left by their author, a mere wreck." Not a little of their popularity was due

to the impressive style in which they were written. Never in a law book has lucidity been wedded so happily to felicity. It is clear, notwithstanding the complaints he addressed to his fellow-tenant in Brick-court, that Blackstone's literary powers were unaffected by the boisterous sounds in Goldsmith's rooms overhead. The basis of the Commentaries was a series of lectures which Blackstone delivered at Oxford, and this may partly account for their sonorous note. Like most of the eminent legal writers of the old school, Sir William Blackstone was a judge. Here, again, a change may be observed. The bench is no longer recruited from the ranks of text-writers. Judges whose stepping-stones to fame were books are still to be found in the courts. Lord Justice Lindley, for instance, owes his judicial seat largely to his standard work on partnerships. But there is now a strong tendency to exclude text-book writers from the active practice of the law, to make them a separate class of superior persons whose refined minds ought not to be devoted to anything less noble than the theory of the law. Among the first six leaders of the bar, there is not one with any reputation as an author.

During the past thirty years the publication of leading cases has been under the control of a council representative of both branches of the profession. The Law Reports have not, however, caused such old-established reports as the Law Journal Reports to disappear. The earliest reports in the libraries of the inns were issued in the reign of Edward II. Until the time of Henry VIII. the business of reporting was in the hands of lawyers, who were paid by the crown. Their reports, which were published annually, are known as "Year Books." These are among the most quaint and valuable volumes in the libraries. To modern eyes, it is true, neither their bulk nor price is imposing. At the end of the Tenth Book of Edward IV.'s reign, which consists of forty pages, are these words: "The price of thys boke is iiiid. unbounde." The ordinary reader, who looked for entertainment in these time-worn pages would suffer some disappointment, but it is said that Sergeant Maynard had "such a relish of the Year Books that he carried one in his coach to divert his time in travel, and chose it before any comedy." After the crown ceased to supply the courts with reporters, the business of preserving the important decisions of judges was undertaken by a succession of eminent lawyers, among the number being Coke and Plowden. Law reporters grew so numerous after the Restoration that a diminution in their number was regarded as imperative, and an act was passed prohibiting the publication of law books without the license of the judges. The rapid increase of reporters had, however, no peculiar relation to the restoration of the Stuarts, for Bulstrode, the foremost reporter during the Commonwealth, alluded to the multiplicity of reports in these picturesque

terms: "Of late we have found so many wandering and masterless reports, like the soldiers of Cadmus, daily rising up and jostling each other, that our learned judges have been forced to provide against their multiplicity by disallowing of some posthumous reports, well considering that, as laws are the anchors of the republic, so the reports are as anchors of laws, and, therefore, ought to be well weighed before being put out."—London Globe.

### NEW YORK COURT OF APPEALS ABSTRACTS.

#### NEGLIGENCE — ELECTRIC STREET RAILROAD ACCIDENT — MOTORMAN CONFRONTED WITH SUDDEN EMERGENCY.

A railway company is not responsible for an accident resulting from an error of judgment on the part of a motorman during an emergency brought about by the carelessness of the plaintiff's intestate. In such a case where the negligence of the deceased, in the first instance, is fully established, and the subsequent carelessness of the motorman resulting in the accident depends upon doubtful and conflicting evidence, the defendant is entitled to have the jury fully and explicitly instructed as to the rule of liability above stated, and failure on the part of the trial judge to give such instruction upon request is reversible error.

(Frank Bittner, as Adm'r, etc., respondent, v. The Crosstown Street Railway Co. of Buffalo, appellant. Decided in May, 1897. Opinion by Gray, J.; all concur.)

#### EVIDENCE — EXECUTOR NOT COMPETENT WITNESS TO PROVE CONVERSATION WITH DECEASED.

Where objection is made by residuary legatees to an item of payment for which the executor claims credit upon his accounting, the executor is not a competent witness to prove a conversation had by him with the deceased, wherein the deceased had stated, in effect, that the claim was a proper one and should be paid (Code, § 829).

(Decided in May, 1897. In re Judicial Settlement of the accounts of Alfred B. Smith and Frederick W. Pugsley, as Executors, etc., of Margaret J. Myers, Deceased. Opinion per Curiam.)

#### NOTE GIVEN TO BANK WITHOUT CONSIDERATION — AGREEMENT WITH PRESIDENT THAT MAKER SHOULD NOT BE HELD LIABLE — RECEIVER OF BANK NOT PERMITTED TO ENFORCE PAYMENT.

Where a note is given to a bank upon a verbal agreement entered into at the time between the maker and the president of the bank, to the effect that the maker should not be held on the note and that he was to assume no obligation in the transaction, and where no consideration was in fact received by him, payment of the note cannot be enforced by a receiver of the bank against the maker.

(Decided in May, 1897. Francis Higgins, Receiver, etc., appellant, v. John J. Ridgway, respondent. Opinion by Martin, J.)

#### TRANSFER OF PERSONAL PROPERTY BY MORTGAGOR TO MORTGAGEE — VESTED BENEFICIAL INTEREST OF CESTUI QUE TRUST.

A transfer of personal property made by the mortgagor to the mortgagee, before the creditors of the mortgagor have acquired a lien thereon, vests in the mortgagee a valid title to the property notwithstanding the mortgage itself was void at the time the transfer was made.

The vested beneficial interests of a *cestui que trust* cannot be impaired or destroyed upon the theory that the trustee in his efforts in behalf of the trust estate has made an election of a remedy inconsistent with the one under which the interests were first secured.

(Decided in May, 1897. Bowdish, as Assignee, etc., respondent, v. Esek Page and Others, appellants. Opinion by Gray, J.)

### Legal Laughs.

Judge Russell M. Wing, of the Kent College of Law, tells a good story, according to an exchange. A country justice had been elected but a few days, when a young lawyer rushed in and demanded a *capias*. Now, that justice did not know a *capias* from a police cell, but he disliked to admit his ignorance. So he said:

"Now, see here, my friend. You are a young lawyer, and, I fear, lack experience. I would advise you not to be too hasty. Don't be in a hurry. Wait twenty-four hours, and then, if you think best, come to me and I will give you a *capias*."

The young lawyer agreed and went away. The justice spent the remainder of the day getting acquainted with the writ called *capias*. When the limb of the law appeared the next morning, the court felt himself qualified to issue *capiases* by the bushel.

Before he could speak, the young lawyer said:

"Mr. Justice, you were right; I was too hasty. I have that matter fixed up all right, and do not need a *capias*. I have come to thank you for the good advice, and also have brought you the \$2 fee you would have received for the *capias*, as I don't want you to lose anything by your good deed."

He went away believing the justice to be a paragon of good sense and legal lore.

Gen. Butler was riding to town in a Cambridge car. He was busily engaged in reading a book of unquestioned legal appearance, when James Russell Lowell entered the car.

"Ah, general," was his greeting; "are you reading law?"

"No," was the reply; "only Supreme Court decisions."

### Legal Notes of Pertinence.

Mrs. Mary Isabel Tracy, formerly of Albany and Syracuse, and now living in Chicago, was awarded \$200 a month alimony by Supreme Court, New York city, Justice Andrews, in a proceeding against her former husband, Henry Partridge Tracy, coffee broker in Chicago. The odd thing about it is that Mrs. Tracy obtained a divorce 19 years ago. She had plenty of money then and did not ask alimony. Now she avers that she is in want.

According to a despatch to the London Times from Melbourne, all four of the daily newspapers in Sydney have been fined £100 each for contempt of court, consisting in improper comment upon the trial of Frank Butler, the Australian bush murderer, which is now pending.

The Supreme Court of Massachusetts decides that a county commissioner is not an officer of the Commonwealth, within the meaning of the Constitution, c. 1, § 2, art. 8, and is not subject to impeachment.

The burden of proving defendant's sanity, in a trial for murder, is held, in *Ford v. State* ([Miss.], 35 L. R. A. 117), to rest upon the State; but if there is no evidence on the subject it may be sustained by the presumption that all men are sane, while if there is evidence to rebut the presumption, the proof of sanity must be made beyond a reasonable doubt. A note to this case reviews the numerous authorities on the presumption of a continuance of insanity.

The old Cincinnati Law School, and the new Law School of the Cincinnati University will be consolidated. At present the college building is not exempted from taxation, and the trustees pay out some \$4,000 a year in taxes on it. If it is transferred to the university trustees it will be exempt from taxation, in that it will belong to the city. It is calculated that with the income which will be derived from the building that is to be erected, one of the greatest law schools in the country could be maintained. The Cincinnati Law School, the oldest in the west, it is understood will close its glorious career of half a century with the present term.

It may not be generally known that there are two States in the Union that have no chattel mortgage laws. They are Pennsylvania and Louisiana. Pennsylvania is now trying to get such a law on its statute books, not to oppress debtors, but to facilitate business by making it safe to sell tools, machinery and other portable property to persons who cannot pay cash for them. Under the present arrangement, security cannot be given in the form of a mortgage on these or any other chattels. A bill to remedy this state of affairs is now before the legislature, and there seems to be a fair prospect of its passage.

### MORE KIND WORDS OF CONTEMPORARIES.

THE ALBANY LAW JOURNAL celebrates its new editorial and business management by appearing in improved guise. An excellent portrait of Hon. Rufus W. Peckham, Associate Justice of the Supreme Court, accompanies the issue of May 1. Current legal points and comment of deepest interest to the fraternity are served in such a way as to make it the most complete periodical of its class now published. — Boston Globe.

THE ALBANY LAW JOURNAL, which has had an uninterrupted weekly publication for more than a quarter of a century, appeared in an enlarged and much improved form in its issue of May 1. It is now under new editorial and business management, and its conductors promise that the good record of its past shall be improved upon in the future, and every effort will be put forth to make each new issue brighter and better than the preceding one. — The Newspaper Maker.

THE ALBANY LAW JOURNAL comes to us in a new and handsome form. It has been improved typographically and materially, and will certainly gain in circulation as it has in usefulness. THE ALBANY LAW JOURNAL is edited by most competent editors, and should be found on every intelligent lawyer's desk in the country. Good luck to you, E. C. — Trade Mark Record.

THE ALBANY LAW JOURNAL in its last few numbers comes to us in enlarged form, and is more interesting and valuable than ever. The JOURNAL possesses many valuable features which address themselves to the legal fraternity with force, and is held in high esteem for its character as sterling periodical. — Mercantile Review, Buffalo.

The following letter, which came in the mail, on Monday last, we take the liberty to print, in order to indicate, in some degree, how THE ALBANY LAW JOURNAL, under present management, is regarded by high authority:

"SUPREME COURT CONSULTATION ROOM.

"JACKSON, MISS., May 21, '97.

"*Albany Law Journal Co., Albany, N. Y.:*

"GENTLEMEN — Through the courtesy of my friend, Judge J. A. P. Campbell, I have read three copies of your LAW JOURNAL, the numbers for May 1st, 8th and 15th. I have not, in many years, read anything comparable to the article of Mr. Van Winkle, on "Imprisonment for Debt." He has all our literature, and biographies of all our literature-makers, in perfect command. Not this only have I enjoyed, for the JOURNAL sparkles with legal, as well as literary brightness. I have accordingly directed our librarian, Mrs. Helen D. Bell, to subscribe for your journal for our library.

Very truly yours,

A. H. WHITFIELD,  
Asso. Judge Sup. Court.

### English Notes.

The English Court of Queen's Bench has just decided that £500 is a fair price for procuring a peer as a director in a stock company. The Earl of Westmoreland was the peer in question. Mr. Justice Day said in giving judgment: "I confess I do not understand this buying and selling of peers or any one else. It appears, however, to be a practice, and the plaintiff, having completed his part of the bargain, is entitled to judgment."

The question is still being asked, whether nothing is to be done by the bar in celebration of the completion of the sixtieth year of the queen's reign. The Law Journal remarks that an effort might be made in behalf of the Barristers' Benevolent Association, the condition of which is anything but prosperous. The erection of a statue to the queen in the Central Hall, at the Royal Courts of Justice, is also suggested as another appropriate method of celebrating the Diamond Jubilee.

A further decline in the popularity of Lincoln's Inn is the most striking feature of the list of calls this term. Of the forty-nine students who became barristers on Wednesday—a number considerably below the average—twenty-six, or more than half, belong to the Inner Temple, eleven to the Middle Temple, six to Lincoln's Inn, and a like number to Gray's Inn.

In an action tried before the lord chief justice the other day, in which a railway company was sued for damages for personal injuries, the chief medical witness stated that the plaintiff's nervous system was injured, and would probably never improve. "Isn't it true that litigation is bad for the nerves?" asked Mr. Darling, Q. C., in cross-examination. The doctor admitted that it was. "And it is probable that his nerves will get stronger after this litigation is over?" The doctor was less ready to admit this. The lord chief justice came to his assistance by suggesting that the answer would depend upon the verdict of the jury. "So, doctor, you prescribe damages as a cure?" was Mr. Darling's final question, and the answer was a smile. — London Globe.

At the suggestion of a number of prominent university oarsmen, an invitation, says the Times, has been given to Lord Esher (Master of the Rolls), Lord Macnaghten, Lord Justice Smith, and Lord Justice Chitty, to a dinner in celebration of the remarkable fact that at the present time no fewer than four appellate judges, including one-half of the Court of Appeal, are old rowing Blues. The invitation has been cordially accepted by the four distinguished guests, and the dinner will take place at the Trocadero restaurant on Monday, May 31.

May 15th was the fiftieth anniversary of the death of Daniel O'Connell, the famous Irish politician and lawyer. It is not, perhaps, generally known that Mr. O'Connell was, on more than one

occasion, pressed to accept judicial office, which he firmly declined, on the ground of his close connection with politics rendering his promotion to the bench unwise.

### Notes of Recent English Cases.

Fishery — License to Fish — Grantees of Exclusive Right to Fish With Rod and Line — Pollution of River by Stranger — Injury to Spawning Beds — Right of Action — Damages. — An action was brought by the trustees of a piscatorial society, having an exclusive right of fishing with rod and line in part of a certain river by grant from the freeholder, against the proprietor of certain gravel works. The plaintiffs claimed to restrain the defendant from polluting the river to the prejudice of and injury and damage to the plaintiffs and their fisheries, and more especially from polluting the river by discharging into it thick and yellow sand, and from doing any other thing to injure the fish or fishing or damage the plaintiffs or their fisheries. The plaintiffs also claimed damages for the injury already done. The defendant had ceased to discharge the matter into the river before the trial of the action, and the case was argued on the question of damages. The defendant contended, amongst other things, that the plaintiffs, as mere licensees of the freeholder, had no right of action against the defendant; that a right to fish with rod and line alone was not a several fishery as known to the law, but a mere license to catch and carry away such fish—in other words, such *fera natura*—as the licensees happened to find in the river; and that even if the discharge of matter into the stream by the defendant had diminished the number of fish by driving them away or by injuring the spawning beds, the right of action belonged not to the plaintiffs, but to the owner of the bed of the river. It was decided by Kekewich, J. (102 L. T. 155), that, assuming the plaintiffs to be only licensees or grantees for value of an exclusive right of fishing with rod and line, there was no reason why they should not sue a third person for any interference with that right; and that although there was no authority produced exactly in point, the interference caused by the pollution constituted a good cause of action in the plaintiffs. His lordship accordingly assessed the damage at £150, and gave judgment for the plaintiffs for that amount, and the costs of the action. The defendant appealed. *Held*, that the defendant had damnified the plaintiffs to the extent of driving away the fish from the river; that that was not *damnum absque injuria*; and that the plaintiffs were entitled to damages for the injury done to them through the interference by the defendant with their rights. Decision of Kekewich, J., affirmed. (*Fitzgerald v. Fairbank*, Ct. of Appeals No. 2, L. T., May 15, 1897.)



**Notes of Recent American Decisions.**

**Mechanics' Liens -- Claim of Lien.** — One employed on salary to do such work as may be required, and doing lienable and non-lienable work indiscriminately, is not entitled to a mechanic's lien. (*Getty v. Ames* [Oreg.], 48 Pac. Rep. 355.)

**Mortgage — Consideration.** — Where a mortgage is given to secure a pre-existing debt of a third person to the mortgagee, as well as a present loan by the mortgagee, it will be presumed, in the absence of anything to the contrary, that the new loan is made for the purpose of obtaining the security of the mortgage for the antecedent debt; so that the new loan is sufficient consideration to support the entire mortgage. (*Mayberry v. Nichol* [Tenn.], 39 S. W. Rep. 881.)

**Municipal Corporations — Improvements — Special Tax.** — A contractor who has made improvements for a city, which by law are to be paid for by a tax on contiguous property benefited, is not entitled to the enforcement of a tax beyond the benefits accruing to the property on which it is levied, and his rights are not abridged by an amendment of the law, changing the procedure by which the amount of such benefits is determined. (*Palmer v. City of Danville* [Ill.], 46 N. E. Rep. 629.)

**Officers — Quo Warranto.** — A person who is the incumbent of an office, and is entitled to hold it until a legal successor is duly qualified, has the right to test by *quo warranto* the eligibility of one taking possession of the office under claim of election thereto. (*Roane v. Matthews* [Miss.], 21 South. Rep. 665.)

**Principal and Agent — Husband and Wife.** — A husband may act as the agent of his wife, and the fact of his agency, while not to be presumed from the marital relation alone, may be proved as in other cases by the acts and words of the wife which show previous authorization or subsequent ratification of his acts as her agent. (*Elliott v. Bodine* [N. J.], 36 Atl. Rep. 1038.)

**Public Lands — Cutting Timber.** — Lands lying beyond the tier of townships adjoining those through which the right of way of the Denver & Rio Grande Railroad extends are not "adjacent," within the act of congress allowing the company to take timber for construction from public lands "adjacent" to the right of way. (*United States v. Bachelder* [N. Mex.], 48 Pac. Rep. 310.)

**Sales — Fraud — Rescission.** — A purchase of goods with intent at the time not to pay for them is such a fraud as entitles the seller to rescind, though there were no false representations. (*Reager v. Kendall* [Ky.], 39 S. W. Rep. 257.)

**Sales — Waiver of Defects.** — One who buys coal for future delivery, and receives it with knowledge that it is not of the quality sold, or could by inspection on delivery discover its quality, cannot

afterwards claim a deduction in the price. (*Bannon v. St. Bernard Coal Co.* [Ky.], 39 S. W. Rep. 252.)

**New Books and New Editions.**

**Leading in Law and Curious in Court.** By Benjamin F. Burnham, author of "The Life of Lives," *Divers Digests*, etc. New York and Albany: Banks & Brothers. 1896.

In this volume Mr. Burnham has not only given to the busy professional reader a vacation *vacuum*, but, as he remarks in his preface, a thesaurus for the diversion and instruction of lay readers. The book, which is the result of a vast amount of research, and of much time, distributed over many years, devoted to the collection of suitable materials for its enrichment, is filled, from cover to cover, with interesting matter, culled by a student and scholar, whose industry and erudition are apparent throughout its pages. Of the three thousand or more cases cited, the author has carefully examined each for himself. Working in a field practically limitless, much, if not all, depended upon the care and judgment exercised in selecting. In this Mr. Burnham has been highly successful. There is hardly a dull page in the 1,368 making up the volume, which would constitute a valuable addition to any library. It contains, indeed, a veritable mine of interesting reading which cannot fail to prove a source of constant delight to the delver after useful information, for there are innumerable pearls and few pebbles. Mr. Burnham is to be heartily congratulated upon having produced so unique and valuable a work.

**General Digest, American and English.** Vol. II. New series. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1897.

This volume of 1,329 pages covers all the reported decisions of all the courts in the United States, of the higher courts of England, and the Supreme Court of Canada, with many important cases from other Canadian courts. It includes all officially reported cases, and all cases not to be officially reported which were first published between July 1, 1896, and January 1, 1897. The excellent features of this work, heretofore referred to in these columns, need no further commendation. It is concededly one of the most complete, as well as practical, of all digests. The editors are men of large and varied experience, who, instead of taking head-notes as they find them, state each proposition of law from the opinion itself, clearly and concisely. To thus combine accuracy with condensed form of statement is exceedingly difficult. The extent to which this is accomplished in the General Digest is really remarkable, and one would hardly be able to suggest how or where it could be improved.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JUNE 5, 1897.

### Current Topics.

THE rather unexpected passage by the senate of the United States of the Morgan resolution recognizing the belligerency of the Cubans has made pertinent, if not important, the question as to what effect the passage of this resolution by both branches of congress, and its signature by the president, would have. The advantage to the Cubans of such recognition is clear, since it would give the struggling patriots not only moral support and a better position in the eyes of the world, but would allow them to begin naval operations without the liability of being considered pirates under international law. The passage of the belligerency resolutions would also have an important effect upon the United States, one of which would be to relieve the Spanish government from liability to us for damages done to American property in Cuba by the insurgent or rebel forces, though, of course, Spain would still be liable to us, after the recognition of belligerency, as she is now, for damages to American property committed by her troops. Another change which might prove very vexatious to our merchant marine would be the conferring upon Spain of the right to visit and search merchant vessels on the high seas, though this right might be limited in some respects by existing treaty with Spain. In any event, however, the possibility of friction arising between the United States and Spain on account of searches of vessels should be

taken into account. There is, perhaps, no need to anticipate further as to the possible workings of a belligerency resolution for the probability of its passage by the house of representatives seems decidedly remote. Diplomacy is likely to have full opportunity to do its perfect work.

Have the denizens of populous communities any rights which the so-called Salvation Army is bound to respect? is a question which a jury in Judge Newburger's court, in New York city, has just decided in the affirmative. The aforesaid jury found Commander Booth-Tucker, of the Army, guilty of maintaining a disorderly house at the big barracks in West Fourteenth street. Complaints, loud and frequent, had been made by residents in the neighborhood of the barracks, who alleged that they were greatly annoyed and disturbed by the singing and band-playing at the Salvation Army meetings, especially those that lasted all night. Accounts of eye witnesses and ear witnesses of the orgies which were of nightly, one might say all-nightly, occurrence at the headquarters, agreed that they were soul-harrowing, sleep-annihilating affairs. One of the aggrieved persons, a real estate broker, testified that on one occasion when he found himself unable to sleep, he visited the barracks and discovered that there were 1,700 persons gathered there, all of them shouting and 250 of them performing on various instruments. They varied the exercises with religious songs to the tunes of "We'll Never Get Drunk Any More," "The Sunshine of Paradise Alley," and other popular worldly ditties. The racket is described as having been particularly awful "on the night when they burned the devil;" on another night when they "dedicated the heavenly babe, Herbert Booth Lincoln Tucker;" and on a third night when they swung out a sign which read: "Two Nights to be Spent With God—A Grand Hallelujah Eye-Opener." On none of these nights, according to this witness, was sleep possible for residents of the neighborhood. For the defense the Salvation

Army people testified, denying that any musical instruments were played at unreasonable hours, or that the singing was at any time of a more disturbing character than that at any other religious meeting. Judge Newburger, in his charge to the jury, said there was involved injury to life and property. A public nuisance was a crime against the law and economy of the State. Whatever the character of the Army's services, if they deprived any considerable number of persons of the enjoyment of life or property, the verdict must be guilty. This is so plain a proposition that no one can misunderstand it. It applies to all descriptions of disturbing noises at unreasonable hours. It was claimed by the defense that this was a religious service, and as such entitled to the protection of law. This is true in only a limited sense. While the Constitution of the State grants the right of worship and of public assemblage to all alike, it confers on no one the privilege of disturbing his neighbor. If the Salvation Army people insist on retaining the London slum features of their so-called worship, they must be prepared to run up against the heavy hand of the law, and all their claims of persecution and martyrdom will find scant sympathy from communities all too lenient and well-disposed. Without denying the good accomplished by the Salvation Army, it is the plainest sort of proposition that they must not be permitted to employ methods or resort to practices which interfere with the peace, comfort or well-being of their fellow-citizens.

The United States Supreme Court has handed down a decision, written by Justice Peckham and concurred in by the entire court, adverse to the claim of L. E. Parsons, late district-attorney for the northern district of Alabama, that he was entitled, under section 769, of the Revised Statutes, to hold his office for four years, notwithstanding President Cleveland's order of removal. Parsons, it appears, was removed from the office in 1893, having been appointed in 1890. He wrote a letter to the presi-

dent, refusing to surrender the office on the ground that he had been appointed for four years. It was claimed on his behalf, that the president had no power to remove him before the expiration of that time. The court holds that while the appointment was for four years, it might be revoked or terminated earlier, at the discretion of the executive. The determination of the case had been looked for with considerable interest because of its possible effect upon the removal of office-holders incident to the change of administration. Parsons surrendered his office after an order had been issued to him by the Circuit Court to do so. All the lower federal courts decided against his claim. This view agrees with the construction accepted by the first congress, among whose members were several of those who sat in the convention which framed the Constitution.

Among the so-called thirty-day bills which Governor Black, of New York, signed after the final adjournment of the legislature, was one introduced by Senator Lexow and Assemblyman Laimbeer, regarding the effect of a woman's marriage with an alien on the rights of herself and her descendants in holding real estate. The bill, which has now become law, amends section 6 of chapter 547 of the Laws of 1896, being "An act relating to real property, constituting chapter 46 of the general laws," so as to read as follows: "Sec. 6. Effect of woman's marriage with alien on rights of herself and her descendants. — Any woman born a citizen of the United States, who shall have married or shall marry an alien, and the foreign-born children and descendants of any such woman, shall, notwithstanding her or their residence or birth in a foreign country, be entitled to take, hold, convey and devise real property situated within this state in like manner, and with like effect, as if such woman and such foreign-born children and descendants were citizens of the United States; and the title to any such real prop-

erty shall not be impaired or affected by reason of such marriage, or residence, or foreign-birth ; provided that the title to such real property shall have been or shall be derived from or through a citizen of the United States."

The bill is said to have been introduced at the instance of counsel representing the Duchess of Marlborough. The increasing number of international marriages among the wealthy has led to many complications over their estates, and this act is expected to go far toward untying the legal knots.

In a recent address before the Philadelphia Academy of Law, Judge Dean, of the Supreme Court of Pennsylvania, discussed the growing habit of dodging jury duty, so common in nearly all of the larger communities, and denounced it in strong terms. Referring to this defect in the administration of law in this country, Judge Dean said:

"I would make shirking jury duty as odious as skulking in time of war ; instead of leaving to them the sole part of criticising and denouncing courts and juries. I would inflexibly compel them, as the law intended they should, to perform their part in the administration of justice, wherever they were sober, intelligent and judicious. I would make jury duty as imperative and as certain as payment of taxes on a house and lot."

It will hardly be denied that the evil of which Judge Dean complains, and which he so stingingly rebukes, is a real one, or that it seriously hampers the operation of the courts of law. Jury duty has, of late years, come to be regarded as something unworthy of a reputable citizen, and in some communities the man who successfully evades it is regarded as "smart." It is one of the most regrettable features of this abuse that the very men whose character and intelligence render them especially competent and desirable for such duty are often, if not usually, the most active and persistent in finding excuses for its non-performance. Under such

circumstances, it is easy to fix the responsibility for the deterioration of the jury system in this country. The most flagrant offenders are native-born Americans, who thus set a very poor example to those who come from foreign lands to become citizens of the United States. The remedy for the abuses referred to, which Judge Dean suggests, is in the proper direction—that of educating public opinion to regard the shirking of jury duty as on a par with skulking in time of war. As the New York Mail and Express truthfully observes: "The one who truly serves his neighbor and his state by acting as a juror in cases involving grave questions of right and justice fulfills the high obligation of citizenship as faithfully as the one who stands with rifle in hand to repel an attack upon the country's honor from a foreign foe. The false impression that jury service is trivial and unworthy of the average man must be eradicated from the public mind, and in its stead must be planted the truth that such duty is one of the highest and noblest functions of citizenship."

Kentucky is, through its legislature making a creditable effort to suppress the mob violence which has done so much, of late, to cast reproach upon the administration of the law in that commonwealth. The purpose of the particular measure referred to is to prevent the lynching of negroes, and to break up the operations of the gangs which, for some months past, have been making war upon the toll-gates of the State. Encouraged by the success of their lawlessness and the supineness of the authorities, the mobs have gone still further and have established a condition of terrorism in some sections of the State; incendiarism has become rife, millers have been ordered to restrict the output of flour, and tobacco growers have been commanded, under severe penalties, to cultivate only a specified number of acres. Under a new law, just passed, when a mob assaults a jail with a view of capturing prisoners, the jailer is empowered to arm the prisoners for their

own defense. The bill also authorizes a sheriff to call on citizens to aid him against a mob, and imposes a penalty of \$100 for each refusal to do so. It further makes the members of mobs liable for all damages to persons or property done by them. This law may not entirely eradicate the serious evils complained of, but it ought to have some effect in stamping them out.

An important patent decision was handed down by the United States Supreme Court recently in the case of *Allen, plaintiff in error v. Culp*. The question at issue related to the reissue of a patent. The action was originally instituted in the Court of Common Pleas for the county of Philadelphia, State of Pennsylvania, by the defendant in error, Culp, against Alonzo W. Allen, to recover half of the profits made by the defendant from a certain patent for a cap and bobbin winding machine, granted jointly to Culp and Allen, and subsequently assigned to the defendant Allen. The alleged consideration of the transfer of plaintiff's half interest was a promise on the part of the defendant that he would divide with him the profits made by the sale of the device, of which they were the joint owners, and also all damages which might be recovered against infringers of the patent; the principal object of the transfer being to enable the defendant to have title thereto for the purpose of prosecuting these infringers. It seems that in November, 1892, the defendant was advised by his counsel to apply for a reissue, in order to more fully protect the invention, and he thereupon obtained the signature of the plaintiff, his co-inventor, to the application by renewing the promises he had already made. Both parties joined in the surrender of their patent, and in the application for the reissue, which, however, was rejected on the ground of unreasonable delay, and also upon the further ground that the new claims of the reissue had been anticipated by other patents. Counsel for the defendant, who appears to have had absolute control of the reissue proceedings, made no effort to meet

the formal objection of the examiner, and permitted the application to lapse by his failure to prosecute it within two years. He also neglected to take an appeal from the rejection of the application.

In January, 1893, the defendant informed the plaintiff that he did not intend to take any further proceedings with reference to the patent, and refused to fulfill his promise with reference to the division of profits.

Thereafter plaintiff began this suit to recover, under his contract with the defendant, the half of the profits which the latter had made out of the patent. The suit resulted in a verdict for the plaintiff for \$225. A new trial being refused, the defendant carried the case to the Supreme Court of Pennsylvania, by which the judgment of the Court of Common Pleas was affirmed, and the record remitted to that court. (166 Pa. 286). Thereupon defendant sued out this writ of error.

The court of last resort holds that there was no error in the ruling of the court below, and enunciates the doctrine that a surrender of a patent for reissue takes effect under the patent act of 1870, § 53, only when the patent is reissued; and if a reissue be refused, the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue, even if in making his surrender the patentee declared that the patent was inoperative and invalid. Whether, if the reissue be void, the patentee may fall back on his original patent, has never been decided by the Supreme Court. The question was raised in *Ely v. King*, 158 U. S. 266 (39:1018); but as the original patent in that case was also held to be void, it did not become necessary to express an opinion on the subject.

On the 24th of May last, after rendering final decisions in thirty-six cases, and giving attention to other business incident to the last sitting of the term, the United States Supreme Court adjourned until October next. When the court crier announced the final adjournment for the term, there were apparently 380 cases on the docket undis-

posed of, but there were actually only 359 cases, twenty-one having already been argued and submitted. This is a smaller number than the records of the court have shown for thirty years. At the conclusion of the term ending a year ago there were 533 cases undisposed of, and since then 284 have been added, making a total of 817 contained in the docket for the year. Of this number 437 have been finally disposed of, and the principal labor done in twenty-one others.

A bill recently introduced in the Illinois legislature provides that "any newspaper found guilty of unduly eulogizing any person or persons, thus falsely building for such person or persons a reputation without merit, thereby misleading and deceiving the public, shall, after ten days' notice served in writing upon the publisher or publishers of said newspaper of the false and misleading character of said eulogy, make a retraction or correction of said eulogy, in manner and place as conspicuous as was its original publication, for three succeeding issues of said newspaper. This act shall not apply to deceased persons, nor be operative against funeral orations nor obituary notices."

As an example of pure and unadulterated fool legislation, this is certainly entitled to the first premium.

Another piece of proposed legislation, though perhaps not properly classed with the above, is so radical, not to say revolting, that it should be thoroughly discussed. This bill, known as House Bill No. 672, was introduced by Mr. Edgar, in the legislature of Michigan, and is entitled "A bill to provide restrictions relative to persons, inmates of certain State institutions, that such inmates shall cease to be productive, providing rules and modes of procedure to restrict the propagation of their kind." The bill is so important in some of its provisions that it is given herewith entire:

"SECTION 1. *The People of the State of Michigan enact*, That all persons inmates of the Michigan Home for the Feeble Minded

and Epileptic and all persons who shall hereafter become inmates of said Home for the Feeble Minded and Epileptic, that such and every person confined in said institution and before he or she is discharged shall be caused to submit to an operation that causes asexualization, that such persons shall cease to be able to produce their kind.

"§ 2. All persons who shall have been convicted of a felony a third time and so stated by the court, the first or second conviction having been committed in this State or some other State of the United States, upon conviction and sentence to a Michigan State Prison, all of such persons so convicted and sentenced at a time prior to the expiration of such known third sentence shall be caused to submit to an operation that causes asexualization and stops their ability to produce their kind.

"§ 3. The superintendent, warden or other person having charge of such Home for the Feeble Minded and Epileptic and such prisons as shall contain such persons as provided for in sections one and two of this act, the medical superintendent in charge of said institution shall perform such operation, or if from inability at the time he may call to perform or assist in the performance of the same any physician or surgeon of this State. The superintendent, warden or other person in charge of said institution may pay to such operator a sum not more than twenty-five dollars for each and every operation so performed, and in no case where the operation is performed by the physician employed regularly by the within named institution shall there be paid any extra compensation.

"§ 4. In each and every case before such operation shall be performed, if the person be feeble minded or an epileptic, confined within a prison in this State, the matter shall be presented in writing to the board of control of such institution, wherein it shall be shown that such operation would benefit the subject physically and morally, or that it is necessary as a restrictive measure to prevent propagation of kind in case the subject is discharged from the institution. The board of control shall, after being satisfied of the

advisability of such operation, authorize the medical superintendent to perform the same, after first giving notice in writing to the parents or guardians of such person at least ten days before such operation.

"§ 5. That whoever shall have been convicted of the crime of having ravished a child or woman while upon the streets of any city, village, public highway or any other place within this State, it shall be the duty of the judge making such sentence to include in such sentence, that within one year after being confined in such prison, an operation which causes asexualization shall be performed as provided in sections three and four of this act.

"§ 6. The penalty for non-compliance of this act shall be just cause for removal and forfeiture of the position of such superintendent, warden or other person named in this act."

This measure will undoubtedly provoke much discussion, and even leading penologists are likely to disagree as to the wisdom and propriety of enacting it into law.

#### IS THE PRESIDENT'S POWER EXCLUSIVE?

THE very remarkable statement of Richard Olney, as secretary of state, in a quasi-official utterance given to the press, that the president has exclusive control of the power to recognize, or to refuse to recognize, a new or revolutionary government, for the first time in the history of this nation brings this question squarely up for consideration, and it is hardly less remarkable that he should be sustained in this opinion by Judge Cooley, Senator Edmunds, William H. H. Miller, ex-attorney-general under President Harrison, and other gentlemen whose standing before the people entitles their opinions to consideration. That this view of the question is a mistaken one entirely inconsistent with the genius of our institutions, must be apparent to every man who is familiar with the history of the republic, and with the principles which underlie our institutions. "To recognize the independence of a new State, and so favor, possibly determine, its admission into the family of nations," says William H. Seward, secretary of state, in writing to Mr. Adams, our representative in England in 1861 (MMS. Inst., Gt. Brit., Dip. Corr., 1861), "is the highest possible exercise of sovereign power, because it affects in any case the welfare of two nations, and often the

peace of the world. In the European system this power is now seldom attempted to be exercised without invoking a consultation or congress of nations. That system has not been extended to this continent. But there is even a greater necessity of prudence in such cases in regard to American States than in regard to the nations of Europe." If the recognition of a new nation is "the highest possible exercise of sovereign power," then we are called upon to decide whether the American people, jealous of their prerogatives, cautious almost to the degree of cowardice in the delegation of powers, vested in a single executive the exclusive control of this high sovereign power. "I cannot conceive," says Edmund Randolph, a member of the Federal constitutional convention, in speaking of the powers of the president in the Virginia convention (Elliott's Debates, vol. iii., page 209), "how his power can be called formidable. Both houses are a check upon him. He can do no important act without the concurrence of the senate. \* \* \* In England the king declares war. In America congress must be consulted. In England, parliament gives money. In America, congress does it. There are consequently more powers in the hands of the people, and greater checks upon the executive here than in England. \* \* \* Our government is founded on real checks."

James Monroe, opposing the adoption of the Federal Constitution in the Virginia convention (Elliott's Debates, page 222), says: "Consider the connection of the senate with the executive. Has it not an authority over all of the acts of the executive? What are the acts which the president may do without them?"

Francis Corbin, supporting the Constitution before the Virginia convention (Elliott's Debates, page 466), and defending the treaty-making powers, says: "The representatives are excluded from interposing in making treaties, because large popular assemblies are very improper to transact such business, from the impossibility of their acting with sufficient secrecy, dispatch and decision which can only be found in small bodies — and because such numerous bodies are ever subject to factions and party animosities. It would be dangerous to give this power to the president alone — as the concession of such power to one individual is repugnant to republican principles. It is, therefore, given to the president and the senate (who represent the States in their individual capacities) conjointly. In this it differs from every government we know. It steers with admirable dexterity between the two extremes — neither leaving it to the executive, as in most other governments, nor to the legislative, which would too much retard such negotiations."

George Mason, opposing the Constitution in the Virginia convention (Elliott's Debates, page 464), and in speaking of the treaty-making power, de-

clares that "it is true that this is one of the greatest acts of sovereignty, and, therefore, ought to be most strongly guarded. The cession of such a power without such checks and guards cannot be justified; yet I acknowledge such a power must rest somewhere."

With these sentiments finding expression in the convention by gentlemen who had been identified with the development of the Constitution, both as advocates and opponents, it is very evident that no one then believed that the high sovereign power of recognizing new government likely at any moment to involve the nation in war—a power specially delegated to congress—was vested in the executive. If "it would be dangerous to give this power (that of making treaties) to the president alone—as the concession of such power to one individual is repugnant to republican principles," how much more so would have been the suggestion that the president should have the power to recognize revolting governments, a power practically equivalent to that of the king in declaring war?

The question to be determined is not what the courts may have said in cases where this controversy was not before them, and in which they referred to the executive simply as the exponent of the political department of the government, whose findings of fact in foreign intercourse could not be reviewed, but whether the president is vested with the power of sovereignty. Whether "we, the people of the United States," who refused to entrust the executive with the unrestrained power of making treaties, and who specifically declared the power of making war to be vested in congress, have turned over to the discretion of a single individual a power greater in many respects to either of these powers. If this has been done; if this high prerogative of government has, in fact, been turned over to the president, it ought to be specifically declared, and not to rest upon any mere implication, sanctioned by no good usage, except in the recognition of *de facto* governments in old-established States or in instances in which there was no question as to the government in legitimate possession. Do we find this delegation of the high prerogative of sovereignty in any of the powers conferred upon the president? Sections two and three of article two define the duties of the president. It is provided by subdivision two of section two that "he shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators concur; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law." Subdivision three, which grants the only absolute power of appointment, provides

that "the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session." Section three provides that "he shall receive ambassadors and other public ministers," which is the clause relied upon to sustain the contention of Mr. Olney, in speaking of which Henry Clay, as chairman of the senate committee on foreign relations, reported to that body in reference to the proposed recognition of Texas (Senate documents 406, 24th congress, first session), that there were several ways by which this could be done, and after reciting three other methods, he says: "Or, lastly, by the executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the executive only is competent to make it."

President Jackson, in his Texas message, December 21, 1836, in discussing this power, says: "Nor has any deliberate inquiry ever been instituted in congress, or in any of our legislative bodies, as to whom belonged the power of originally recognizing a new State; a power the exercise of which is equivalent, under some circumstances, to a declaration of war; a power nowhere especially delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to congress—in that given to the president and senate to form treaties with foreign powers, and to appoint ambassadors and other public ministers, and in that conferred upon the president to receive ministers from foreign nations.

"In the preamble to the resolution of the house of representatives, it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of congress. In this view, on the ground of expediency, I am disposed to concur; and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the executive, either apart from or in conjunction with the senate, over the subject. It is to be presumed that on no future occasion will dispute arise, as none has heretofore occurred, between the executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to congress, which represents in one of its branches the States of the Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country, and a perfect guarantee to all other nations, of the justice and prudence of the measures which might be adopted."



President Taylor evidently entertained the same views, for in the instructions of Mr. Clayton, secretary of state, to A. D. Mann, our special agent to Hungary in 1849 (2 Curtis' Life of Webster, 533), we find his saying that "should the new government prove to be in your opinion firm and stable, the president will cheerfully recommend to congress, at their next session, the recognition of Hungary, and you might intimate, if you should see fit, that the president would, in that event, be gratified to receive a diplomatic agent from Hungary to the United States by or before the next meeting of congress, and that he entertains no doubt whatever that in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body."

The command of the Constitution that "he shall receive ambassadors and other public ministers" is not a delegation of sovereignty; it is merely a designation of the president as the official, diplomatic head of the nation; as the authority through whom the negotiations for treaties and other public functions shall be carried on, and it is accompanied in the very next clause with the still further command that "he shall take care that the laws are faithfully executed," indicating clearly that in his relations with these "ambassadors and other public ministers" he was still subject to the law. A nation can have no "ambassadors or other public ministers," in so far as this nation is concerned, unless it shall have been recognized by the United States as having a distinct and competent government, and the action of the president in receiving such public ministers is not to be construed as the act of recognition, but as the consummation of a recognition already made by the nation in its sovereign capacity. This may have been by common consent, as in the case of the revolutionary governments in France and other parts of the world, where old nations have changed their forms of government, and where we have had to deal with the nations, rather than with the particular form of government, or by the concurrent action of the government as a whole, as distinguished from any department thereof, as was the case in respect to the South American republics, and afterward of Texas. It is true, of course, that in the South American States the recognition was made by the president, but it was done only when the congress had provided by law to "defray the expenses of missions to the independent nations on the American continent" (3. S. at L., 678), and after the house had, upon the motion of Henry Clay, declared that the house "participates with the people of the United States in the deep interest which they feel in the success of the Spanish provinces of South America, which are struggling to establish their liberty and independence, and that it will give its constitutional support to the president of the United States when-

ever he may deem it expedient to recognize the sovereignty and independency of any of the said provinces" (2 Annals, 1st session, 10th Congress, 1081).

If we keep in mind the fact that the recognition of independent governments is one of the high prerogatives of sovereignty; that the sovereign power of the United States vests, not in the executive, but in the people, and that this power can be exercised only through the representatives of the people, and their authorized officers, we shall be able to read understandingly subdivision 17 of section eight of article one of the Federal Constitution, which clearly recognizes the existence of the "government of the United States" as distinguished from its several departments, and embracing them all. It says: "Congress shall have power \* \* \* to make all laws which shall be necessary and proper for carrying into execution the foregoing powers (which are enumerated), and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

What are the "other powers vested by this Constitution in the government of the United States?" Obviously the power to exercise the sovereignty of the United States, and to discharge those unenumerated duties which inhere in a national government. This is the construction which the Constitution itself gives in the tenth article of the amendments adopted at the first session of congress under the Federal Constitution. It says that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers not specifically delegated to "any department or officer thereof," and which are not "prohibited by it (the Constitution) to the States," must, therefore, be the "other powers vested by this Constitution in the government of the United States," in respect to which the congress is to "make all laws which shall be necessary and proper" for carrying them into effect.

It is only necessary then to inquire what are the powers prohibited to the States by the Federal Constitution in order to determine accurately the extent of the power of congress over the question under discussion. Section ten of article one provides that "no State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility." In section two it is provided, among other things, that "no State shall, without the consent of the congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually

invaded, or in such imminent danger as will not admit of delay." Clearly, the States being denied the right to enter into "any treaty, alliance or confederation," or without the consent of congress to "enter into any agreement or compact with another State, or with a foreign power, or engage in war," these powers were intended to be "vested by this Constitution in the government of the United States," as a whole, in respect to which congress is to "make all laws necessary and proper for carrying them into execution," subject only to the veto power of the president, which in turn may be over-ridden by a two-thirds vote of both houses of congress.

In other words, "the office of president is essentially executive in its nature," and the contention of Mr. Olney and his supporters that the president has the right to refuse to obey the mandate of the legislature, when that mandate assumes the form of a law of the United States, is absurd, and if acted upon would involve liability to impeachment as certainly as a refusal to carry into effect any other law which might be enacted by the congress in pursuit of its delegated powers.

Jamestown, N. Y.

BEN S. DEAN.

#### CONVICTION FOR MURDER—JURISDICTIONAL DEFECT—HABEAS CORPUS.

*Re* EDWARD ECKART, Petitioner.

1. A conviction for murder upon a verdict which fails to specify the degree of murder, when the law divides it into degrees, the punishment varying according to the degree, although erroneous, is not a jurisdictional defect, and the judgment thereon is not void, so as to entitle the person convicted to be discharged upon *habeas corpus*.
2. When a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities which can be collaterally attacked. The writ of *habeas corpus* cannot be made to perform the functions of a writ of error.

Submitted to the United States Supreme Court March 22, 1897. Decided April 19, 1897.

Application of Edward Eckart for the allowance of a writ of *habeas corpus* to obtain his discharge from an alleged unlawful imprisonment in the Wisconsin State prison. Writ refused.

The facts are stated in the opinion.

Mr. Justice WHITE delivered the opinion of the court:

This is an application for the allowance of a writ of *habeas corpus*, to obtain the discharge of the petitioner from an alleged unlawful imprisonment in the Wisconsin State prison.

From the statements in the petition and return,

it appears that petitioner has been detained in custody since April 13, 1878, under a judgment of the Circuit Court of Jefferson county, Wisconsin, entered upon a verdict of a jury finding him "guilty," after trial had, upon an information which charged Eckart with having, "on the 13th day of December, in the year 1877, at Jefferson county, State of Wisconsin, unlawfully, feloniously, and of his malice aforethought, killed and murdered Charles Paterson, against the peace and dignity of the State of Wisconsin." The ground relied upon to establish that the imprisonment, under the judgment referred to, was unlawful is that under the laws of Wisconsin murder is divided into three degrees, the punishment varying according to the degree, and that as the verdict in question failed to specify the degree of murder of which the accused was found guilty, the trial court was without jurisdiction to pass sentence and judgment upon the accused, and the deprivation of liberty under such judgment is without due process of law.

It also appears from the statements in the petition and answer to the rule that in September, 1893, Eckart unsuccessfully applied to the Supreme Court of Wisconsin for the allowance of a writ of *habeas corpus*, asserting in his petition the same detention and the same grounds for his right to release as is relied upon in the present application, and that in his petition to the Wisconsin court he specially set up that he was restrained of his liberty "contrary to the Constitution of the United States and laws enacted thereunder, and without the due process of law guaranteed by the Fourteenth Amendment to that instrument."

It has been held by the Supreme Court of Wisconsin that under the statutes of that State an allegation of the commission of crime in language such as was employed in the information upon which Eckart was tried would justify a conviction of murder in either the first, second, or third degree, and it has also been there held that the jury must find the degree in their verdict, in order that the court may impose the proper punishment. (*Hogan v. State*, 30 Wis. 428, 434 [11 Am. Rep. 575]; *Allen v. State*, 85 Wis. 22; *La Tour v. State* [Wis.], 67 N. W. 1138.)

In its decision refusing the writ applied for by Eckart, the Supreme Court of Wisconsin held that, while the conviction under the sentence in question was erroneous, the error in passing sentence was not a jurisdictional defect, and the judgment was therefore not void. In this view we concur. The court had jurisdiction of the offense charged and of the person of the accused. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offense embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning, and if in so doing he erred, and held the verdict to be

sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of *habeas corpus*. The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime. (Ex parte Coy, 127 U. S. 731, 756-758 [32: 274, 280, 281], and cases there cited.)

The ruling in Ex parte Belt (159 U. S. 95 [40: 88]), is also applicable. There an application was presented for leave to file a petition for a writ of *habeas corpus* directed to the superintendent of the Albany county penitentiary, in the State of New York, for the discharge of Belt from custody under a sentence of the Supreme Court of the District of Columbia. Belt had been indicted for the crime of larceny. In the course of the trial the record of a former conviction of larceny was introduced to establish that the offense for which the prisoner was then upon trial was a second offense, which fact, if established, subjected the accused to a greater punishment than would otherwise be authorized. Objection was taken to the admission of the record, on the ground that it showed a waiver of the right of trial by a jury on the part of the prisoner and a trial and conviction by the court alone without a jury, a mode of procedure claimed to be in violation of the Constitution of the United States, and rendering the subsequent proceedings null and void. The objection was overruled, and Belt was convicted and sentenced. The judgment being affirmed on appeal, Belt made the application to this court referred to, asking to be relieved from imprisonment under the alleged void sentence and judgment. It was argued on his behalf that the constitutional requirement of trial by a jury in criminal cases could not be waived by the accused, though in pursuance of a statute authorizing such a waiver, and on the assumption that the first conviction was necessarily void, the second conviction predicated thereon was likewise a nullity. Upon the authority, however, of Ex parte Bigelow (113 U. S. 328 [28: 1005]), it was held that the ground of application did not go to the jurisdiction or authority of the trial court, but was allegation of mere error, which was not reviewable on *habeas corpus*, citing on this latter

proposition Re Schneider ([No. 2], 148 U. S. 162 [37: 406]).

The case of Ex parte Bigelow determined that the action of a trial court in overruling a plea of former jeopardy could not be reviewed on *habeas corpus*. In the course of the opinion, the court said (p. 330 [1006]):

"The trial court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass, if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal, a much stronger case than this, the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute it might be necessary, on such a plea, to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly, in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial, it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea, both as matter of law and of fact, cannot be doubted. \* \* \* It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity. But the general rule is that when the court has jurisdiction by law of the offense charged, and the party who is so charged, its judgments are not nullities."

In Ex parte Belt (159 U. S. 95 [40: 88]), this court, speaking through Mr. Chief Justice Fuller, said (p. 99 [89]):

"Without in the least suggesting a doubt as to the efficacy, value, and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and, this being so, we cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*."

The case presented by the record is not within any of the exceptions to the general rule that when a court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities which can be collaterally attacked. The writ of *habeas corpus* cannot be made to perform the functions of a writ of error. (*United States v. Pridgeon*, 153 U. S. 48 [38: 631]).

It follows that *the rule must be discharged and the writ refused*, and it is so ordered.

#### A LIE WHICH CAUSED A SHOCK WHICH CAUSED AN ILLNESS.

WHAT will doubtless constitute, for all time, a leading case in England, grew out of a "practical joke." The action, which was entitled *Thomas and Lavinia Wilkinson v. Downton*, came before Mr. Justice Wright, of the Queen's Bench Division, in London, recently, and the important paragraphs of the statement of claim are worth reproducing exactly as they stood:

"2. On the 9th April, 1896, the plaintiff, Thomas Andrew Wilkinson, went by train to see the Harlow races, and in the evening of the same day the plaintiff, Thomas Andrew Wilkinson, being then absent, the defendant entered the public house at 25, St. Paul's road, and then and there falsely, fraudulently, and maliciously told the plaintiff, Lavinia Elizabeth Wilkinson, that he had received a message from her said husband that the said Thomas Andrew Wilkinson had had a smash-up and was at that time lying at the Elms public house, Leytonstone, and that the said Thomas Andrew Wilkinson had desired the said defendant to request the plaintiff, Lavinia Elizabeth Wilkinson, to go down at once with a cab and fetch some pillows to take her husband home. The said defendant further falsely and maliciously said to the plaintiff, Lavinia Elizabeth Wilkinson, that her said husband had returned from the races with some friends in a waggonette, and was seriously injured, all of which statements the said defendant well knew to be false and fraudulent, and spoken by him, the said defendant, with intent maliciously to and well knowing that he would thereby aggrive, injure, and annoy the said plaintiff, Lavinia Elizabeth Wilkinson.

"3. By reason of the said false, fraudulent, and malicious statements of the said defendant, the plaintiff, Lavinia Elizabeth Wilkinson, suffered great mental anguish, and was made seriously ill, and her hair was turned white, and her life was for some time in great danger, and the plaintiff, Thomas Andrew Wilkinson, by reason of the grievances herein complained of, has suffered distress of mind on account of his said wife's condition, and incurred considerable expense for medical attendance on his said wife and otherwise in respect of her said illness, and has lost the services

of his said wife, and has been otherwise damaged."

A writer in the *London Law Times* (May 22, 1897), in reviewing the case, tells us that the learned judge allowed the plaintiffs to amend their statement of claim by adding a claim which had been added for the expenses directly caused by the false statement—viz., the expenses of the messengers, whom the wife sent to bring the husband back. This damage the learned judge, in the early part of the proceedings, considered to be the only damage for which the plaintiffs could in any case sustain their claim. Such was, therefore, the final form of the statement of claim, which in its original form had caused Mr. Justice Wright to ask whether there was any authority for such an action. Mr. Warburton answered that there was plenty of authority, from *Pasley v. Freeman* (3 T. Rep. 51) downwards. The judge said that he thought that the plaintiffs might recover the damage to which he alluded, and he therefore allowed the counsel for the plaintiffs to open their case.

The case was accordingly opened, and facts sufficient to sustain the allegations which we have cited were proved. Mr. Abinger, for the defendants, ridiculed the story of the hair turning white. Yet that is a recognized phenomenon, the notion of which Lord Byron made familiar in the well-known lines in which he explained that the case of the prisoner of Chillon was different:

My hair is grey, but not with years,  
Nor grew it white  
In a single night  
As men's have grown from sudden fears.

Mr. Abinger tried to show that no real deception had been practised, and that no real shock had been suffered, but that, in the language of his pleading, the words were "spoken humorously and by way of a joke, and were so understood by the plaintiff." He also suggested that they were not spoken by the defendant at all, but by another man called Boorer, and Boorer corroborated him in this. But the jury believed otherwise. They found that the defendant had spoken the words; that he meant them to be believed and acted on; that they were false to his knowledge; that they were believed and acted on; and the medical testimony satisfied them that a serious illness resulted as the effect of what was said. They found that the messengers' expenses were only 1s. 10½d., but they assessed the damages on the score of illness resulting from the shock at £100.

Could this last sum be recovered? If I maliciously tell you a lie, which gives you a shock, which causes a serious illness, am I responsible in damages for the effect of my words? The point is novel, but we think that our readers will incline to the opinion that the answer should be "Yes." And so Mr. Justice Wright decided, in spite of his previous hesitation so to do. He did not think that *Pasley v. Freeman* (3 T. Rep. 51) and *Lang-*

ridge v. Levy (2 M. & W. 519) carried the plaintiffs very far. In the first of these cases the lie was, "John Christopher Falch is a person safely to be trusted and given credit to," and the injury was that the plaintiff thereby lost certain goods, wares, and merchandises, and the value thereof; and in the second the lie was, "This gun was made by Nock, and is good, safe, and secure," and the injury was the destruction of the plaintiff's son's left hand by its explosion. Only the 1s. 10½d., the expenses of the messengers, could in the present case be recovered upon a principle similar to that of those cases.

The judge thought, however, that the £100 might be recovered upon another ground. "The plaintiff," said he, "has wilfully done an act calculated to cause physical pain to the plaintiff, *i. e.*, to infringe her legal right to personal safety, and has, in fact, thereby caused physical pain to her. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, was imputed to the defendant."

Was the damage too remote? The case of the Victorian Railway Commissioners v. Coultas (58 L. T. Rep. 390) was relied upon by the defendant as showing that it was so. In that case the Privy Council, arguing that damages in a case of negligent collision must be the natural and reasonable result of the defendant's act, considered that damages claimed on account of a nervous shock or mental injury caused by fright at an impending collision were too remote. Mr. Justice Wright said that the Court of Appeal had treated this case as "open to question" in the later case of the signalman. (Pugh v. London, Brighton and South Coast Railway Company, 74 L. T. Rep. 724.) But that case was quite different; it was an action of contract, and all that the master of the rolls said about the Privy Council case was: "It is unnecessary to say anything with regard to that case, except that, being simply an action for negligence, it was quite a different kind of case from the present one." In any case no doubts thrown upon the correctness of the decision by the Court of Appeal, nor by the Irish Exchequer Division, who somewhat disapproved of it in the interesting case of Bell v. The Great Northern Railway Company (L. Rep. 26 C. L. Ir. 428), nor the dissent of the Supreme Court in New York, nor the condemnation of eminent writers of text-books, could overthrow the authority of the judgment unanimously arrived at by Lords Fitzgerald and Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

Was, then, the Victorian Railway Commissioners v. Coultas distinguishable from the present case? The learned judge thought that it was at any rate "not altogether in point." "For," said he, "there was not in that case any element of wilful wrong, nor, perhaps, was the illness so direct and natural a consequence of the defendant's wrong as in this case."

Then there was the case of Allsop v. Allsop (2 L. T. Rep. 290), where the cause of action was, as in this case, "a lie which caused a shock which caused an illness." The lie in that case was, "You, the plaintiff, have committed adultery with me," and the plaintiff "by reason of the committing of the grievances became and was ill and unwell." The court decided in favor of the defendant — a decision afterwards approved by the house of lords in Lynch v. Knight (9 H. L. Cas. 577). But there the *rationale* of the decision against the plaintiff depended upon the particular form of action — an action of slander imputing unchastity to a woman, in which action at that date it was necessary to prove special damage. Mr. Justice Wright, therefore, received no assistance from the authorities, and treated the case as one of first impression.

In discussing this interesting case, the London Law Journal says:

"The primitive common law cared little for nerves. It dismissed nervous sufferings contemptuously as sentimental. But one of the best qualities of the common law is its power of adjusting itself to the changing conditions of the social environment. In divorce, for instance, the conception of cruelty is no longer confined to bodily injury or reasonable apprehension thereof. It includes conduct endangering a wife's health or injurious to her feelings, and the same principle is spreading to torts. It is true if an express train whizzes by you without touching you that you can get no redress for the fright, though the shock may shatter your nervous system. There must be 'impact' (The Victorian Railway Commissioners v. Coultas) — so much mediæval materialism still clings to our law, but such an alarm differs, *toto cælo*, from a malicious hoax like that of telling a wife that her husband is lying disabled by an accident (Wilkinson v. Downton). Here are all the elements of a genuine tort or wrong, and it would be a reproach to any system of law if such a hoax were not actionable as well as stupid and cruel. Mr. Justice Wright's decision constitutes, no doubt, a new departure; it opens a vista of possibilities fraught with problems for the judges of the future; but it is a new departure for which the age is ripe. All rational beings are now agreed that an injury to the feelings and to the nerves is as real an injury as, and often a much worse injury than, one done to the body."

### Legal Laughs.

Senator Voorhees once had succeeded in delivering an appeal which had brought tears to the eyes of several jurymen. Then arose the prosecuting attorney, a gruff old man, with a piping voice and nasal twang. "Gentlemen," said he, deliberately, "you might as well understand from the beginning that I am not boring for water." This proved so effectual a wet blanket to the emotions excited

by Mr. Voorhees that he realized the futility of his own "boring."

Criminal Lawyer — "You killed no one in the family excepting your nephew?"

Prisoner — "No one excepting my nephew."

Criminal Lawyer — "What a pity! Had you assassinated them all I could have pleaded insanity!"

Judge Randolph, of Kansas, was hearing a divorce case last fall. The witness was the plaintiff, a white-haired man, broken in health and in spirit, and wearing a bronze button in his lapel. The examination was severe and the session monotonous.

"You say your wife abused you; tell us just how," thundered the attorney.

The witness looked appealingly at the judge. "Answer the question, sir," was the order from the bench.

"Well, she said I was an old hypocrite to be proud of my war record. She said all the brave men who went to the war were killed, and that only the cowards and deserters lived to come back, and —"

"Stop!" commanded the aroused judge. "This divorce is granted. The court spent four years in that war — and the court came back."

The monotony was broken for that day.

#### A PARODY.

TELL me not, in accents croaking,  
"Brevity's an empty dream;"  
What is gained when verbal cloaking  
Makes things other than they seem?

Law is real; and expensive;  
Special pleading's not its goal;  
Rhetoric and tape make pensive  
Many a weary client's soul.

To "orate" or rouse to passion  
In your pleading's not the way;  
State your case in simple fashion,  
Let the judge see what's to pay.

Law is long and time is fleeting,  
And our lips, dull habit's slave,  
Are, forgetting fact, repeating  
The old forms our fathers gave.

In the field of litigation,  
In the strife of good and evil,  
With a straightforward allegation  
Tell the truth and shame the devil.

Trust not Humphrey, Barbour, Chitty;  
Let dead cases bury their dead;  
With stale lies 'tis surely pity  
To bother any judge's head!

Lives of pleaders all remind us  
We may make our lives a bore,  
And, departing, leave behind us  
Pleas chock full of useless lore; —

Precedents that perhaps another,  
Doomed by cruel fate to find —  
Some perplexed and anxious brother,  
Reading, shall quite lose his mind!

Sell your form books for waste paper;  
State the facts at any rate;  
Hesitating how to shape a  
Pleading — why, abbreviate.

— A Friend in Court.

#### A PRIZE COMMISSION.

AT the annual commencement exercises of the Albany Law School, which were held in Albany on the 3d inst., a class of forty-five being graduated, the committee to award the Amasa J. Parker prize for 1897 made its report in a way so different from the stereotyped form that the document is worth reproducing. Here is the finding of the "Prize Commission," in which the youthful Blackstones were deeply interested, and as to the justness of which there were no dissenting opinions:

At a Special Term of (a sort of a) Court,  
held at the City of Albany, on the  
second day of June, 1897.

Present:

Simon W. Rosendale,  
Charles J. Buchanan,  
Robert G. Scherer,

*Prize Commission.*

THE ALBANY LAW SCHOOL.  
(In Admiralty.)

IN THE MATTER

of

the AMASA J. PARKER Prize for  
1897. Subject: "Procedure Con-  
sidered from an Historical and  
Practical Point of View."

*Per Curiam.*

Duly impressed with the fact that this is the court of last resort, careful consideration was given to the questions involved in this "controversy submitted without action."

Of the four essays in competition, three are highly meritorious. All reflect credit upon the school and its instructors, and show the result of careful teaching upon the subject of the origin and the status of the methods and appliances in legal warfare.

The essay by "Assumpsit" is exhaustive and scholarly; the thoughts are well expressed. It is comprehensive and a well considered treatment of the subject.

The paper by "Lexon" is concise and clear, and exceedingly well written and carefully considered.

The one by "Oxford" has decided literary merit. The essay contains considerable study and much thought.

On the whole, it seems to us that "Assumpsit" should be declared the "captor."

In view, therefore, of the foregoing, it is concluded to recommend the award of the prize of fifty dollars to the author of "Assumpsit," and the judgment will be in accordance therewith for the amount stipulated between the parties.

All concur.

The name of the captor was announced to be Daniel E. Hanlon, of Little Falls, N. Y.

### Legal Notes of Pertinence.

"Swipe" has been passed on by the Iowa Supreme Court. The word came up in the case of the State v. Robert Lee, appellant. Somebody said "swipe" in the lower court, and it became an issue. So the grave, dignified and august higher bench had to take official notice of it and incidentally to pass upon its meaning. In affirming the case the court decided that "swipe" means "to steal," and cited the dictionary as its authority.

An important and just ruling has been made recently by the post-office department. The chief of a labor union in St. Louis mailed a letter having on its envelope a colored poster requesting the receiver to boycott a well-known firm. The post-office authorities decided that the letter was a violation of the Federal law prohibiting the sending through the mails of matter designed to reflect injuriously upon the character or conduct of another.

The measure known as the "Anti-Scalpers" bill has been signed by Governor Black, of New York. It absolutely prohibits the selling of railroad and steamboat tickets in the State, except by agents authorized in writing to make such sales by the owners of the vessels or trains or companies operating them, and then they can sell tickets only in the towns where the written authority gives them permission to make sales.

A ludicrous state of affairs exists in Darlington, Ind. Rev. A. N. Cave, a young minister of that place, was recently admitted to the Montgomery county bar, and soon after announced to his townsmen that he would tender his legal services free to all in need of them. This aroused the ire of the village lawyer, Sam S. Martin, who now declares that he will preach free of charge to any congregation desiring his services.

Governor Black, of New York, has appointed the Hon. Frederick W. Kruse, of Olean, a former member of the assembly and a prominent member of the Cattaraugus county bar, county judge of Cattaraugus county, to fill the vacancy caused by the death of Judge Vreeland. The appointment is

an excellent one, upon which the ALBANY LAW JOURNAL congratulates alike the governor, the county and the appointee.

The Canadian bench has just lost the services of Sir John Hawkins Hagarty, whose judicial term extended over forty-one years, and who became chief justice of Ontario shortly after the formation of the Dominion of Canada. He is a poet as well as a jurist. The Hon. G. W. Burton succeeds him as chief justice, making a vacancy in the Ontario Court of Appeal, which has been filled by the appointment of Mr. Charles Moss, Q. C.

Governor Black, of New York, has signed the bill of Senator Brown creating a new legal holiday on Lincoln's birthday, February 12, and amending the Saturday half-holiday act by making it a compulsory half-holiday for all purposes whatsoever as regards the transaction of business in the public offices of this State or counties of this State.

Wauneta is a little town in Chautauqua county, Kan. There is a doctor there who is proprietor of the drug store, justice of the peace and constable. He sells the boys liquor and then arrests and fines them for drunkenness. One day lately he had three of the five voters of the town in his court at the same time.

The Kentucky Court of Appeals has decided that the death of a man as a result of a mosquito bite is an accidental death, within the meaning of an accident insurance policy, and that the representatives of the deceased are entitled to recover accordingly.

A good law is about to be enacted in Belgium, making the physician who associates himself with one who practices illegally or in an unauthorized manner, so that the latter is protected by the diploma of the former, equally guilty, and amenable to the laws as an accomplice.

The commencement exercises of the National University Law School were held at the National Theatre, Washington, on Monday evening, May 31. The graduating classes numbered about fifty. United States Senator John M. Thurston, of Nebraska, delivered the address on the occasion.

Hon. George Gray, United States senator from the State of Delaware, will deliver the address to the graduating class of the Columbian University Law School on the occasion of its annual commencement, on Tuesday evening, June 8.

The New Jersey legislature had to meet in special session last week because a woman typewriter put the word "provided" instead of "prohibited" into a bill designed to stop the pernicious practices of the race track ring.

Under an act passed by the last congress, a person who defaces a gold or silver coin is liable to a fine of two thousand dollars and five years' imprisonment.

Sixty graduates of the Chicago Law School received their degrees on Thursday evening last.

**English Notes.**

Last year a wealthy merchant of Bruges was killed in an accident which occurred by a train running off the line at Bruges-Bassin. The widow and orphans have brought a suit against the State Railway department for 3,000,000 francs (£120,000) damages, and in justification of this claim they state that the deceased's earnings were £4,000 per annum. The following curious defenses have been set up by the State: (1) That if the action is based on the transport contract, the heirs of the deceased have no right to any other indemnity than that arising from "the non-arrival of merchandise at destination;" (2) that Monsieur Lesaffre, having been killed on the spot, was unable to will to his heirs an action for damages on account of suffering endured; (3) the heirs must explain the cause of the accident and point out where the State was at fault.

Mr. Baron Pollock, sitting without a jury in the English High Court of Justice, was not long ago called upon to decide to what extent a wife could properly pledge her husband's credit for the purchase of cut flowers. The husband allowed his wife about £500 a year for household expenses, and insisted that if she wanted the flowers, she should have paid for them out of this allowance instead of running up a bill of upward of £60 in his name for cut flowers furnished in the months of January and February. Inasmuch, however, as "the married couple were living in a house in the north of England in very good style, and gave sumptuous entertainments," the learned judge compelled the husband to pay the bill, although he said the charge seemed a large one.

The Land Transfer bill has passed through the house of lords, and is practically certain to be enacted into law during the present session of parliament. The legal profession will, among other things, have to prepare themselves for a change, unconnected with registration of title, which will revolutionize some portions of the practice of conveyancing. After January 1st next, if the bill passes, real estate will, on the death of an absolute owner not being a joint tenant, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time, as if it were a chattel real vesting in them.

An amusing story as to the way in which acts of parliament are drafted and amended was told by the lord chancellor in speaking in the city on the codification of the statutes. An act was once passed which imposed a pecuniary penalty for the falsification of parish registers, half of which was to go to the informer, and the other half to the crown. In a subsequent and amending act this was changed to transportation for seven years, but the remaining words were not altered, so that half

the transportation was to go to the informer, and the other half to the crown.

A novel proposal, which has the sanction and support of the attorney-general, is being made with reference to the approaching diamond jubilee celebrations. It is that members of the bar should have an opportunity of attending, in their robes, the afternoon service in St. Paul's Cathedral, on June 20. The idea is a good as well as a novel one, says the London Law Journal. If carried into effect it will do some little towards rolling away from the bar the reproach of having taken as a body no step whatever expressive of its undoubted loyalty to the queen.

The report for 1896 of the prison commissioners for Scotland has been issued as a blue-book. The statistics show that the average number of persons convicted of some of the more serious crimes about fifteen years ago was 505, while in 1896 484 were convicted for the same offenses. This shows a decrease of four per cent., but on account of the increase of population the decrease is in reality greater.

M. Emile Chauvin, of Paris, doctor of laws, a barrister at the Court of Appeal, has just been prohibited by the minister of public instruction to act as chief lecturer of the Paris faculty of law. The reason for the measure is that M. Chauvin recently gave a lecture at Nanteuil-les-Meaux in which he expressed his socialist opinions.

Mr. Justice Byrne and Mr. Justice Ridley attended Windsor Castle on the 14th inst., and were severally introduced to her majesty's presence by the secretary of state for the home department, when the queen conferred upon them the honor of knighthood.

At Windsor Castle, on the 15th inst., her majesty conferred the Order of the Bath upon William Edward Davidson, Esq., Q. C., legal adviser to the foreign office, and William John Mure, Esq., legal secretary to the lord advocate of Scotland.

**Notes of Recent American Decisions.**

Loss of Life — Railroad — Conjectural Cause of Death — Action. — An action cannot be maintained against a railroad corporation, under the Employers' Liability Act, St. 1887, c. 270, for causing the death of a brakeman in its employ, through the alleged negligence of the engineer of a freight train on which he was working, in stopping the train before he had received the motion so to do, if, assuming that the engineer had begun to stop the train before receiving such motion, the evidence fails to connect the accident with this conduct of the engineer, and leaves the cause of the accident conjectural. (*Dewhirst, Adm'r, etc., v. Boston & Maine R. R.*, 167 Mass. 402.)

Personal Injuries—Caving-in of Sewer Trench—Negligence — Law and Fact. — In an action for



personal injuries occasioned to the plaintiff by the caving in of the side of a sewer trench in which he was working, where all the facts are before the jury, he is not entitled, at the close of the charge, to a ruling that the fact that the earth fell out was some evidence of negligence, but the case is rightly submitted to the jury on all the evidence. (*O'Neal v. O'Connell*, 167 Mass. 388.)

**Petition for Partial Distribution of Residue of Estate — Contingent Remainder.** — A provision that the residue of an estate shall be held in trust "until the decease of the last survivor of the life annuitants, \* \* \* and that then the said residue and remainder, with all the accumulated interest thereof, shall be equally divided among my grandchildren *per stirpes*," will be construed to give the grandchildren a contingent interest, especially if that conclusion is favored by the scheme of the will. (*Hale v. Hobson*, 167 Mass. 397.)

**Testamentary Powers — Bad Faith of Executor — Sale of Land for Less Than Value — Executor Charged With True Value.** — An executor, who, in the exercise of a testamentary power to sell lands for the payment of debts, in bad faith sells them for a price that is manifestly less than their true value, should, on exception to his account in the probate court, be charged with the difference between such inadequate price and the true value of the lands. (Decided in April, 1897. *Brown, Executor, etc. v. Hannah Reed*, Ohio Sup. Court, Adv. Repts., Vol. lvi., p. 128.)

**Vendor and Purchaser — Misrepresentations.** — On foreclosure of a purchase-money mortgage, defendant set up an affirmative defense, alleging deceit and fraudulent representations as to the future prospects of the town in which the land was situated, and as to contemplated improvements. It appeared that no fiduciary relation existed between vendor and purchaser, and that the purchaser was an active business man. *Held*, that the purchaser was bound to inquire into such representations as were material. (*West Seattle Land & Improvement Co. v. Herren* [Wash.], 48 Pac. Rep. 341.)

**Will — Charitable Bequest — Limitation.** — A devise of land in Texas to a New York corporation, prohibited by its charter from taking and holding property beyond a certain value, is void where, at the time the will takes effect, the corporation owns property of the prescribed value. (*House of Mercy of New York v. Davidson* [Tex.], 39 S. W. Rep. 924.)

**Wills — Interpretation of — Word "or" Construed to Mean "and."** — C., the testator, after other devises and bequests, gave his residuary estate to his "spinster or unmarried nieces." Six of his nieces had never been married, and two had been married and were widows at the time of his death. *Held*, that as the spinsters and the widows were in the same relation to the testator, and their

actual condition being that of single or unmarried women, and no reason for discriminating between them appearing, the testator used the word "or" in the sense of "and," and intended to include the widows as well as the spinsters. (*In re Conway's Estate*, Pennsylvania Supreme Court, Weekly Notes of Cases, Vol. xl., p. 193.)

### Notes of Recent English Cases.

**Adulteration of Food — False Warranty — Necessity of Guilty Knowledge.** — The appellant appeared before the magistrate upon the hearing of a summons under § 27 of the Sale of Food and Drugs act, 1875, upon the complaint of the respondent, an inspector of nuisances for the city of Manchester, for that the appellant, on the 8th September, 1896, in the city of Manchester, "did give a false warranty in writing in respect of an article of food, to wit, butter," then sold by him to a purchaser, and subsequently sold by such purchaser to the prosecutor, the present respondent. The facts proved were these: The respondent, on the 16th September, 1896, went to the shop of one Hopkins, a retail grocer in Manchester. On the counter in the shop was a quantity of butter marked "pure butter, 10d.," and the respondent, pointing to this butter, asked for, and was supplied with, one pound of the butter. This butter was analyzed, and the analyst gave his certificate and proved that the butter was adulterated, containing 23 per cent. of water. The seller, Hopkins, had previously purchased the butter from the appellant as the same in nature, substance and quality as that demanded of him by the respondent, and with a written warranty to that effect, and Hopkins sold it in the same state as when he purchased it. A summons was taken out against Hopkins under § 6 of the act, and was dismissed upon his proving that he purchased with a written warranty from the appellant. The present summons was then taken out against the appellant, under § 27 of the act, for giving to Hopkins a false warranty on the sale of the butter to him. The appellant also had purchased the butter in question in August, 1896, from a merchant in Limerick as the same in nature, substance and quality as that so sold by him to Hopkins, and with a written warranty to that effect, and the appellant had no reason to believe when he sold it to Hopkins that the article was otherwise, and the appellant sold it in the same state as when he purchased it. It was contended for the appellant that it was necessary to prove that the appellant, at the time when he gave to Hopkins the warranty in question knew that it was false; and for the respondent it was contended that it was not necessary under § 27 to prove that the appellant knew that it was false. The magistrate held that it was not necessary to prove that the appellant knew that the warranty was a false warranty, and he convicted the appellant and

fined him £5 and costs. The question was whether it was necessary to prove guilty knowledge on the part of the appellant in giving the warranty to Hopkins. Section 27 provides that "every person who shall give a false warranty in writing to any purchaser in respect of an article of food \* \* \* sold by him \* \* \* shall be guilty of an offence," etc. *Held* (reversing the decision of the magistrate), that to constitute an offence under § 27, guilty knowledge is necessary, and that, as the appellant in giving the warranty to Hopkins had no such guilty knowledge, he could not be convicted. (H. C. of J. 2 B. Div. Derbyshire [App.] v. Houliston [Resp.], L. T., May 15, 1897.)

Practice—Pleading — Action for Libel — Libel Published in Foreign Country. — The plaintiff brought an action for damages for an alleged libel contained in a pamphlet alleged to have been published by the defendant in Brazil. The defendant applied to the registrar for leave to amend his defense by pleading that if (which was contrary to his contention) the pamphlet had been published in Brazil, by Brazilian law that publication could not be a ground of legal proceedings against the defendant in Brazil in which damages could be recovered; or, alternately, that it could not be a ground of legal proceedings against the defendant in Brazil in which the plaintiff could recover general damages for any injury to his credit, character, or feelings. The registrar allowed the plea to be added, and his ruling was affirmed by Kennedy, J., sitting at chambers, though his lordship expressed some doubt about the matter, and gave leave to the plaintiff to appeal. On appeal, the cases were cited of *Phillips v. Eyre* (20 L. T. Rep. 770; L. Rep. 6 Q. B. 1); *Scott v. Lord Seymour* (1 H. & C. 219); *The M. Moxham* (1 P. Div. 107); and *The Halley* (18 L. T. Rep. 879; L. Rep. 2 P. C. 193). *Held*, that, assuming that the meaning of the plea put in by the defendant was that the libel could not be made the subject of a civil proceeding at all in Brazil, but only of a criminal proceeding, and although in order to maintain an action in this country it was necessary that the act complained of should be wrongful, both by the law of this country and by the law of the country where the act was committed, yet it was not necessary that it should be the subject of civil proceedings in the foreign country; that the cases of *Phillips v. Eyre* (*ubi sup.*), and *The M. Moxham* (*ubi sup.*), showed that, if the act committed in this country would have been actionable, an action could be maintained here if the act was a non-innocent act in the foreign country; that in the present case both the conditions laid down in *Phillips v. Eyre* (*ubi sup.*) had been complied with; and that, consequently, the publication in Brazil was actionable here, the damages which flowed from the wrongful act being just the same as if the libel had been published in this country. *Held*, therefore, that the

plea was absolutely bad, and ought to be struck out. Appeal allowed with costs. Decision of Kennedy, J., reversed. (*Machado v. Fontes*, Ct. of App. No. 2: *Lopes and Rigby*, L. JJ.) — *Law Times*, adv. reports, May 22, 1897.

### TYPOGRAPHICAL ERRORS.

*To the Editor of the Albany Law Journal:*

The article on "Some Old Law Books," reprinted from the *London Globe* in your issue of May 29, is very interesting, but is marred by several errors. "Ranulph de Granville" should be Ranulf de Glanvil, or Glanville. "Cook's fifteen authors" should be Coke's. Something about Bracton seems to have been dropped out accidentally, for I find nothing about him or his work in the article in question, though it says "After speaking of such writers as Bracton," etc. Q.

### The Magazines.

The June number of Harper's Magazine is distinguished by the first instalment of a new novel by Frank R. Stockton, "The Great Stone of Sardinia," dealing, in the humorist's most whimsical vein, with events in the twentieth century, including a submarine expedition to the north pole. Among the other features is the first of two papers on the British parliament, "The Celebrities of the House of Commons," by T. P. O'Connor, and an instalment of "The Martian," with drawings by Du Maurier, one of which is given, as it was left, unfinished. The illustrators include C. D. Gibson, Frederic Remington, and F. H. Lungren.

For significance, variety and interest of matter, and beauty of illustration, there rarely issues a magazine equal to the June number of McClure's. Prof. Langley's account of his ten years of hard study and experiment in the construction of flying-machines, crowned at last with a machine that actually solves the problem and proves "mechanical flight" to be both possible and practicable, is a positive contribution to science; but it is at the same time a most interesting story of heroic patience and effort directed to a noble end. The paper is illustrated with pictures of Prof. Langley's own machine (the only flying-machine that has ever flown), made under his direction. A series of life portraits of Queen Victoria, made timely by the sixtieth anniversary of her reign, is another attractive feature. Madame Blanc ("Th. Bentzon"), who has long been associated with the "Revue des deux Mondes," has an interesting article on the great "Revue," its founder and first editor, Buloz, and its present editor, Brunetière, who has just finished a visit and course of lectures in this country. Hamlin Garland writes of "Grant's First Great Service in the War," supplying some new personal glimpses of Grant.

The Century for June has as its high-lights the subjects of Queen Victoria, apropos of the celebration of this month, and the work of the sculptor St. Gaudens, apropos of the dedication of the Shaw Memorial, in Boston. The most complete pictorial record of the work of St. Gaudens yet made is here published in a group of papers by Edward Atkinson, W. A. Coffin, and T. W. Higginson. Besides three full-page reproductions of the Shaw Memorial, there are twenty-nine pieces of sculpture by St. Gaudens shown in the articles. There is also a sketch of the life of Col. Shaw by the editor, and an editorial on the sculptor. The material relating to Queen Victoria comprises a tribute by the Hon. Thomas F. Bayard, an article by Florence Hayward on "Queen Victoria's 'Coronation Roll,'" here reproduced by her majesty's special permission, and four portraits of the queen at different ages, the frontispiece being the Princess Victoria at the age of four. A third article of special and curious interest is an illustrated account, by Eugene P. Andrews, of "How a Riddle of the Parthenon Was Unraveled," Mr. Andrews himself being the one by whom the riddle was solved while he was a student at the American School in Athens. Other notable articles include the first full, authoritative account, by Prof. W. O. Atwater, of the result of the government experiments with men in a respiration apparatus to determine "How Food Is Used in the Body"—the "man in the copper box;" a record by Miss Alice C. Fletcher of her personal experiences among the Indians; a paper on Harvard's astronomical work, by Mabel Loomis Todd; and the first of a group of articles on "Heroes of Peace," this one being "Heroism in the Lighthouse Service," by Gustav Kobbé.

The North American Review for June presents in its opening pages a most interesting article from the pen of the Hon. T. B. Reed, speaker of the house of representatives, entitled "How the House Does Business." H. Seton-Karr, M. P., contributes an able paper on "England's Food Supply in Time of War," while "Popular Errors in Living" are helpfully treated by Dr. Charles W. Purdy. "Literary Treasure-Trove on the Nile," by Prof. Rodolfo Lanciani, furnishes an account of the recent discovery in Egypt of the lost poems of a famous Greek writer, and the second paper in the series of articles on the "Progress of the United States," by Michael G. Mulhall, F. S. S., has for its topic "The Middle States." Lewis Nixon, who designed the battle-ships "Indiana," "Massachusetts," and "Oregon," writes upon "The Military Value of the Ship-Canada." An eloquent discussion of "The Trust and the Workingman" is contributed by the Hon. Lloyd Bryce. The approaching jubilee of Queen Victoria lends additional charm to a paper on "The Record Reign," by her majesty's son-in-law, the Rt. Hon. the Marquis of Lorne, while

apropos of the jubilee season, special interest attaches also to a brilliant contribution by H. W. Lucy on "The Queen's Parliaments," the first part of which appears in this number. Other topics graphically dealt with are: "The Disintegration of Political Party," by Prof. Goldwin Smith; "The Senate and the Tariff Bill," by Henry Litchfield West, and "Another Word on Prison Labor," by George Blair.

One finds the expected variety in the contents of the American Monthly Review of Reviews for June. The subjects of the sugar tariff, a sixty years' retrospect of the British Empire, the recent visit to the United States of M. Brunetière, the French critic; the defective eyesight lately developed among American children, and the movement for the pensioning of school teachers, are treated in special articles. The editorial department, entitled "The Progress of the World," covers such topics as American intervention in Cuba, the relation of Hawaii to the sugar question, the use of money in politics by corporations, the enlarged metropolis of New York, the fate of the arbitration treaty, European alliances, and the Greco-Turkish war, the future of Greece, etc.

### New Books and New Editions.

Probate Reports Annotated; Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With notes and references by Frank S. Rice, Counsellor at Law, author of "American Probate Law" and "Civil and Criminal Evidence." Vol. I. Baker, Voorhis & Co., New York, 1897.

According to the statement of the publishers, it is the plan of this new series of reports to give, in an annual volume, contemporaneous or recent decisions of the courts of the different States of the Union upon all matters cognizable in probate courts. In this way the convenience of lawyers will be facilitated, and their labors lightened by Yard," and John W. Russell sets very strongly forth the subject of "Our Trade Relations with having before them the most recent and valuable decisions drawn from the numerous State reports upon subjects which have to be considered daily in the practice of the law. The points covered by the cases presented arise in courts of common law and chancery jurisdiction, as well as in probate courts. The notes and references by the editor, who is peculiarly well qualified for this work by study and experience, form an important and valuable feature of these volumes. An examination of the first volume is sufficient to convince one that this series will be exceedingly valuable to all practitioners in, and judges of, probate courts. There are in this volume upwards of one hundred cases reported in full, while the number of cases cited reaches nearly eight hundred.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JUNE 12, 1897.

### Current Topics.

THIS is the happy commencement season. Institutions of learning all over the land are turning out the graduates, armed with the much-prized diploma, and more or less thoroughly equipped to fight the battle of life. To drop the ideal and the theoretical and wrestle with the practical is one of the first lessons to be learned in the great school of experience. Neither law schools nor any other institutions of learning can change a man's nature any more than they can add to his stature. They can only instil into his mind correct principles and habits of thought. Their principal function is to teach him how to learn, to point him to the fountains of knowledge, and to show him the best method of acquiring it. No school can guarantee the success of its graduates, for that depends wholly upon his own energy, ambition, natural aptitude and perseverance. It is perhaps true that in no profession are the misfits so numerous, and in none is their condition so hopeless, as in the legal profession. That that profession is overcrowded no one will attempt to deny. We are told, on good authority, that there are over 8,000 lawyers within the boundaries of Greater New York. How they all make a living is one of the unsolved mysteries. The prizes of the profession are alluring, but they are few. Where one lawyer succeeds in acquiring a large fortune, hundreds merely eke out a precarious living, and many have to resort to questionable, if not absolutely criminal,

VOL. 55 — No. 24.

practices in order to keep body and soul together. Proof of the terribly congested condition of the profession is easily given. Here are a few advertisements taken at random from the columns of a New York legal publication:

WANTED — By attorney, 15 years' practice, position in law firm as managing clerk, or assistant in trial of cases; will take \$6 per week.

A BRIGHT, MIDDLE-AGED LAWYER (notary), thorough in practice and procedure, desires managing clerkship; salary moderate.

CLERKSHIP WANTED — Managing or assistant; competent attorney; college and law school (Columbia); highest references; moderate salary.

WANTED — Bright young attorney (admitted); familiar with city practice; in law department mercantile agency; salary to begin, \$5.

A YOUNG ATTORNEY, with six years' experience, good references, desires position; salary, \$10.

WANTED — Position as law clerk or stenographer, by lawyer, eight years at bar; highest references; salary, \$8 per week.

Here we find middle-aged as well as young lawyers, some of them with college and university training, seeking positions at the starvation wages of \$5 per week! Could there be stronger proof given that there are too many lawyers — so-called? But be it remembered that it is just as true now as it ever was, that there is always room at the top. There are not too many good lawyers, but too many professional misfits, too many men who have mistaken their vocation. Thousands of young men who are struggling to win a precarious living at the bar could doubtless have done well, if not amassed a competence and proved a positive benefit to society, in some trade. Undoubtedly one of the greatest causes of this congestion of the professions is the widespread notion that manual labor is unworthy, and, in a sense, degrading — a mischievous idea which it ought to be one of the purposes of every institution of learning in the land, as well as of every parent, to stamp out. It is more than unfortunate — it is almost a crime — to spoil a good mechanic to make a failure of a lawyer. This is not at all an argument against law schools, or law departments of univer-

sities. The ranks of the legal profession must be recruited, and no better method of doing this has been devised than the agency of well-organized and thoroughly equipped law schools, in conjunction with stricter and more practical bar examinations. Happy, then, is he who early discovers that he has mistaken his calling, and leaves the profession for which he is not fitted.

The question, "What Constitutes a Unanimous Verdict?" has again arisen, this time in a Pennsylvania court. The case was that of a former assistant city attorney of Pittsburgh, recently convicted of crime. Four of the jurors who sat upon the case have made affidavits reciting that at first they were unable to agree upon a verdict, but that having been instructed explicitly by the trial judge that "the minority should yield to the majority," they considered it their duty to vote for conviction, in accordance with the opinion of the majority. They distinctly declare that at no time were they convinced of the guilt of the defendant, and that when they finally voted for conviction they did so against their own belief and judgment, in obedience to the judge's ruling. Can the verdict properly be called unanimous under these circumstances? Assuming the state of affairs to be as the minority of the jury declare, there can hardly be any question as to the irregularity of the verdict, or that the judge was guilty of reversible error. The very facts stated in the affidavits of jurors referred to show that these officers of the court possessed very improper notions of their powers, prerogatives and privileges. Every juror ought to know that, unless the court orders a verdict for one or the other side, as it sometimes has the right to do, he, the juror, not only has the right, but it is his sworn duty, to exercise his own individual judgment as to controverted questions of fact. Each juror, in criminal cases, must be convinced of the guilt of the defendant, and convinced beyond a reasonable doubt. If he is not so convinced, he ought never to yield, though, of course, the fact that a majority of the jury had reached a different conclusion would naturally have some effect

in causing a change of view on his part. These are plain, elementary principles which scarcely need elucidation.

The peculiar complications caused, in New Jersey, by the mistake made by a woman typewriter, Miss Margaret Williams, in substituting the word "provided" for "prohibited," in the anti-pool selling bill, necessitating the calling of the legislature in special session in order that the error might be corrected, seem to have had a happier solution than had been anticipated. The young lady is being congratulated, because the reassembling of the legislature to correct her error has afforded an opportunity to correct another that will save the State some \$46,000. During the closing hours of the regular session it was found that no provision had been made for a special election so that the people might vote on the proposed constitutional amendments. A bill was hastily drafted, the provision for registration being copied bodily out of the law governing regular elections. This law provides for three days of registration, and under it the cost of the constitutional election would have been about \$102,000. Under the amended bill but one day's registration is provided for, reducing the cost to some \$56,000. Miss Williams' blunder may therefore be said to have saved the State some \$46,000. All's well that ends well, perhaps, but this is no argument against care on the part of clerks. It is much safer to be accurate.

The question of the liability to taxation of life insurance policies, under the laws of Indiana, was passed on, a few days ago, by the Marion County Circuit Court. There had been an effort made by the Indiana State Board of Tax Commissioners to place life insurance policies upon the schedule — the schedule never before having had inquiry as to life insurance held by the taxpayer, and there being no direct statute authorizing such tax. During the session of the last legislature a bill was introduced, and passed the house, making insurance policies taxable. It failed in the senate. The State

Board of Tax Commissioners, nevertheless, altered the schedule by inserting inquiry as to life insurance policies, claiming to have full authority under the general law and the Constitution. The trial of the case occupied but a short time; the argument occupied a much longer time. The court, on the 29th of May last, decided adversely to the tax commissioners. This is the first time, we believe, that a court of law in this country has been called upon to say whether a life insurance policy is or is not taxable. In his argument in the case under discussion, John A. Finch, one of the attorneys representing the policy-holders, stated that the only distinct expression, judicial or *quasi*-judicial, to be found upon the subject, is in the learned opinion of the attorney-general of the State of Pennsylvania, in the negative. In the Indiana case it was assumed that a life insurance policy has a "value," within the meaning of the law, for the taxation of property, for the reason that, if a paid-up policy, it is assumed that it draws a dividend; and if a running policy, that it has a value in cash or paid-up insurance on surrender. In answer to the assumption, made on behalf of the Board of Tax Commissioners, that dividends are paid on paid-up life insurance policies which are of such considerable per cent. on the face of the policy as to amount to an income, Mr. Finch showed that very few paid-up policies are entitled to dividends, and that the dividend, as a rule, when there is one, is less than one per cent., and generally less than one-half of one per cent. of the face of the policy. As to the policy of the proposed taxation, Mr. Finch argued that the State had far better aid men with small incomes to carry life insurance than to make it more onerous for them to insure their lives, thus reducing the constant flow of population to the poorhouses and orphan asylums. Pointing to the example of England, in this matter, he showed that the English government, instead of taxing life insurance policies, has established a life insurance bureau, by which citizens can insure their lives under the protection of the government, and with the government's guarantee of payment. So in Germany there is

a life insurance system under governmental management, towards which the government contributes. During the arguments, much was said with reference to the reserve which the companies maintain under the requirements of most of the States for the security of their policy-holders. This, Mr. Finch contended, was a matter between the State and the companies, and of no concern to the policy-holder, except as it was regarded by him as a reason for insuring in a company operating under such a law because of the feeling of security which it gave him in the strength of the company. The reserve is merely a test of solvency fixed by the State. No individual part of it belongs to any individual policy-holder; nor does a policy in a company maintaining a reserve cost any more than in a company that maintains no reserve. Mr. Finch further argued that, while a policy of insurance is in force as a policy of insurance, it can only be taxed as a policy of insurance, and for its value as such; and because it gives the insured the right to surrender it, and receive something in return, as a paid-up policy or a cash sum, does not add anything to its value as a policy of insurance. The right to surrender is not in itself taxable; only after this right has been exercised and something received in return can that which is received in return be taxed.

The decision of the court was adverse to the claims of the tax commissioners. A synopsis is published in this issue of the LAW JOURNAL. The court expressed no opinion upon the power of the legislature to pass a law taxing life insurance policies, because that question did not arise. It merely held that such a radical step could not be taken by any State commissioners, however eminent, without express legislative authority, and there was no pretense that this had been given.

In the course of a Memorial Day address at Rochester, N. Y., the Hon. Charles T. Saxton, former lieutenant-governor of New York, made reference to the notorious case of Broker Chapman, which is worth reproducing here. After declaring that the statute

which establishes injustice and oppression is the most effective weapon of anarchy, and that laws should not only be just in themselves, but justly administered, the speaker said: "I hope it is not true, as reported, that a broker who was recently sentenced to a term of imprisonment for a criminal offense, is living in a Washington jail as comfortably as he might at a good hotel. There must be no class distinction in this country, and there certainly ought not to be inequalities of conditions among convicted criminals. One of the gravest dangers to our institutions is the growing belief that citizens are not all equal before the law; that there is one kind of justice for the rich, and another for the poor. The people will be confirmed in this belief if those who have money can, by its liberal use, turn their prison cells into palaces, and thus escape in large part the penalty of their crimes."

If the newspaper reports are to be relied upon, the condition of affairs described by Mr. Saxton actually exists, and the thirty days' incarceration of Broker Chapman will not only prove, on the whole, a pleasant experience for him, but he will emerge from his sumptuous quarters in something the guise of a hero, while the questions, for refusing to answer which he was committed to jail, will remain unanswered. An adequate punishment would be to keep the prisoner behind the bars, on ordinary jail fare, until the questions referred to, which relate to the operations of the so-called Sugar Trust, are answered. Any other course is a mere mockery of justice.

A decision which is likely to have important bearing on testimony in criminal cases was rendered by Judge Dellenbaugh, of the Cuyahoga (Ohio) Common Pleas Court recently. The judge held, in effect, that an action for slander or libel cannot be maintained against a witness who tells certain things in a criminal case, in answer to inquiries on the part of the prosecutors or attorneys. If the person on the stand does not tell the truth there can be an action for perjury, but not for slander or libel. The case in point was that of Charles Eberman

against Patrolman Martin Bruder. The former brought action because the patrolman had said, on the stand, that he believed Eberman was a known thief and was the keeper of a "fence." Eberman declared the accusation to be false, and asked \$5,000 damages. Judge Dellenbaugh said, in part, as follows: "The petition does not show that the answers complained of were not relative to the issue then on trial, or that they were not honestly believed to be true. The court must presume, in the absence of an averment to the contrary, that the answers of the defendant were within the scope of the inquiry, pertinent to the issue then on trial in the Police Court, and that they were honestly believed by the defendant to be substantially true. It is a well-settled rule of law, founded upon public policy, that a witness, in giving evidence, written or oral, in a court having jurisdiction of the subject-matter, shall do so with his mind uninfluenced by the fear of an action for slander or a prosecution for libel. This rule of law must be applied in this case at bar. The demurrer by the city to the petition is sustained."

Charles L. Lundy, a member of the Hamilton county (Ohio) bar, was tried recently before Judge Wright, of the Common Pleas bench, on the charge of unprofessional conduct, involving moral turpitude, preferred by a committee, consisting of ex-Attorney-General Harmon, ex-Judge Worthington and Francis F. Oldham. The charge was that of trying an uncontested divorce case before Judge Wright which had been tried and dismissed by Judge Evans, thereby deceitfully intending to conceal from Judge Wright the fact that the cause had been previously tried on its merits and dismissed, and also that the said Lundy, well knowing the premises, and fraudulently intending to destroy the evidence of the previous judgment, and to conceal from the court the fact that a judgment of dismissal had been rendered, erased from the wrapper containing the paper the word "dismissed" and the initial "E." placed there by Judge Evans. Lundy admitted the erasure, but denied having set the case for

trial before Judge Wright, claiming that it remained on the docket from the previous term, but the notice of the setting of the case in his own handwriting was produced. The policy of the defense was to treat what was done as foolish and unwarranted action on Lundy's part, but not action which had worked any harm or involved moral turpitude.

At the conclusion of the argument Judge Wright announced a judgment of disbarment. In doing so the judge spoke of the close and confidential relations existing between the court and members of the bar, and the entire disregard by Lundy of the obligations thus imposed. Notice of appeal was given and the bond fixed at \$500. This suspends the judgment, pending the hearing of the case *de novo* in the Circuit Court.

The address of Judge D. Cady Herrick, of Albany, to the graduates of the Albany Law School, which we publish in this issue of the ALBANY LAW JOURNAL, is well worthy of careful perusal, not only by young lawyers, to whom it was particularly addressed, but by every member of the profession of which the distinguished jurist is an ornament. Within the space of two or three newspaper columns Judge Herrick has succeeded in condensing a vast amount of most excellent and timely advice on those topics the discussion of which would be most likely to prove of benefit to young men on the threshold of a professional career, and who would avoid the mistakes and pitfalls, all too numerous, which might mar or wreck that career. The one feature of the address which will doubtless strike the average reader is its candor. Judge Herrick evidently drew largely upon his own varied and interesting experiences in formulating the rules of conduct, personal and professional, which he laid down with such admirable force and conciseness. The distinguished speaker's advice with respect to taking part in public affairs was particularly timely, urging, as he did, active participation, but never to the extent of neglecting the profession of their choice, "for the law is a jealous

mistress, and will not permit devotion to any other shrine." On the subject of the alleged decadence of oratory, too, Judge Herrick spoke with singular truth and felicity. The address, which was delivered in admirable style, is, taken altogether, one of the best we have heard or read anywhere, and constitutes an important addition to the literature of the profession.

The continued outbreaks of mob violence, culminating in the terrible affair at Urbana, Ohio, in which a number of citizens were killed and wounded by militia which had been called out to prevent the threatened lynching of a negro ravisher, and to disperse the mobs, again direct public attention to this serious menace to the continued reign of law and order — indeed, to civilization itself. In some isolated parts of the country, whose population is composed largely of lawless, desperate men, resort to mob rule is not unexpected, but that there should be such outbreaks in an old-settled and conservative State like Ohio is a great surprise, as well as reproach. Terrible as were some of the features of the brutal assault, for which the alleged perpetrator has paid the forfeit of his life, they entirely fail to justify the resort to such extreme measures. No community can afford to place upon itself the stigma of overthrowing law and order to gratify its lust for blood. To do so is to undermine the very foundations of society—to invite anarchy and barbarism. Those who complain that the criminal laws and their administration are not perfect; that many murderers and other criminals in "due process of law" go free, need to be reminded that no human institution is perfect; that if there have been miscarriages of justice, it was upon the recorded verdict, in each case, of twelve men, drawn from the body of the county, rendered after a charge under which they were authorized to convict. The question was well asked by a Texas jurist: "Who assumes to be a better judge of the testimony and its credibility than the juror who hears it all as it comes to him, relieved of the noxious and deadly element of the common rumor, sublimated by the antecedent oath that the wit-



ness will swear the truth, the whole truth and nothing but the truth, not as he hears it, but as he knows it, and by the pains and penalties of perjury?" "If justice is to be administered by the mob, let us abolish the law; if by the law, let us abolish the mob," declared this Texas judge, and his words should be writ in letters of fire upon the heart and conscience of every American citizen who loves his country and would see it a land of law and order, not a hot-bed for the propagation of anarchy and barbarism.

#### LIFE INSURANCE POLICIES NOT TAXABLE.

JUDGE ALLEN, of the Marion County (Ind.) Circuit Court, recently granted the injunction asked for by John H. Holliday and others against the State Board of Tax Commissioners, restraining them from levying a tax on life insurance policies. The court said, in part:

"The fundamental principles of government are directly involved. The question before the court is not whether such life insurance policies should be taxed, but whether they have been taxed. I think it must be conceded that if such tax has been levied, we must find authority for it in some act of the legislature, the only branch of the State government which has power vested in it to levy a tax. It is clear that there is no power given the board of tax commissioners to determine what shall be taxed. They have no power to select the subjects of taxation. The will of the legislature is supreme upon this subject, except as expressly limited by the Constitution. If insurance policies were not subject to taxation by force of law prior to the action of the defendants, then no act of any of the defendants can render them subject to such taxes. They belong to the executive branch of the State government. Their duties are administrative, and require that they carry into effect the will of the legislature. It is not a subject of inquiry by them in the performance of their duties as to what the public good requires should be taxed. It is their duty, not to make laws, but to see that the tax laws are enforced. Property may escape taxation, which is taxable, by their failure to do their whole duty, but by no act of theirs can any property become the subject of taxation which is not made taxable by law.

"The power of taxation is a sovereign power, exercised in this country through the legislative power, and taxes can only be collected when the property has been assessed and the taxes levied in the mode prescribed by law. I am of the opinion that the legislature did not intend to delegate to the State Board of Tax Commissioners any of its

legislative power, and that if it had so attempted it could not do so.

"The purpose and wisdom of the three great divisions of the functions of government provided by our Constitution can find no better illustration than the present case, wherein it gives the power of taxation to the legislature, and places the collection of such taxes in an entirely separate department. If the board, whose duty it is to enforce the collection of taxes, could be, and were, given the power to select the subjects of, and fix the rate of taxation, it would be subvertive of the very foundation principles of our government, and become a menace to liberty. But I do not understand that the legislature has attempted to do anything of the kind. Then the court must determine the intent of the legislature as expressed by existing statutes. \* \* \* \* \*

"It is contended by the plaintiff's counsel that there should be a strict construction of the law against the taxing power, while counsel for the defendants contend that a liberal construction shall be given in favor of the taxing power; and there are authorities supporting each of these contentions; but a better and more reasonable rule than either is not to construe too strictly the law which exacts a share of the public burden from a citizen; nor so liberally in favor of the taxing power as laws intended to effect directly some great public object; but rather to construe the law of taxation fairly for the government and justly for the citizen, so as to carry out the intention of the legislature gathered from the language used, read in connection with the general purposes of the law, in the light of the facts and conditions existing at the time. I am convinced beyond any doubt that it was not the legislative intent in the enactment of any of the statutes of this State to levy any tax upon any policy of life insurance.

"I find no statute, past or present, in my investigation in this State, or any other State, referring to life insurance policies with any purpose of making it a subject of taxation—and I am cited to no instance where any government has ever levied any tax upon life insurance policies—and I am cited to no instance, until the acts of defendants complained of by the plaintiffs herein, where any officer of this or any other State ever attempted to levy on such property any such tax, or ever claimed it was made by law the subject of taxation, as is now attempted.

"If the life insurance policies are by the terms of these statutes subject to taxation as being personal property within the meaning of the statutes and the Constitution concerning taxation, then they have been subject to such taxation under similar statute in the State, and most all of the States, practically, since they were such States.

"In the light of the facts and circumstances of this case, no court could hesitate for an instant to conclude that these statutes do not so clearly express the intention to tax life insurance policies as

to not raise such doubt as to require the court to call to its aid all the many moves of construction which may aid it to make a proper interpretation of the intention of the legislature; and when we consider these statutes in the light of the law bearing upon the subject, and all of the existing facts and conditions, it seems to me equally clear that it was not the intention of the legislature to levy any such tax, and not the intention of those who adopted the Constitution to require any such tax.

"It has been manifested in the policy of this and all the States of the general government, from the beginning to the present time, not to tax life insurance policies, and such policy has been so universally and uniformly acquiesced in that it has become a matter of history.

"If, for any reason, the time has come, or shall come, when the people desire to change that policy, it is an easy matter for them to do so, in the way people have provided for themselves, through their legal representatives.

"It would, in my opinion, be a dangerous perversion of the principles of our government to establish the precedent that a State board of tax commissioners, however eminent and worthy its members, might direct, control, or change the policy of the State government, in a matter of so vast importance, and one that has so especially been reserved to be exercised by the people themselves, through their representatives in the legislature.

"For the reasons stated, the finding will be for the plaintiffs, and the injunction will be granted against the defendants."

The attorneys for the board said the case would be appealed to the Supreme Court. The insurance companies were profoundly interested in the case, and their representatives say they believe they will win in the court above as they have won below.

#### LIMITATION.

##### SEDUCTION UNDER PROMISE OF MARRIAGE.

##### NEW YORK COURT OF APPEALS.

May 4, 1897.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GEORGE NELSON, Appellant.

The two years' limitation for the finding of an indictment for seduction under promise of marriage begins to run from the time of the commission of the first offense between the parties, notwithstanding the prosecutrix is then only fifteen years of age. A woman can be seduced but once under the statute Penal Code, §§ 284, 285.

The age of consent (now eighteen years), fixed by § 278 of the Penal Code, relating to the crime

of rape, does not apply to the crime of seduction under promise of marriage.

The term "previous chaste character," as used in § 284, does not mean reputation for chastity, or chastity founded upon any presumption of law fixing the age of consent, but actual, personal virtue.

Appeal from a judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment of the Court of Sessions of Sullivan county entered on the verdict of a jury.

On the 27th of September, 1893, the defendant was indicted "for that the said George Nelson, on or about the 7th day of December, 1892, and on divers other times before and after that date, \* \* \* under promise of marriage, did feloniously, wrongfully and wilfully seduce and have sexual intercourse with one Fannie A. Moore \* \* \* then and there being an unmarried female of previous chaste character." In June, 1895, he was tried, convicted and sentenced to State prison for the term of three years. He appealed to the General Term of the Supreme Court, which affirmed the judgment, and he now appeals to this court.

Further facts appear in the opinion.

Thornton A. Niven for Appellant.

George McLaughlin for Respondent.

VANN, J. — In March, 1891, when the defendant was twenty years of age and the prosecutrix was fifteen, he asked her to marry him, and she said she would if her parents would consent. On the second of August following he proposed sexual intercourse, which she at first refused, but upon his promise to marry her "if anything happened" (as soon as she discovered that she was pregnant), she finally consented. From that time until March, 1893, he had connection with her every two or three months, and on each occasion, according to her statement, before the act, he promised to marry her "if he got her into trouble." On the 11th of February, 1892, the day that she became sixteen years old, there was a mutual promise to marry without any condition. After this, however, the same as before, each act of sexual intercourse was preceded by a promise exacted by her that he would marry her if she became pregnant. The first time that he had to do with her after she was sixteen was on the 4th of July, 1892. As the indictment was not presented until September, 1893, or more than two years after the first act of sexual intercourse, the defendant insisted upon the trial, and insists upon this appeal, that his conviction was barred by the limitation prescribed by section 285 of the Penal Code. He further claims, and the point was distinctly made at the trial, that if any subsequent act is relied upon to convict, it does not satisfy the statute, because at that time the prosecutrix had ceased to

be chaste. The position of the People upon the subject is that all intercourse with the prosecutrix before she became sixteen is conclusively presumed to have been without her consent, because, by the statute then in force, the "age of consent" was sixteen years, and, accordingly, they seek to avoid the bar of the statute by basing the conviction on the first act of intercourse that occurred after she became of that age.

Seduction under promise of marriage was not a crime at common law, but was made such by chapter 111 of the Laws of 1848. This statute was substantially re-enacted in the Penal Code, which provides that "a person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both" (§ 284). By the next section it is provided that "the subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section" (§ 285). No age of consent is mentioned in any of the sections relating to the subject of seduction, but the statute which defines the crime of rape provided, at the time the offense in question is alleged to have been committed, that "a person who perpetrates an act of sexual intercourse with a female not his wife, under the age of sixteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years" (L. 1892, ch. 325, amending § 278 of the Penal Code). In 1895 the section was further amended so as to increase the limit of age, as applied to rape, to the period of eighteen years, although under the Revised Statutes it was but ten years (L. 1895, ch. 460; 2 R. S., 5th ed., 849, § 22). The only other statute relating to the subject of age, as applied to the relations of the sexes, is the Code of Civil Procedure, which provides that an action may be maintained by a woman to annul her marriage when she had not attained the age of sixteen at the time of her marriage, and it took place without the consent of the one having legal charge of her person, was not followed by consummation or cohabitation, and was not ratified after she attained the age of sixteen years (§ 1742). None of these limitations upon the power to consent were expressly applied by the statute to the crime of seduction, and we have no power to extend them by implication to an offense that is purely statutory. Penal statutes must be strictly construed, and cannot be extended to cases that are not clearly covered thereby. An essential element in the crime of seduction is the consent of the female, founded upon a contract to marry, and plain language on the part of the legislature would be necessary to permit us to hold that the prosecutrix, although

old enough to make that contract, was not old enough to consent to defendant's advances (*People v. Alger*, 1 Parker Cr. Rep. 333; *Crozier v. People*, Id. 453, 456). This is especially true since, by another section of the same statute, an act of sexual intercourse with a female under sixteen, whether chaste or not, even with her consent and without any promise of marriage, was made a crime of a graver nature. As protection was thus afforded to girls under the prescribed age by the severe punishment imposed for rape, it is not probable that the legislature intended to import the age limit into the section relating to the milder offense of seduction, because there was no necessity for it, nothing to indicate any intention to do so. If the People had seen fit to prosecute the defendant for rape committed upon the prosecutrix prior to February, 1892, neither the presence nor the absence of consent would have been material, and the Statute of Limitations would have been five years instead of two (Cr. Code, § 142). As they did not do so, but proceeded against him for another crime, quite distinct in theory and nature, they must be limited to that crime and cannot be allowed to add an element from another offense in order to avoid the Statute of Limitations. It follows, therefore, that according to the testimony of the prosecutrix, her seduction was accomplished on the 2d of August, 1891, or more than two years before the indictment was found. It is true that subsequently, and within the period of two years, there were further acts of intercourse based on concurrent as well as prior promises to marry. We think, however, that a woman can be seduced but once, at least under the statute in question, and that the first voluntary act on her part, after she is able to understand its nature and comprehend its enormity, is the only one in which she can participate as a victim. In *Cook v. People* (2 T. & C. 404), the indictment contained two counts for seduction under promise of marriage, one charging the offense to have been committed July 2d, and the other August 10th. In reversing the conviction the court said: "An important requisite to the offense charged is, that the female against whom it is alleged to have been committed shall have been of a previously chaste character. The requisition of the statute, it is held, relates not to the reputation of the prosecutrix, but to her actual condition, and requires absolute personal chastity. It is, therefore, impossible that the offense be twice committed against the same female. If she has once consented to and willingly permitted sexual intercourse with herself, she no longer possesses that chaste character required by the statute as an essential ingredient of the offense." In another case, where the illicit intercourse between the prosecutrix and the defendant began four or five years before the indictment was found, and continued until within two years of that date, it was held not to be a case of seduction within two

years previous to the finding of the indictment and not to be within the statute. The court said: "If the illicit intercourse began four or five years before the indictment, and continued until within two years, the jury should have found for the defendant on the question of seduction within two years. It would be a rather loose construction of the statute to hold that a woman who has continued in the practice of fornication with a man for four or five years, and up to the time she prosecutes, had been seduced within the last two years. The counsel for the prosecution on the trial seems to have supposed the commission of the crime might be charged, as it were, with a continuance for several years, or that each occasion was a first seduction. \* \* \* But seduction and the act of illicit intercourse, under certain circumstances, complete the crime, and such a construction is hardly within the spirit of the act, which was not intended to punish illicit cohabitation, but the seduction of a virtuous female under a promise of marriage" (*Safford v. People*, 1 Parker Cr. Rep. 474, 480). In a case that arose in the State of Michigan, under similar statute, it appeared that illicit intercourse was had between the parties at short intervals and as opportunity offered, and it was held that, to warrant a conviction of seduction for the second or third, or later acts, there should be clear and satisfactory proof of reformation, and that the burden of proof in that regard was upon the prosecution (*People v. Clark*, 33 Mich. 112).

Our statute does not punish seduction generally, but only when it is committed under promise of marriage, upon an unmarried woman of "previous chaste character." Chaste character, as thus used in the statute, does not mean reputation for chastity, but actual personal virtue (*Kenyon v. People*, 26 N. Y. 203, 207). As was said in the case cited, "the female must be chaste in fact when seduced," and "the legislature could only have meant personal qualities that make up the real character;" or, as was said in another case, she "must be actually chaste and pure in conduct and principle, up to the time of the commission of the offense" (*People v. Carpenter*, 8 Barb. 603, 608). The same words used in a statute upon the same subject in another State were held to mean the "real moral qualities" of the woman, or her "character in its accurate sense and as signifying that which" she "really is" (*State v. Proger*, 49 Iowa, 531, 532).

The only answer made by the learned counsel for the People to the fact that the prosecutrix had surrendered her chastity more than two years before indictment found is that she was not within the age of consent, and that hence her acts were not unchaste. This argument would have the same force even if the previous intercourse had not been with the defendant, but with some third person. Under the present statute, it would apply to a female eighteen years of age, although she

could have made a valid will of personal property at the age of sixteen (L. 1867, ch. 782; L. 1895, ch. 460). Her favors might be common to all, yet she would be chaste by operation of law. Impure in fact, she would be pure by statute; a Lucretia in the State of New York, but a Messalina everywhere else. We do not think that the legislature meant constructive chastity when it said previous chaste character, but that it meant chastity in fact, according to the popular sense of that word. Character pertains to the person and is the distinguishing mark of what the person is. It is not founded on presumptions of law, but on good conduct and pure thoughts, and only one who is morally and physically pure can be said to have a chaste character within the meaning of the statute under consideration.

It is insisted that unless there is a fixed standard by which it can readily be determined when consent will indicate unchastity, such doubt and confusion will arise as may lead to injustice. We think, however, that an ironclad rule applied inflexibly to all females under a given age would be harsh, unequal and unjust. It might lead to the conclusive presumption that a prostitute was chaste, simply because she was young, while the same presumption would not extend to an older person, whose feeble mind and ignorance of evil called for the protection of the law. The safer course is to leave the question of capacity to consent where, as we think, the legislature in this class of cases has left it to the judgment of a jury, guided by evidence showing the intelligence of the subject and her ability to distinguish right from wrong.

For these reasons we think that the defendant was unlawfully convicted, that the judgment should be reversed, and, as the facts cannot be changed, that the indictments should be dismissed.

O'BRIEN, J. — (Dissenting.) — I dissent on the ground that unchastity within the meaning of the statute cannot be imputed to a female in consequence of intercourse involving the crime of rape, whether that crime was the result of violence or actual or legal incapacity to consent. The fact that the capacity to consent has been enlarged by statute furnishes a good reason for the repeal or modification of the statute defining seduction; but so long as the statute remains as it is the age limit for consent concludes the courts.

All concur with Vann, J., for reversal, except O'Brien, J., who reads memorandum of dissent.

Judgment reversed.

A lawyer at Stratford, Ont., whose sign read "A. Swindle," was advised by a friend to have his first name spelled out in full — Arthur, or Andrew, or whatever it might be. He didn't follow the advice, however. His first name is Adam.

### Notes of Cases.

The Supreme Court of the United States has recently declared, that when a criminal convicted by a State court escapes and becomes a fugitive, pending his appeal to the State Supreme Court, it is competent for that court to order the dismissal of the appeal unless he shall surrender himself or be recaptured within sixty days; and the dismissal of the appeal at the end of the sixty days is not a denial of due process of law. (*Allen v. State of Georgia*, 17 Sup. Ct. Rep. 525.)

In *State v. Namias*, decided by the Supreme Court of Louisiana, in April, 1897 (21 S. R. 852), it was held that an ordinance of the city of New Orleans prohibiting all sales in the public markets after 12 M., except fruits and meats in limited quantities, and prohibiting the sale of fruits, vegetables and other articles of food within six squares of the public markets by peddlers, is constitutional and valid. The appeal was by a peddler prosecuted for selling fruits and vegetables within six squares of a public market.

The result of an autopsy on the body of one for whose death an action is brought is not privileged under a statute (Code Civ. Prof. Cal. § 1881, subd. 4), which provides that "a licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." "A dead man is not a 'patient,' capable of sustaining the relation of confidence towards his physician which is the foundation of the rule given in the statute, but is a mere piece of senseless clay, which has passed beyond the reach of human prescription, medical or otherwise." (*Harrison v. Sutter St. Ry. Co.* [Supreme Court of California], 47 Pac. Rep. 1019.)

In an action by James N. Sickles, as administrator, against the New Jersey Ice Company, to recover damages resulting from the death of Winfield F. Sickles, the New York Court of Appeals has reversed judgment given below for the plaintiff. The company was engaged, in the winter of 1893, in harvesting ice from the Hudson river, at Stuyvesant Landing. Its ice-house was located upon the banks of the river, and was about 350 feet in length. The plaintiff's intestate, a boy of thirteen years, was drowned by breaking through newly-formed ice in front of the ice-house while skating. The court holds, in an opinion by Judge Haight, that if one familiar with the situation skates upon the ice newly formed, over a cutting from which the original ice had been removed by the company only three days before, to his knowledge, and guarded, at the time and previously, to his knowledge, on only three sides, by lines of bushes, commencing some distance from the shore, and not running on the shore side fronting the ice-

house, and the new ice turned out to be only three-quarters of an inch thick, and the skater breaks through, he is guilty of contributory negligence, which will prevent a recovery of damages from the ice company, on the ground of its negligence. The court holds that the doctrine that a traveler on a city street may, without negligence, rely on the assumption that the municipality has performed its duty in keeping the street safe, is not applicable to a skater on a water highway, as against one having the right to cut ice therefrom.

An interesting decision relating to the liability of restaurateurs for overcoats stolen from guests was rendered by the Appellate Division of the New York Supreme Court, first department, recently. The appeal was from a judgment of a District Court, awarding Harry Appleton \$35, the value of an overcoat, which he intrusted to a waiter in the Harlem Casino. Presiding Justice Daly said in his opinion: "The case shows that the waiter took the hats and coats of the party when they entered the restaurant and sat at the table, and, under the circumstances, it may be inferred that it was within the scope of his duty to do so. The master would be liable for any neglect to safely care for such articles. Guests invited to sit and eat at tables must be expected to remove and lay aside their hats and wraps, and the defendant was bound to provide a reasonably safe place for them."

Christopher Martin, a milkman, was the owner of a number of cows, which he was driving on King's Bridge road. At the crossing two of the cows were struck and killed by a New York Central train. In a suit against the railroad company by Martin, in the Tenth District Court, for the value of the cows, the jury gave a verdict in his favor. The justice had charged the jury that the statute imposes upon a railroad company the duty of fencing its road with sufficient fences to turn cattle, and that, aside from the statute, a railroad passing through a district in the nature of a village was under an implied duty to construct a sufficient obstruction across highways or roads. The Appellate Term has reversed the judgment, holding, by Justice McAdam, that as a failure to keep up fences was not the proximate cause of the killing of the cows, that portion of the charge relating to fences was irrelevant, and the instruction that the defendant was under a duty to construct obstructions across the highway where the accident occurred was erroneous. "If the justice," Justice McAdam said, "had submitted the question of negligence to the jury, leaving them to determine it from all the circumstances of the case, the absence of gates or obstructions, of a flagman, of warning of any kind, the rate of speed at which the train was going, and the degree of care taken or omitted by the respective parties on this particular occasion, a question different from the one before us would have been presented."

## WISE WORDS TO YOUNG LAWYERS.

AT the commencement of the Albany Law School, on the evening of June 3d, the address to the graduates was delivered by the Hon. D. Cady Herrick, of Albany, associate justice of the Supreme Court, Appellate Division, third department. The ALBANY LAW JOURNAL takes pleasure in publishing the address in full, and commends its careful perusal to every young lawyer in the land who seeks to win place and profit in his chosen profession. Judge Herrick said:

*Gentlemen of the Graduating Class:*

I congratulate you that you have advanced successfully so far in your efforts to enter into an ancient and honorable order. If you have honestly and earnestly pursued your studies thus far you should have no great difficulty in passing the examination which will permit you to enter upon the practice of your chosen profession.

There are no elaborate ceremonies to herald your entrance to the bar, no addresses made, no advice given, so that perhaps it may not be amiss here, upon the threshold of your professional life, to make a few suggestions and offer a little friendly advice.

If your aim in life is merely the accumulation of money, or to escape laborious effort and toil in your way through life, stop right where you are. There are few callings or pursuits where the same ability, industry and perseverance will not yield greater pecuniary returns than the bar. Better start in life as a day laborer than enter the profession merely for what is to be gained from it in dollars and cents. While some accumulate large fortunes, yet, compared to the total number of practitioners, they are few and far between. But to those who desire to make their way in the world by purely intellectual effort, who enjoy the conflict of mind with mind, and who can, without shrinking, look forward to years of unremitting mental toil and labor, not ceasing with the going down of the sun, nor measured by any eight-hour statute, who are content to receive moderate pecuniary returns, there is no profession like that of the bar. Like all callings, it can be and is prostituted and abused, but none can be more honorable and useful. And the man who endeavors to make his professional career an honorable and useful one, even though, through lack of ability or from mischance, he misses reaching its higher walks, will obtain an honorable standing among his fellow-men and enjoy the respect and confidence of the community in which he lives, rewards more to be desired than wealth without them.

Moderate abilities, coupled with great industry and absolute integrity, will insure you a moderate competence, and even open to you great opportunities for public trusts and honors. To the man of superior abilities great possibilities are opened.

I will assume, however, that you have determined upon your career, have passed your final examinations, and been licensed to practice. Do

not think your time for study has ended, and that you have only to wait for business, and do not be discouraged because clients do not flock to your office. Some one has said that it is one of the merciful dispensations of a Divine Providence that a young lawyer's clients are few and far between, in order to give him time to learn something about his profession.

While waiting for clients to come is the time for earnest thought and study. It is the period in your life for "moderate living and high thinking." It is the time to lay broad and deep the foundations of your professional career; it is the time of waiting; the opportunities it affords to of law. It will be time enough to study cases when your clients come. Make the most of this time of waiting; the opportunities it affords to equip yourself for the higher branches of the profession, and its great responsibilities will never come back to you.

Do not make the mistake of thinking that it will be time enough to equip yourself when the case comes and the occasion arises for the use of your knowledge. It has frequently happened that the case and the opportunity has been presented to a lawyer to establish his reputation upon a firm foundation, but from lack of a broad knowledge of his profession he has failed to realize its possibilities, and his chance has gone, never to return.

To carry on this work you must have books. Most of you will enter the office of some lawyer to whose library you will have access, but do not depend entirely upon that; begin early the creation of your own library; put all the money you can scrape together into books. Buy few textbooks, and let them be of the standard authors, upon the leading subjects, and the last editions.

Commence early the collection of reports. Buy those of your own State first.

Senator Matthew Carpenter, one of the great lawyers of the last generation, in an address to the graduating class of the Washington Law School, advised them to get Barbour's Reports; to buy, beg, borrow or steal them, but by whatever means, to get them; that they were a library in themselves; that in them they would find ingeniously reasoned decisions upon every side of every question, and that no matter upon what side of a question they were employed, they would find in Barbour's Reports a decision to support their contention.

I am not prepared to say that there are not other reports of this State that deserve the same commendation for the same reasons.

Do not, in your efforts to fit yourself for your future career, confine yourself merely to the law; the lawyer whose knowledge is confined solely to that to be found between the covers of law books is only partially fitted for his profession. He may become a sharp, keen, acute practitioner, but always a narrow one; he may know the letter of the law, he will not fully realize its spirit; and upon

large questions will fail to meet the demands made upon him. There is no branch of knowledge that comes amiss to the lawyer.

Everything that concerns the affairs of men sooner or later touches the law, and needs the lawyer.

Of course, it is not to be expected that you will master all branches of knowledge, or all professions. The human mind is not adequate to such a task; and when you get a case that requires special scientific or professional knowledge, you can secure the assistance of a specialist, but it may well be that without any general knowledge of a subject you will not appreciate that it enters into your case, or realize that you need the assistance of a person learned in that particular branch of knowledge until it is too late.

Let the creation of your law library go hand in hand with that of a general library.

But in your study of books do not become a recluse. The study of men is of just as much importance as the study of books.

Learn to know them and their pursuits, and all the phases of human nature. Acquire a knowledge of business and of public matters. The successful lawyer must, in these days, be a man of affairs.

The all-round lawyer must not only be a warrior to fight his clients' battles, he must also be an adviser, a negotiator and a diplomat.

The preparation, trial and argument of cases is but a portion of a lawyer's business. He must be prepared to advise in business affairs, to negotiate the settlement of controversies. The reputable and skilful lawyer does not promote, but composes, contentions.

Some of our greatest and most prosperous lawyers seldom or never appear in court. Great legal victories are frequently won, not in court, but in the office, where diplomacy and skill in handling men and measures preserve reputations, save families from disruption, keep great business houses from wreck and ruin, harmonize conflicting and contending interests, and make possible the combinations of men and capital necessary to carry forward the great commercial enterprises of the age.

These things require not only legal learning and ability, but a knowledge of men and affairs, and frequently a fineness as delicate as the touch of a woman.

It is lawyers possessing these qualifications that are sought by the great corporate and business interests of the country.

Those interests are generally in the hands of men of a high order of ability; when they require legal assistance they want the best. They possess the intelligence to understand and appreciate ability in others, and they are willing to pay for it. The result is that our best legal talent is rapidly drifting into the almost exclusive employment of the great corporate and commercial interests of the country.

I have advised you to acquire a knowledge of public affairs. I mean something more than merely reading about them. Take an active part, so that you will acquire a practical knowledge.

First, because good citizenship demands it. Every citizen owes some service to the State.

The better trained and educated a man is, the higher that duty becomes, and the more valuable the service he can render.

In this country the man who does not take an interest in public affairs is not a good citizen, and is not fit for public service either upon the bench or elsewhere. The more intelligent and active an interest he takes, and the more vigorous and robust a personality he becomes, the better fitted he is for high positions of public trust and honor.

Second — Take a part in public affairs for your own benefit. It enlarges your ideas; it makes you a broader man. It gives you a new and larger conception of law and the statutes.

It will give you a greater knowledge of men and of the springs of human action, which will be invaluable, particularly in the trial and argument of cases.

It will also greatly enlarge your acquaintance from which to draw business.

But be careful, very careful, not to become too much absorbed in politics; it is a seductive pursuit, and its pleasures and enjoyments continue to allure long after all other amusements have become stale and flat, and unless held firmly in hand it is well calculated to wreck your professional career. The law is a jealous mistress, and will not permit devotion to any other shrine.

Still, public service and high legal standing are not incompatible.

Almost every chief justice and lord chancellor of England, and most of the judges of the first class in this country, have taken an active part in public affairs before their elevation to the bench, and such participation has only the better qualified them for their high duties, and rarely, very rarely, has partisanship swayed their rulings.

Lawyers stood in the forefront of every struggle for English liberty, and in our own country, from Adams and Otis to Lincoln, have been leaders in every battle for human rights, and are still rendering valuable, voluntary, unbought service to the State and nation.

While, therefore, as good citizens, as well as for your own advancement, I advise you to take an active part in public affairs, do not do so for the sake of obtaining office.

Take no office except strictly in the line of your profession, unless under very exceptional circumstances. Except to escape starvation, do not seek for or accept any political clerkship. Do not be a seeker for political business. If it comes to you voluntarily, is honorable, and the compensation fair, well and good; but do not seek it. In doing so other and more lasting clientage is lost; you become more and more dependent upon it, and

I know of no more contemptible figure in the profession than the legal political bone hunter.

But let us return to our studies. While fitting yourself for your professional career, do not fail to qualify yourself to present cases to courts and juries. Of course, much of that ability comes only from practice and experience, but much also can be acquired by previous thought and preparation.

It has always been a matter of surprise to me that in the two professions, the law and the ministry, where the ability to present their views in the strongest possible manner is of such great importance, so little attention is apparently given to the art of public speaking. There is an impression, I know, with many people, that oratory has ceased to be effective. This, I think, is a mistake. The style of oratory which is effective has perhaps changed; the people are better read and more intelligent, and it requires greater knowledge and skill to convince or move them, but clear and persuasive oratory is just as effective as ever.

It has been said "that the orator is born, not made," and while you may not have that heaven-born fire and genius, still much may be done by study and practice to make you a powerful and persuasive speaker.

Study to be clear in your statements of law and fact, and bear in mind always that you cannot make a clear statement unless you have a clear and perfect understanding of the matter yourself. Make your statements in clear, precise, simple English; use small words when possible.

In arguments before courts, when you have made a perfectly plain, full and clear statement of the facts, your case is more than half argued.

Avoid all mannerisms and affectations. Speak easily and naturally. The highest art is to conceal the art you are employing.

Speak as if you were dead in earnest, and meant and believed every word you said. In the vast majority of cases there is no occasion for splendid rhetoric or declamatory display; indeed, they would be out of place.

The advocate who wins the verdicts is the one who makes himself the thirteenth juror, and in plain, earnest, simple Anglo-Saxon, with no apparent arts of oratory, satisfies the remaining twelve that his side is the right side.

This art was perhaps possessed in the greatest perfection by Scarlet, afterwards Lord Abinger, one of the most effective jury lawyers ever known at the English bar. He was a contemporary of Lord Brougham, who had a world-wide reputation as a great orator and advocate. This story is related of them: An English farmer, who had been attending a circuit, in speaking of the trials that had there taken place and the lawyers engaged, said: "Brougham is the man for my money; he is a great orator, an eloquent man, and if I ever get into trouble he is the lawyer that I want." "But," said one of those present, "I see that you decided against Brougham in all the

cases he was in, and in favor of Scarlet." "Oh," said he, "that is all right. Scarlet is a nice man, and he chanced to get on the right side in all those cases, and we had to decide with him." Scarlet had made himself the thirteenth juror.

If you expect to become trial lawyers, or to argue your own cases, you must assiduously cultivate this art of public speaking. It is absolutely necessary in those branches of the profession.

It is surprising how few really good trial lawyers we have. I do not speak of first-class trial lawyers, because men of the first class are few and far between in every profession, calling or business; but the moderately good trial lawyer is rare, and there is hardly a bar in the State but what has room for one or more lawyers who can present cases to courts and juries with ability and skill.

I have not the time to give you my ideas as to what constitutes a good trial lawyer, or as to how you should study and practice to make yourself one; I can only say, do not despise the day of small things. Take hold of the smallest cases that are brought to you, and exercise all your skill and arts upon them. Do not refrain from going into the lower courts; make them your training schools. The old country justices' courts were the training schools for the greatest trial lawyers and advocates this country has ever known.

Prepare your cases thoroughly. Make yourself master of all the facts and the law in your case, so that you know more about it than any other human being. Thorough preparation upon both the law and facts is one of the greatest secrets of success.

In preparing upon the law, either to advise your client or for your brief for the court, strive to be intellectually honest — honest with yourself. By that I mean, do not permit your desire to assist your client or your case warp your judgment as to principles or color your opinion as to what a case has really decided. Strive to find out what the law really is, not what it is the interest of your client to have it — that is the only way to become a safe adviser.

In starting out in your professional career, be careful and guarded in your conduct towards your brethren in the profession. Do not acquire the reputation of being a sharp practitioner. Let your simple word be as good as your oath or written stipulation; do not depend upon tricks to overreach or obtain advantage of your adversary. Be sharp, keen and acute to detect and prevent impositions upon you or your client; but do not depend too much upon mere sharpness or keenness to advance your own causes.

Be absolutely candid with the court; do not attempt to mislead it. Remember you are one of the officers of the court whose duty it is to assist in ascertaining the truth; it has a right to rely upon you, and will until you prove untrustworthy.

The lawyer who is not candid with the court, who attempts to deceive or mislead it, soon be-



comes a marked man. He may continue to be treated pleasantly and courteously, perhaps with that extreme courtesy that sometimes marks the lack of cordiality, but his every word and act is watched and scrutinized; nothing is taken upon trust; and while his client is not consciously permitted to suffer, yet his services have become practically valueless to that client.

While it is the duty of the courts to mete out justice irrespective of persons, that applies more particularly to the causes and the clients, and not to the counsel. It is natural that the man of great learning and industry, who understands and thoroughly prepares his cases, who is honest and candid with the court, should have, and deservedly have, great weight with it. Ability and high character are entitled to and will receive, corresponding weight and consideration in whatever forum they appear.

The man who gains the reputation of being sharp and tricky seldom advances to any high position in the profession, but spends his days as he begins his professional career, to use the words of Sheridan, "picking up small fees and impudence," and never reaches the higher grades of the profession and the accompanying emoluments and honors.

In all your acts and dealing so conduct yourselves that you will not be ashamed to have any of them exposed to the full blaze of public scrutiny and criticism.

The profession is much misunderstood, and from time immemorial the lawyer has been the subject of ridicule and abuse, and it is, therefore, so much the more important that not only in his professional life, but in his daily walk and conduct, he should so conduct himself as not to give just occasion for reproach.

No matter how upright he may be, he cannot escape calumny, but he can avoid just cause for it, and sooner or later the community will recognize the rectitude of his life.

Never commence an action unless you think your client ought of right to succeed. In the defense of an action a different course is permissible, and so long as you do not pervert or suppress testimony, you can properly assist your client in procuring the opinion of the court or jury as to his rights and duties, and not usurp their functions yourself. Every man has a right to his day in court, and the right of counsel to present his side of the controversy.

Never lend yourself to any scheme for making money out of any person's lapses from virtue or morality. The only place for the lawyer who assists the blackmailer is to share with him the felon's cell.

While it is the custom of the ignorant and thoughtless to malign and abuse the profession, yet the very persons who do so do not hesitate, when in trouble or difficulty, to fly to some member of the profession which has been the subject of

their abuse, and confide their troubles to him, unfold to him the innermost secrets of their lives, and place fame, good name, fortune, and even life itself, in his hands, feeling and believing that the trust will not be betrayed, and that the fidelity of the lawyer thus employed can be absolutely relied upon.

There is no class of men, either professional or otherwise, that have so many, vast and varied interests committed to their fidelity, and where so few betray the trust.

I hope that it is unnecessary to impress upon you the duty of absolute fidelity to your clients.

Lord Brougham, upon the trial of Queen Caroline, made this declaration as to the duty of an advocate to his client:

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among others, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

"Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

I think it is the consensus of professional opinion that Lord Brougham, in the heat of conflict and in his desire to let it be known that the defense was not to be intimidated by the king, went too far.

The means and expedients resorted to to save your client must be neither dishonest nor dishonorable; neither must you sacrifice the innocent to save your client or your cause, and your duty as a patriot is superior to your duty as an advocate. With these limitations, it seems to me the definition I have quoted as to the duty of an advocate may be accepted, with this addition, that under no circumstances are you to reveal the confidences of your client without his consent. They are his secrets, not yours; and should be regarded as sacred as the revelations at the confessional.

This obligation exists not only while the relation of counsel and client continues, but after it ceases, and is to be carried inviolate to your grave.

These suggestions, trite and commonplace, to the old lawyer, I trust may be of some little use to you, in calling attention to what you may usefully employ yourself about in the waiting years of your professional life, and also your obligations and duties from the beginning to the end of your career.

In closing, let me say, enter upon your professional career as you should upon the trial of a cause. Having, after careful thought and preparation, determined upon your course, enter it not timidly or half-heartedly, but cautiously and prudently, firmly and and fearlessly, and if you do not achieve success, you will, at least, deserve it.

## A LETTER FROM NEW ZEALAND.

*To the Editor of the Albany Law Journal:*

In response to your invitation, conveyed through the librarian of our Supreme Court, I propose to give you some notes from time to time from this remote little island, on such topics as may possibly be of some interest to your readers. The ALBANY LAW JOURNAL has its readers even here, and, I need hardly add, it is a welcome visitor wherever known. But for your invitation I should have thought we are too insignificant a people to be of much interest to the bulk of your readers. Of this, however, you should be the best judge.

In the last general election a good deal was heard about bribery, but, then, it is not bribery of individuals, but of constituencies, in the shape of promises and appropriations of public money for local works. But bribery in another form, namely, by the bestowal of government "billets," is, I regret to say, rapidly becoming a matter of course amongst us; and, as a natural consequence, we are drifting into acquiescence in that most detestable practice expressed in the maxim, "To the victors the spoils," with which you Americans are commonly supposed to be so familiar. This comes of being a progressive democracy, and, I assure you, we rather plume ourselves on our progressiveness! Some amongst us think all our progress is downwards; but, then, are there not in any community people who would like simply to stand still! Like Huxley's Irish carman, if we are not going in the right direction, we are at any rate going at a great pace — and is not that better than standing still?

The third session of our parliament has closed — a parliament that has signalized itself by the volume of the legislation passed. Indeed, the legislative activity of our parliament is truly wonderful, and, I must add, to many amongst us somewhat alarming. During its three sessions of about four months each the number of bills introduced was 546. Of these 272 were passed, and the rest were disposed of in various ways, the larger number being slaughtered in the annual "Massacre of the Innocents," whilst a fair proportion were either killed with kindness by the upper house or were ignominiously kicked down stairs. As you may gather from the list I send you of bills introduced last session, our acts and bills deal with all conceivable, and even with some inconceivable, subjects, and largely with constitutional and legal matters, but especially, as you will observe, with social subjects. Indeed, we are rather proud of our achievements in legislation on social subjects, and, whatever else may be said of it, this is by far the most interesting part of our luxuriant crop. Whether it will be very profitable remains to be seen. The harvest is not yet!

We try legislative experiments on constitutional and social subjects with the utmost lightness of heart, and the promoters of this class of legislation

are rather pleased and flattered that New Zealand should be regarded, by the rest of the civilized world, as a sort of laboratory for trying all kinds of social experiments; and their equanimity is not likely to be disturbed by such criticism as that of M. Pierre Leroy-Beaulieu, in a recent number of the *Revue De Deux Mondes*. For is not he merely a benighted Frenchman? You imagine that you beat creation in some things, but in social legislation we are in the van of civilization! I shall be glad to give your readers some information on these subjects if you wish it, but for the present I propose to confine myself to the more strictly legal subjects. Not being "cabin'd, cribb'd, confin'd," by a written Constitution, as you are, we are at liberty to play all sorts of *cantrips* with constitutional subjects, and we are not slow to exercise our freedom. As a proof of this, may I state that three years ago we admitted women to the franchise. The late parliament was the first elected on this universal suffrage, and to it we owe the social and socialistic legislation referred to. But another remarkable fact about this most "liberal" and socialistic parliament is that it should have also proved to be the most subservient to the will of the leader of the Liberal party for the time being, who happens to be a man of great native ability and determination of character, although having but slight education.

I notice that, in a recent number of the *North American Review*, Paul Blouet (Max O'Rell) states that the women's franchise in New Zealand led to such an intolerable tyranny that the act granting the suffrage to women was repealed in six months! If this is to be considered a fair sample of the kind of "information" Monsieur Blouet serves up for his readers, the bulk must be worth very little. Needless to say, the act has not been repealed. We would not (yet) repeal it if we could, and we could not if we would. This is a kind of *argumentum ex necessitate* that might have occurred to M. Blouet. The unfortunate thing about experiments of this kind is that they cannot be undone. "You cannot correct a wrong subtraction by doing your addition right." I would not, however, have it inferred that there is any general consensus of opinion amongst those who favored the women's franchise that a mistake has been made in granting it. It were premature to come to any conclusion on the subject.

One of the acts passed by our parliament is one opening the legal profession to women. In this you set us an example a good many years ago, and the change met with comparatively little opposition here. Our elective house shows great jealousy of the legal profession as being a "close corporation," and the tendency is to throw the doors open to all comers, and to make the entrance as easy as possible. Whilst amongst you there is, as I learn from your files, a movement in the direction of raising the standard, with us the tendency is entirely in the opposite direction.

And this in a country that devotes large sums to the advancement of secondary and university education! Last session an act passed the house having for its object to dispense with Latin as a subject of examination, but it was thrown out in the legislative council (upper house).

One of the most remarkable proposals ever submitted to our parliament was a bill introduced into the upper house by the late attorney-general. The purpose of this bill was to introduce into our judicial system the practice in vogue in some of your States of forbidding the judge who presides at a jury trial from commenting on the evidence! The gentleman who introduced it was to all appearance in earnest, for he made the attempt in two parliaments; but he was not able to give any good reason for the proposal. Two of our judges wrote very able brochures against the bill, and we were indebted to your volumes in our library for information on the subject, and also to Dillon's "Lectures on English and American Jurisprudence." We are not likely to hear any more of this strange proposal.

In my next I shall give some particulars regarding our judicial system and law generally..

J. MACGREGOR.

DUNEDIN, NEW ZEALAND.

### English Notes.

The average cost of criminal prosecutions in England at present is £33 each.

The bar has successfully urged its claim to accommodation to view the jubilee procession. The lord chancellor has secured 180 seats, which are to be balloted for. By common consent of the four Inns of Court, the work of distribution has been undertaken by the general council of the bar, on the suggestion of the lord chancellor.

The decision of the house of lords in the Gasfloat Whittom gives the *imprimatur* of the supreme tribunal to the proposition that the only subjects of salvage are a "ship," her cargo, her apparel, wreck, and, by statute, passengers' lives, and that structures such as gasfloats, which cannot be turned to the ordinary purposes of navigation, are not "ships" within the meaning of this definition.

It is settled law that a solicitor has an implied authority to compromise an action in which he is retained for one of the parties. Even when the settlement has been made in violation of the client's prohibition, it has been held that the latter is bound, provided that the other party has acted *bona fide* and without notice of such prohibition, though, of course, the solicitor is in such cases liable to the client for his breach of duty. As regards the power of a solicitor to settle a claim before the issue of a writ which he is retained to prosecute, there has hitherto been little authority. The only reported case bearing directly on the point seems to be *Duffy v. Hanson* (16 L. T.

[N. S.] 332), in which Mr. Justice Willes ruled at *Nisi Prius* that a compromise entered into before the issue of a writ by an attorneys' clerk was not binding on the client. The Court of Appeal has just held that the same rule applies where a solicitor before action brought accepted a small sum in discharge of his client's claim without the latter's sanction. Why the issue of a writ should make a difference in the authority of the solicitor is by no means obvious. It is, however, unsatisfactory that a client should ever be bound by a compromise made without his knowledge or approval, says the *London Law Journal*, and for this reason the decision of the court is a welcome one.

The Press Association's Liverpool correspondent states that Joseph Hollis Yates, solicitor, who was sentenced at Liverpool Assizes, on the 21st inst., to penal servitude for life for various frauds, had a much more daring and gigantic scheme on hand, which was frustrated by his arrest. In 1819 Col. Blake, an English military officer on duty in Ireland, eloped with and married a handsome young Irish girl of humble parentage. At his death Col. Blake left the bulk of his property to his wife, a legacy of £10,000 going to Mr. Gladstone. The widow died intestate in 1876, in London, and left no family. No heirs could be discovered, and in 1883, after the usual process, the crown claimed the estate, which then amounted to over £100,000. In 1891 a claim to the estate was made. Ten persons alleged that they were heirs to the deceased lady. The matter was taken up. The crown defended, and owing to the difficulty of establishing their case, their claims fell through. Last year Yates heard of the matter, and at once set to work. He went to Ireland and interviewed several persons. He obtained an old family Bible, and wrote the history of the family on the fly-leaf in prepared ink, which faded. A watch was also obtained and engraved in Liverpool with an inscription, purporting that it had been presented by the deceased lady to her nephew, and some bogus coffin plates were ordered. Having prepared a case, he submitted it to counsel and got a favorable opinion. He then advertised in the London papers for help to prosecute a claim, and some hundreds of pounds were offered. His arrest, however, put an end to the scheme, and he told the police that, though they had got him for some small things, he had a much bigger thing on hand, which he would have got through in a few months. A young man named Duff, who had acted as Yates' managing clerk, was sentenced to ten years' penal servitude. James Richard Smythe, a clerk with Yates, was sentenced to five years' penal servitude. Arthur Cooke, an insurance agent, for participation in the frauds, was sentenced to five years' penal servitude. James Francis Durkin, an ex-police officer, who had also been convicted in complicity with Yates, was sentenced to two years' hard labor. And Emma Cooke, wife of the prisoner Cooke, was sentenced to six months' imprisonment.

## LAW SCHOOL CATALOGUES.

THE ALBANY LAW JOURNAL acknowledges the receipt of a copy of the catalogue of the Indiana Law School for the year 1896-7. This school, which was organized three years ago, for the purpose of giving the law students of the middle west an opportunity to acquire a more thorough and systematic knowledge of the law than had theretofore been afforded them by any institution within easy reach of their homes, has been attended with encouraging success. The school, which is located in the city of Indianapolis, now forms a part of the University of Indianapolis, and degrees and diplomas are conferred by authority of the senate and trustees of the university. The members of the faculty have been carefully chosen for their special ability and qualifications, and the course of study is thorough and systematic. Among the advisory trustees we notice the name of Hon. Benjamin Harrison, ex-president of the United States. The next school year opens October 5, 1897.

We have also received from the Illinois College of Law, Chicago, Ill., their circular of information for 1897-98. This institution is regularly incorporated under the laws of the State of Illinois, with full power to maintain courses of study in law and related sciences, and to confer the usual degrees. It offers an unusually large number of courses of instruction, practically covering the entire science of the law. The many advantages incident to its location in so large and progressive a city as Chicago are apparent, while the faculty includes many men of national eminence in the law.

## Notes of Recent American Decisions.

Insolvency. — Preference — Exempted Property — Waiver — Life Insurance — R. S., c. 49, § 94; c. 70. — Exempted property is a personal privilege of the debtor. He may waive it and does waive it when he conveys the property to another, and if the conveyance works a fraudulent preference under the insolvent law, the assignee may recover the property or its value. This doctrine applies to policies of life insurance where the annual premium on each is less than \$150. (*Wyman, as Assignee, etc. v. Gay*, 90 Me. 36.)

Negligence — Master and Servant — Remote Cause. — It is the settled law in this State that an employer is not liable for the negligent acts of a contractor, or his servants, where the contractor carries on an independent business, and in doing his work does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on; and that such employment does not create the relation of master and servant. *A fortiori*, an employer is not responsible for the acts of a contractor, or his servants, that are not negligent. The independent act of a third person that intervenes between the

wrong complained of and the injury sustained is a good test of remoteness of cause that forbids recovery. The defendant contracted to have its wood, along the line of its railroad, sawed in lengths suitable for fuel at a stipulated price per cord; the contractor owned and used for the purpose three railroad cars, one for a living car for his men, one for a tool car, and one for a cooking car, in which a fire was kept for the purpose. To enable the contractor to do his work conveniently, the defendant placed these cars on one of its spur-tracks, about one hundred feet from the plaintiff's mill. *Held*, that this act of the defendant did not make it liable for the burning of the mill from fire kept by the contractor in his cooking car. There is a distinction between placing the car on the spur-track, and the act of using it with fire. The former is the act of the defendant, the latter of the contractor, and for which the defendant is not to be held responsible. (*Leavitt v. Bangor & Aroostook Railroad Co.*, 89 Me. 509.)

Practice — Disposition of Case — Power of Court. — If the parties to an action pending in court agree to enter it "neither party, no further suit for the same cause," and it is so entered, and there is neither fraud nor mistake in the making of the agreement or the entry, it is a disposition of the cause, binding upon the parties, and cannot be changed by the court, unless the parties consent to the change. (*Berry v. Somerset Railway*, 89 Me. 552.)

## Notes of Recent English Cases.

Charity — Setting Aside Deed of Gift — Mistake. — An action was brought to set aside two voluntary deeds of gift founding two charities, the plaintiff being the donor. *Held*, that, where there is no fraud, no undue influence, no fiduciary relation between donor and donee, and no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor, and a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him. *Held*, also, that in a long and complicated deed of gift mistakes may be made which the court would rectify if desired by the donor, and yet such mistakes may not be important and serious enough to enable the donor to set aside the whole deed as failing in substance to carry out his intention. *Held*, therefore, that the deeds ought not to be set aside. Decision of *Byrne, J.* affirmed. (*Ogilvie v. Littleboy*, Ct. of App. Law Times Adv. Rep., May 29, 1897.)

Fixtures — Mansion-house — Tenant for Life in Possession — Natural History Museum — Stuffed Birds and Animals — Cases Fixed to the Wall. — Stuffed birds and animals fastened to iron cases fixed to the wall of a natural history museum, the

museum being expressly built for the reception of the collection, are not part of the museum, so as to be fixtures annexed to and passing with the mansion-house. (*Viscount Hill v. Bullock*, H. C. of J., Chan. Div., L. T. Rep., Vol. lxxvi., 417.)

### Legal Notes.

The sultan of Turkey has withdrawn his objections to the new American minister, having finally concluded that an Angell is good enough for the choice society of Constantinople.

The "Parody" which appeared in the ALBANY LAW JOURNAL of June 5, '97, was written by Irving Browne, formerly editor of this journal, and should have been so credited.

One woman and seventy-eight men, including two colored men, graduated from the Kent College of Law at its commencement exercises on May 27, 1897.

Twelve men have lately been fined \$30 each and sentenced to 45 days' imprisonment in Cleburne county, Ala., for selling their votes at an election. This is a good example for every State in the Union to follow.

In the United States Circuit Court, Judge Wheeler handed down a decision allowing \$818,074.32 to Christopher C. Campbell in his suit against the city of New York for infringement of a patent for fire engines consisting of a relief valve for steam fire engine pumps, for which letters patent had been granted May 24, 1864, to James Knibles, who assigned it to Campbell. The suit was begun on November 24, 1877. Judge Wheeler says in his decision that the city had enjoyed the advantages from the use of the patent, according to the evidence, which was conclusive.

The Supreme Court of Minnesota has declared the Public Warehouse law of 1895 unconstitutional. The law provided that every public warehouse, other than those used for the storage of grain, should secure licenses from the government within thirty days after the passage of the act, and that all railroad companies should be required to turn over to the warehouse companies all goods which had been in their possession uncalled for twenty days or more. The storage company was to pay the transportation charges and take a lien upon the goods for the amount. The Milwaukee, Great Northern and Chicago Great Western roads contested the law.

### New Books and New Editions.

The True Doctrine of Ultra Vires in the Law of Corporations. Being a concise presentation of its application to the powers and liabilities of private and municipal corporations. By Reuben A. Reese, of the Colorado Bar. T. H. Flood & Co., Chicago. 1897.

This is a leading work on an increasingly im-

portant subject, one which is often attended with much difficulty, and which gives practitioners not a little trouble. The author has evidently spared no efforts to make it clear, concise, practical and comprehensive, and to that end, in its preparation, has carefully examined some 4,000 of the latest and most important decisions of the higher courts of America and England. In the main, the propositions laid down, and the general principles deduced from these adjudications, are stated in the exact language of the court, but the author has not hesitated, where the courts are in conflict with respect to the proper application of the doctrine to the different phases of corporate acts or contracts, to point out what seems to him the apparent inconsistencies and misconceptions which result from the loose construction which is sometimes put upon this doctrine. The author, who shows entire familiarity with his subject, has conscientiously sought to set out the true doctrine, and has produced a work which deserves a place in the library of every practicing lawyer, more particularly those whose business is connected with the rights, duties and obligations of corporations. We can unreservedly commend Mr. Reese's work to the profession as thoroughly covering the field right down to date.

The Excise and Hotel Laws of the State of New York, as amended to the legislative session of 1898, with complete notes, annotations and forms. By Robt. C. Cumming and Frank B. Gilbert, Attorneys of the Albany Bar, and Assistants to the Commissioners of Statutory Revision. Third edition. Matthew Bender, Albany, N. Y. 1897.

As its title indicates, this work is a compilation of the excise and hotel laws of the State of New York up to date. Besides the much-discussed and much-amended Liquor Tax law, as altered by the late legislature, the volume contains the Public Officers law, provisions of the Penal Code and Code of Criminal Procedure applicable to violations of the Liquor Tax law; United States statutes and regulations relating to the payment of taxes by liquor dealers, and statutes relating to the rights, liabilities and duties of hotel-keepers. The authors, in preparing this, the third edition of the work, have applied all the judicial determinations made during the past year, and acknowledge indebtedness to State Commissioner Lyman for access to the rulings and holdings of the State excise department, which have been inserted in their proper places. As is well known, the amendments to the Liquor Tax law made by the legislature of 1897 have materially changed the original act, nearly every section being affected. The editors have done their work with care. A feature of particular value to lawyers is the table of forms, which constitute chapter eight.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JUNE 19, 1897.

### Current Topics.

THE doctors seem to be having a hard time of it in the British law courts. If they disclose secrets in breach of professional confidence, the *Kisson-Playfair* case is a warning as to what may overtake them at the hands of a jury, and now we have another picture presented to us in a Scotch case, wherein the consequences of being loyal to professional honor were disastrous. It appears, according to English exchanges, that the doctor, in the case in question, was insured under an accident policy covering, *inter alia*, blood-poisoning. In operating on a female patient afflicted with syphilis he scratched his finger, and blood-poisoning ensued. It was clear, according to the evidence, that the injury was within the policy, the doctor's *bona fides* being unimpeachable, but the insuring company demanded to know the name of the patient. This the doctor would not give, his collegiate oath pledging him not to do so, and the court, in consequence, dismissed his claim, on the ground that he had not furnished the evidence required; that is to say, the best evidence. Lord Young, who dissented, observed that "however candid and credible a pursuer's statements may be, and however much they may be believed and supported by evidence, \* \* \* his claim must be rejected unless he is prepared to do what is confessedly dishonorable, that is, disclose the name of the patient from whom he received the infection." The action of the company appears

to have been based on a technicality, raised for the purpose of avoiding liability under the contract, in which they have been successful. Perhaps the only thing the physicians can do under the circumstances is to steer clear of this sort of insurance.

The Illinois house of representatives has given the anti-department store bill its quietus, although sixty-three representatives voted for the measure. Without doubt politics was the motive power behind the bill, and supplied by far the largest number of votes, the remainder being made up of sentimentalists, who were sincere in their belief that the interests of the comparatively few small dealers whose business has been injured or ruined by the great department stores are entitled to be placed above those of tens of thousands of families who have been and are being benefited by the big establishments. As has been heretofore pointed out in these columns, the rise and great popularity of the department store is only one feature of the industrial changes, the end and aim of which is to bring about concentration and consolidation in order to effect economies and bring down prices. To attempt to stop this movement is as useless as was the sincere, but ludicrous, effort of Mrs. Partington to push back the Atlantic ocean with a mop. It is but natural and proper that we should sympathize with those small dealers who are pecuniarily injured by the department stores, and endeavor to aid them in every proper way, but to attempt to stop great industrial changes and social progress in their interest is so grotesquely absurd that it is well the courts were not called upon to pronounce such laws unconstitutional, as they would undoubtedly have done, without any hesitation.

The Maine Supreme Court recently decided a very important legal question, arising under the will of the late Ira P. Farrington, by which two-thirds of his residuary estate was bequeathed to the Maine Eye and Ear Infirmary, to be held by that institution for its charitable purposes. This corporation was organized under chapter 55 of the Re-

vised Statutes of Maine, authorizing the formation of charitable and benevolent corporations, and by section 4 of that chapter such corporations are authorized "to take and hold, by purchase, gift, devise or bequest, personal or real estate, in all not exceeding \$100,000 owned at any one time." At the time of Mr. Farrington's decease the infirm-ary owned its buildings and lot on Congress street, in the city of Portland, subject to mortgage, and, with the Farrington legacy, the amount of its property would largely exceed \$100,000. The heirs-at-law of Mr. Farrington brought a bill in equity to restrain the executors of his will from paying the legacy to the infirm-ary, on the ground that the bequest was void for the reason that the infirm-ary was not permitted to take and hold property in excess of the limitation above mentioned, and praying for a decree that the property should be distributed among the heirs as undevise estate. The infirm-ary contended that the objection was not open to the heirs, and that no one but the State could take advantage of the limitation. The opinion, which was delivered by Chief Justice Peters, and concurred in by all the justices who sat in the case, sustains the contentions of the defendants. It was held that the will was valid on its face, there being no statute of Maine limiting the testamentary capacity of the testator; that the limitation, in the charter of the corporation, of the amount of property it may hold, was mainly intended as a regulative and directory provision, and is only impliedly, and not expressly, prohibi-tory, no penalties being attached thereto; that the charter is a contract or compact between the corporation and the State, the limi-tation being for the benefit of the general public, represented by the State, and not for the benefit of the testator or any particular persons; that any transgression of the com-pact by the corporation in accepting exces-sive devises or bequests is an offense only against the State, and in no sense an offense against the heirs of the testator or his next-of-kin; that the contested devises and be-quests are voidable only and not void, and must be treated as valid until declared void; that whether they shall be declared void or

be permitted to remain as valid is a question of policy or expediency, which the State must determine for itself, a governmental and not a judicial question; that such ques-tion can only be determined in a direct pro-ceeding originated by the State through its representative officers, and not by any col-lateral proceeding brought by or for the benefit of any individuals to set such provi-sions aside; and, finally, that the State has not hitherto, in the present condition of its chari-table institutions, felt any motive to enforce strict exactions upon them, nor has the legislature yet seen cause for placing re-straint upon the power of testators to be-queath property to such institutions, a step easily taken when deemed necessary or wise to do so.

The case, which was entitled *Ira K. Far-rington et al. in Equity v. W. L. Putnam and Thos. H. Haskell, ex'rs, et al.*, excited gen-eral interest by reason of the importance of the questions involved, on which some of the highest State courts had reached opposite conclusions. At the last session of the Maine legislature a special act was passed, authorizing the Maine Eye and Ear Infirm-ary to take and hold property for the pur-poses of its organization to the amount of one million dollars, thus confirming the legality of the bequest, even as against the State, and providing for possible future emergencies of a similar nature. The deci-sion of the Maine Supreme Court is clearly in the line of equity, being, in effect, a declaration that mere technicality will not be permitted to defeat the clearly expressed wishes of a testator.

A very pleasant event was the presenta-tion, recently, of an oil portrait of Justice Charles H. Van Brunt, of the Appellate Division of the New York Supreme Court, first department, to the court over which he so ably and acceptably presides. The inter-esting formalities attending the presentation, together with the felicitous remarks made by members of the New York bar, elsewhere reported in this issue of the ALBANY LAW JOURNAL, show the high regard in which Justice Van Brunt is held, and emphasize the

evident sentiment on the part of the bar that his valuable services on the bench should be retained until the constitutional age limit is reached.

The new jury law passed by the New York legislature, which recently adjourned, is being sharply criticized, especially by the labor organizations. It must be confessed that the objections raised to this radical departure from the long established method of selecting juries are not without force. According to the provisions of the new law, special juries are to be selected from a list of 3,000 men prepared by special commissioners for the trial of important cases. The special jurors are to be examined, not by the court, but by the commissioners, and their qualifications are to be much higher than those required of ordinary jurors. The 3,000 special jurors are to be exempt from ordinary jury duty, and are not to be called upon to serve except when either the prosecution or the defense moves for a trial by special jury; the expectation being that under this plan prominent and influential citizens, who now persistently dodge jury duty, will cheerfully serve in that capacity. The objection of the labor organizations to this scheme is that the entire arrangement is an attempt to provide a machine for the trial of class questions, and that the constitutional right to representative juries is denied under the new law. In labor cases, they allege, it will be impossible to secure fair verdicts from juries drawn from the circles of the rich and powerful. They protest against the special jury system as a "virtual transformation in the form of government through an apparent conspiracy of silence on the part of the press." Without endorsing this somewhat radical view, it will perhaps be generally conceded that the importance of the subject is such as to warrant much fuller and more candid discussion than has been accorded it in the public prints. The fundamental principle of trial by jury, it seems to us, is clearly violated by this distinction between so-called "important cases" and other cases—between jurors representing education and wealth, and jurors representing "the masses." There

should be no such distinctions drawn in this country. The constitutionality of the new law may well be doubted, and it is to be hoped that the highest court will soon be asked to render an authoritative and final adjudication in the matter.

Charles Cowley, attorney and counselor, of Lowell, Mass., not long ago instituted proceedings before the Massachusetts house of representatives, looking to the impeachment of the Hon. Daniel Webster Bond, of Cambridge, an associate justice of the Superior Court. The judicial misconduct alleged is that, on July 25, 1896, at Cambridge, in delivering a judgment in a case commonly called "The Case of the Three Fornicators," the said Justice Bond, without cause, officially pronounced words of censure upon the petitioner, saying that in one particular, while acting as counsel for Stephen P. Wiley, in his suit for divorce from Henrietta S. Wiley, in the Superior Court, in the year 1892, "he was not duly mindful of his duty to the court." The cause of this animadversion was the allegation that the petitioner failed to apprise the court of certain rumors which came to his ears, as he alleges, from a thoroughly disreputable source, to the effect that the libellant in the divorce suit above mentioned had, in June, 1892, gone to New Hampshire and had criminal relations with a woman of whom the petitioner claims he had never before heard. This action of Justice Bond is claimed by Attorney Cowley to be inconsistent with the principles of the decision of the Massachusetts Supreme Court in *Ford v. Ford* (104 Mass. 198), and with the action of the Divorce Court in many other cases, including that of *Bicknell v. Dorian* (16 Pick. 489-490). Mr. Cowley's contention is that no court ever before attempted to impose upon counsel the duty of acting as a spy or informer against their own clients, touching past transactions, and that in so doing Justice Bond not only violated the professional and constitutional rights of the petitioner, but struck a blow at the independence of the bar. Mr. Cowley's position is that the duty which a lawyer owes to his client is sacred,



and that to compel a man's counsel to accuse him is, in effect, to compel him to accuse himself. In the course of his argument before the judiciary committee of the Massachusetts house of representatives, Mr. Cowley said:

"The conduct of Judge Bond can only be justified on the assumption that if, in a suit for divorce, the counsel for the libellant hears a report that his client has been guilty of any act which, if actually committed by him and properly pleaded by the libellee, might defeat the suit, it is his duty to communicate that report to the court, and that this is his duty even though this suit is not defended; and though this report comes to him from the libellee. In *Orrok v. Orrok* (1 Mass. 341), it was laid down as a rule of practice in divorce cases that, if a defense is intended to be made, there must be an answer in writing, setting forth the grounds of defense; but if Judge Bond's assumption obtains, the necessity of appearing or filing an answer is removed; the libellee has only to send to the libellant's counsel a report of what might be alleged in defense; and then the libellant's counsel must set it up.

"I deny this assumption, and never knew a lawyer who acted upon it. In my practice I have acted on the contrary assumption. If I am wrong I have been wrong all my life, and have deserved censure in more than a hundred cases. My understanding is, and has ever been, that it is no part of my duty, but contrary to my duty, to carry to the court any accusations or reports against my client touching any past transactions, or to furnish evidence against my client touching any past transaction. With respect to future transactions, the rule is different. If a lawyer participates in a crime with his client, or aids and abets it, or connives at it, he should go to the penitentiary with his client. But I am concerned only with the duty of counsel touching the past offenses of his client which are reported to him.

"The practice of all our courts is contrary to Judge Bond's notion. No issue is ever tried unless it is raised in the libel or in the answer. In *Ford v. Ford* (104 Mass. 198), Chief Justice Chapman said 'the case could

not be tried on allegations not made; 'made, too, as the context shows, by the adverse party. Heretofore counsel have sometimes been blamed for betraying their client's secrets, but never before for being too reticent, touching their client's faults. I am the first counselor in the English-speaking world who has ever been the subject of judicial animadversion for being too true to his client."

The judiciary committee, which heard the arguments, reported "leave to withdraw," and the house adopted that report. The question presented in the case, which we have briefly reviewed, is one of vital interest to both bench and bar. While there was probably no intention on the part of the petitioner to seriously press the impeachment charges against Justice Bond, Mr. Cowley is entitled to the thanks of the bar of the country for vigorously insisting upon his rights, and causing a stop to be put upon a practise which, if followed, would necessarily result in untold scandals; for no divorce case could be tried without an overhauling of all the by-gones of the entire married lives of the parties. As Mr. Cowley truly says, every such trial would be a public misfortune.

The validity of a contract to give life employment is affirmed in an opinion recently handed down by the Supreme Court of Michigan, in the case of *Stearns v. Lake Shore and Michigan Southern Railway Company*. Suit was brought by plaintiff to recover damages for breach of contract made in 1872. In settlement of a claim made by the plaintiff for damages for serious personal injuries sustained while in its employ, the company paid the plaintiff \$175, and agreed to employ him in the capacity of train baggage master, at a salary of \$47.50 per month, during his natural life, or his ability to do the work. In 1895 defendant discharged plaintiff, and refused to pay or employ him longer. A verdict was rendered in the Circuit Court sustaining the plaintiff's claim. The company appealed, claiming that the contract was not enforceable, because not mutual; that plaintiff was not bound to work for any

stated time for the defendant. "In a case where no consideration passed for the employment," says the court, "there might be force in this contention; but in this case, under the proofs, a valuable consideration was paid to the defendant for the conditional agreement which the defendant saw fit to enter into, leaving it optional with the plaintiff to continue in defendant's employ, the engagement of the defendant resting not upon the consideration of any promise by the plaintiff, but upon a consideration actually paid in hand at the time of the engagement—namely, the compromise of the disputed claim."

The ALBANY LAW JOURNAL has received from F. S. Brittain, San Francisco, Cal., a copy of the eloquent argument of Samuel M. Shortridge, covering the interesting question of criminal libel and the criminal responsibility of publishers for expressions of political opinion concerning candidates for office. It was in the case of *The People v. Frederick Marriott*, the defendant being charged with having published in the *San Francisco News Letter* the following words concerning Judge J. C. B. Hebbard:

"In another part of the *News Letter* appears an article signed by a committee of the People's Home Savings Bank depositors, showing adequate cause why Judge Hebbard should not be re-elected. The statements made in this terrible document will cause every honest man to shrink from voting for a creature who is therein clearly proven to be the enemy of numerous widows and orphans, and morally liable for the loss of their little savings. Is that the sort of man to re-elect judge? Not so. Intelligent men will learn well the lesson that article teaches, and will see to it that he is removed from the high position he disgraces. If tools are to be elected to the judiciary, then honest men had better get out of the city. But it will be more natural for us to relegate the tools to the oblivion they so richly merit."

Without going into the details of the case, it may be added that the jury, concluding that in this country it is not a crime to criticize a judge, when his official conduct seems

to warrant such strictures, brought in a verdict of not guilty. We have carefully read Mr. Shortridge's argument, and have no hesitation in declaring it one of the most able, brilliant, eloquent and fearless that has come to our attention for a long time.

The ALBANY LAW JOURNAL acknowledges the receipt from Commissioner Richard H. Alvey of volume three (geographical) of the reports of the Venezuela boundary commission, and the elaborate series of maps of the Orinoco-Essequibo region, compiled for the commission. These reports constitute a permanent and invaluable addition to the literature of American geography, as well as an enduring monument to the fidelity and skill of the commission and its accomplished secretary, Severo Mallet-Prevost. Fifteen of the seventy-six maps embraced in the atlas of charts are new, having been made especially for the commission's use.

#### CRIMINAL RESPONSIBILITY UNDER ITALIAN LAW.

THE provisions relating to criminal responsibility, or defining the persons who, or the conditions under which they are punishable, must be, in all essentials, very much alike in the Penal Codes of all civilized nations. The punishments prescribed for crimes may, indeed, vary among different nations, because these depend, in a large measure, upon political, moral or social conditions; the number of acts which are declared criminal may, likewise, vary under different codes, for this also is a matter of policy or of public safety; so, too, the legislative will may be differently expressed by different governments, for this is merely a matter of form; but the fundamental principles of criminal law, the subjective element of a transgression, the conditions that must exist in order to make a person a criminal—these are, and must be, essentially alike in the laws of all peoples, for they are, to a great extent, founded on natural law and on axiomatic truths. Differences in this respect, if any, can only exist either in the formal arrangement or exposition of the subject-matter, or in the ever-troublesome definition and limitation of what mental conditions will exclude criminal intent.

Therefore, in examining that part of the Italian Penal Code which relates to criminal responsibility, we are not to expect any great or fundamental differences from the provisions on that subject in American codes. There are, however, marked

differences, some of which, as we shall see, striking and interesting.

These differences may be divided into two classes: First, differences in the formal arrangement or exposition of the subject-matter, and second, differences relating to the question of the causes which will exclude or diminish criminal responsibility.

As regards the former, we are, at the very outset, struck by the expression or declaration in the Italian Penal Code of the most elementary principles of criminal law. Thus, the first section under this title declares that ignorance of the law is no excuse. The section next following provides that there can be no crime without criminal intent, either actual or by imputation of law. The section reads as follows: "A person is not punishable for a felony unless he has willed (*voluto*) the act in which it consists, except where the law expressly attributes it to him as a consequence of his act or omission. In misdemeanors, every person is responsible for his own act or omission, even where it is shown that he did not intend to commit an act contrary to law."

It may appear, perhaps, that the embodiment of such elementary principles in the form of a code section is unnecessary and superfluous. But it is eminently proper that a Penal Code should expressly recognize a principle so fundamental that all the law of criminal responsibility may be said to rest upon it. It has also a practical advantage; by such a provision the necessity of repeating the elements of intent in the definition of every crime is done away with. Thus, the introduction in our code of a similar general provision would avoid the necessity of repeating such expressions as "wilfully," "with intent," "knowing the same," "with a design," etc., which are now a necessary part of the definition of the various crimes.

Likewise more accurate seems to be the title given by the Italian codifiers to that part of the Penal Code defining criminal responsibility than the title given by the New York Code Commission to the corresponding provisions in our code. Title first of the New York Penal Code is entitled "Persons Punishable for Crime;" the corresponding title in the Italian Penal Code is entitled "Of Criminal Responsibility and of the Causes Which Exclude or Diminish It." While the former may appear more practical, yet the latter is the more appropriate; for the real scope of the provisions under such a title is not so much to describe what persons are criminal as what actions or what mental conditions constitute guilt, *i. e.*, the subjective element of crimes.

But leaving the examination of such formal differences, let us consider the provisions of the Italian Penal Code relating to criminal responsibility.

Criminal responsibility is thus defined:

"No one is punishable who, at the moment of committing the act, was in such a state of mental

infirmity as deprived him of consciousness (*coscienza*) or of the freedom of his own acts."

Italian jurists consider mental infirmity as of two kinds, giving rise to two corresponding kinds of mental effects, *i. e.*, those which deprive a person of "consciousness" and those which deprive a person of the freedom of his acts. Thus, idiocy and all kinds of intellectual insanity obscure consciousness; all kinds of impulsive insanity deprive one of the freedom of choice. As is stated by Serafini, an Italian authority on the subject, all forms of intellectual insanity, whether permanent or transitory, acute or chronic, produce penal irresponsibility, provided they exist at the moment the act was committed.

It will be seen, therefore, that "mental infirmity," as used in the Italian code, is not the same as the "defect of reason from disease of mind," defined in *McNaughten's Case* (1 C. & K. 129), and followed in our State, but has a wider significance.

The definition in force is the result of much discussion and learning among Italian jurists. The earliest formula proposed (that of 1868) was as follows: "No one is punishable who, at the moment of committing the act, was in such a state as not to possess the consciousness of his acts, or was driven to commit the act by a force which he could not resist."

The code commission of 1870 modified this objectionable definition to read as follows: "No one is punishable who at the moment of committing the act was in such a state of mental disease as deprived him of the consciousness of his own acts, or of the free use of his will." Vigliani suggested the substitution of "mental infirmity" to "mental disease." Mancini, in his relation to the senate (1876), favored the return to the words, "mental disease," and the substitution of "the consciousness of committing a crime" to "the consciousness of his own acts." A later form changed "mental infirmity" to "a state of insanity or any mental state which deprives him of the consciousness of his own acts." But this definition met with such universal and persistent opposition that, after various amendments, the form first above set forth was adopted.

To the American student such a definition will probably appear too broad and indefinite, and, indeed, the difficulty in its practical application may seem greatly increased by the provisions of the section following it, which is to the effect that when the mental state of the accused, as defined by the preceding section, was such as to "greatly diminish his responsibility without excluding it," the punishment prescribed for the crime shall be diminished by certain fixed amounts. It must certainly seem as if such provisions would engender confusion and give rise to distinctions too fine to be of practical use. It has been held under these provisions that premeditation and provocation may co-exist with a partial mental defect, on the

ground that a partial mental defect diminishes, but does not exclude, responsibility.

These general provisions are followed by others giving special instances of total or partial mental criminal irresponsibility. Thus it is declared that the provisions of the section already given shall apply in cases of accidental intoxication. Where the intoxication is voluntary, the punishment is diminished by fixed amounts, which vary according to whether the drunkenness is habitual or not. Such diminution is not allowed, however, where the intoxication was incurred for the purpose of aiding the commission of the crime or for furnishing its excuse.

A provision unknown to our code is the one which expressly provides for a fixed diminution of punishments in those cases where the jury find that the accused committed the crime "in the impulse of anger or of profound sorrow." If the provocation is of a grave nature, a greater diminution of punishment is expressly provided. Such diminutions are not discretionary, but imperative. Thus the court must submit to the jury two distinct questions as regards provocation; *i. e.*, first, whether the provocation was simple, and second, whether the provocation was grave. According to the finding of the jury, the court is bound to diminish the punishment as prescribed by the code.

The objection to this, from an American standpoint at least, would seem to be that such a provision must oftentimes result in inadequate punishments on sentimental grounds.

The provisions regarding the responsibility of infants are as follows: "No prosecution lies against a person who, at the moment of committing the act, had not arrived at the age of nine years." But if the act with which such minor is charged would, in an adult, be punishable by life imprisonment, or by imprisonment for over a year, such minor may be committed by the court to a house of correction until his majority, or else (and this would seem a wholesome provision) the court may order his parents or guardians to watch over his conduct, under penalty, in case of their failure so to do, or in case of his committing any felony, of a fine not exceeding two thousand *lire*."

Between nine and fourteen years of age, incapacity to commit a crime is presumed unless it is shown that the accused "acted with discernment." But even when such discernment is proven (and here is a marked distinction from our code), the punishment for the accused is expressly diminished by fixed amounts; and a different fixed diminution of punishment is likewise provided for criminals between fourteen and eighteen years of age.

Thus the punishment of a person between nine and fourteen years of age, who commits a crime "with discernment," is diminished from the amount otherwise applicable, to the same extent as is prescribed in cases of partial mental defect;

this is by reason of the analogy between the two cases. The diminution of punishment for offenders between fourteen and eighteen years of age is fixed at one-half of the amount which would be applicable did not the circumstances of age exist.

Deaf-mutes are evidently considered as of a lower type of intelligence than their more fortunate brethren, for the code expressly provides that a deaf-mute is incapable of committing a crime until the age of *fourteen*, and he may be committed to a house of correction until his *twenty-fourth* year.

Lastly, in cases of misdemeanors committed by a person subject to the authority, direction or vigilance of another, the punishment applicable to the subordinate is, in like measure, applied to the person in authority, or charged with the direction or vigilance of the subordinate, provided the misdemeanor is such that the person in authority was bound to see that his subordinate should avoid, or that might have been prevented, by his diligence. But if the misdemeanor was committed by order of the person vested with authority, and is one which violates a provision which such person was bound by law to see that it was properly observed, then the punishment is applied only to the person giving such order, and not to the subordinate, unless such subordinate has received special instructions to the contrary from the Authorities.

It would be impossible, from this brief outline, to pass upon the merits of the provisions of the Italian Penal Code dealing with the subjective element of crime. The difficulties attending the study of this most important part of criminology become even greater when an Anglo-Saxon student enters upon the study of the penal system of a Latin race. A careful reading of the Italian code, and a close examination of the numerous decisions thereunder, will not suffice to render him a competent judge of the system. He must go further and deeper; he must study the mental and moral development of the Latin races, and especially the gradual growth of Italian institutions through the centuries of ever-changing and conflicting governments and juridic systems which held sway over the Italian States before they became United Italy. Without such preparation the Anglo-Saxon student can hardly hope to deal impartially with the question of Italian jurisprudence. To the American student, for instance, a judicial system in which the principle of *stare decisis* has little, if any, force, seems a menace to judicial stability, and one best calculated to engender confusion. But this is the result, not so much of an examination on the merits, but of the difficulty of imagining any other system than the one with which we are constantly in touch.

Therefore, in judging of the merits of the provisions of the Italian Penal Code relative to criminal responsibility, and especially those which declare what will diminish guilt, due regard must be had to the constitutional, psychological and

historic differences between Latin and Anglo-Saxon races.

We think it will readily be granted that the formal arrangement and exposition of the Italian code relative to criminal responsibility are an improvement on that of the New York code. As regards the test of responsibility formulated by the Italian code, however, no comparison can properly be instituted between it and that furnished by our own code, for the differences between Anglo-Saxon and Latin races, as above pointed out, render comparison of little use. The only question that may fairly be asked of the system is, "Does the Italian test combine sufficient scientific precision with practical applicability?" The test is, of course, far from perfect, far from precise. It is doubtful, indeed, if legislators will ever be able to formulate a satisfactory definition of this difficult question. Scientific definitions of criminal responsibility have been too technical or abstruse to be of much practical use, and yet the question is eminently a scientific one. How to combine the extremes into a satisfactory formula must remain the great desideratum. Under present conditions, therefore, the answer to the question which we have asked as to the efficiency of the Italian test of mental responsibility can only be answered by an examination of the results of its application. And what is the answer? In our courts, under our code, we have witnessed to what lengths an ingenious lawyer can carry the theories of mental responsibility, even in the face of the strict construction of the code provisions made by our courts. It is, indeed, doubtful if such misplaced ingenuity would be allowed in the criminal courts of the Kingdom of Italy. Then, again, while the provisions of the Italian code may allow a larger number of acquittals on sentimental grounds than are possible under our code, there have been far less cases of miscarriage of justice under the cloak of sham scientific theories. Admitting the evil of either method of shielding crime, may it not, nevertheless, be justly said that of the two evils the latter is the greater one? For does it not seem that it would be less farcical and more dignified that pity or strong provocation should absolve guilt than that scientific principles should be distorted to shield crime?

It is true that there is in Italy a large and growing school of mental pathologists, who have advanced theories which may, in some respects, appear too extreme and speculative. But these same criminologists fostered the study of criminal statistics and raised criminal pathology to the dignity of a science. Moreover, their labors are academic, and while money will buy their expert knowledge, it will not change their scientific beliefs.

But perhaps the most potent factor of just and adequate sentences in the courts of Italy may be traced to the fact that the punishments provided for crimes by the Italian code are more adequate,

more evenly elastic, and more scientifically graded than under our laws. The absence of capital punishment, first of all, makes the jury a more impartial judge of the facts, for it will be found that the responsibility of deciding on the life or death of a man is too great a strain for a layman not to make the balance of justice waver. But not alone this; it is the entire penal system, which, by allowing crimes (alike only in name) to be expiated in a varied number of ways, according to the presence or absence of certain circumstances, makes it possible for the courts to apply punishment in an adequate and just amount. So that, although the provisions of the Italian Penal Code relating to criminal responsibility may not appear to the American lawyer to have brought the difficult question of criminal intent any nearer to a solution, yet in their application they have proved to be an effective working theory in the administration of criminal justice. GINO C. SPERANZA,  
Of the New York Bar.

#### JUSTICE VAN BRUNT IN OIL.

MEMBERS of the New York bar, on the 8th inst., presented to the Appellate Division of the Supreme Court, for the first judicial department, a fine oil portrait of Presiding Justice Charles H. Van Brunt, thus pleasantly varying the custom of presenting portraits upon the death or retirement of judges. The pleasant occasion was the outcome of a general desire on the part of the bar to testify their high regard for a judicial officer who is still in the harness and in full vigor of health and usefulness. The portrait, which was painted by Alfred Q. Collins, is an excellent likeness, as well as a finely executed work of art. The ceremonies in connection with its formal presentation were in charge of a committee, consisting of Elihu Root, Abram Kling and Adrian J. Joline.

There was a large attendance of counsel, and many of the down-town courts had adjourned to enable the judges to attend at the Appellate Court, in Fifth avenue. The Supreme Court was represented by Justices Truax, Bookstaver, Bischoff, Dugro, Andrews, Beekman, Smyth, Lawrence, Daly, Gildersleeve and Giegerich. Surrogate Arnold and General Sessions Judges Newburger and Fitzgerald were also present, as were several ladies, among them Mrs. Van Brunt, Mrs. Williams, Mrs. Cottrell, and the Misses O'Brien.

The justices of the Appellate Division — Barrett, Rumsey, Patterson, Williams, Parker, O'Brien and Ingraham — received the committee. Justice Van Brunt was absent.

The presentation speech was made by William Allen Butler, who said, among other things:

"May it please the court, I understand that a preference has been accorded by your honors, at the opening of this term of the court, to the appli-

cation which, with the support of my brothers, Choate and Root, it is my privilege to present. We are charged with the agreeable duty of presenting to this court a portrait of the presiding justice, Judge Van Brunt, a gift of members of the bar to this Appellate Division, and to ask its acceptance by the court. The portrait, by one of our artists of this city, Mr. Collins, is in the courtroom, and we submit it as an exhibit, conclusive on its face, of the merits of this application. As the presiding justice has been obliged to sit in all the preliminary stages, leading up to this final hearing, we think nothing can be raised against our motion, either in form or substance, or as to any feature of the case; and while the presiding justice is debarred from taking part in this proceeding, except as he perhaps may, in the language of the reporters, 'concur in the result,' it is a source of great satisfaction to us, and I think I may say this on behalf of all the members of the bar, that your honor now occupying, for the time being, his place, is able, as we trust, with permanently restored health, to resume your seat and take part in this tribute to one with whom you have been associated so many years in the labors of the bench."

Mr. Butler, continuing, said this gift was not only a mark of personal regard, but a fitting tribute to long-continued, faithful and eminent judicial service. They were there not only in view of the twenty-eight years of consecutive service on the bench of the presiding justice, but the presentation took on the form of a tribute to devotion to the public service, in integrity, fidelity and ability, in a very high sphere of public duty. The speaker referred in high terms to the faithfulness and ability of Justice Van Brunt, from his earlier judicial labors, especially in the trial of jury cases, with his keen discrimination in the marshaling of facts and in the application of the law. He referred to the labors of the Appellate Division since its organization, sixteen months ago, and said there had been during that time 872 decisions written by the judges of that court, an average of 124 by each. "We congratulate ourselves," Mr. Butler said, in conclusion, "and this court and the community that the learned presiding justice, with the aid of his associates, has been able to do so much to secure here, for the general benefit of all, a fair, fearless administration of those principles of justice which are the foundation and safeguard of all private rights and of all public prosperity."

Mr. Elihu Root, who next spoke, said, among other things: "I take great pleasure in seconding the application just made by Mr. Butler. It is perhaps too common to defer expressions of confidence for official service for the obituary notice. The world is full of elegiac eulogium, but expressions of commendation to the living are seldom heard. Many a judge goes through his entire official life without knowing with what confident reliance the bar and the community rest upon their

belief in his justice, in his intelligence, his devotion to the duties of his office. \* \* \* Mr. Justice Van Brunt has filled no ordinary place in the judicial system of this city. Many judges are learned, many judges are devoted to the public service; Mr. Justice Van Brunt is all that, but he has played a great part in a peculiar and important stage of development in our judicial system. The same development which has brought the city from a provincial town to a great metropolis has proceeded in our judicial life. The old method of trying and arguing causes, according to an informal arrangement between judges and counsel, has been outgrown. When Justice Van Brunt took the position of presiding justice of the General Term of the Supreme Court he found the old method of transacting the work of the court had led to an enormous accumulation before the appellate tribunal, so that it required between two and three years after the entry of judgment to obtain a decision by the General Term. It required the vigor and commanding personality of the presiding justice to make the change from the old to the new method. It was a hard experience for the bar in the early days of his presidency, and there was great dissatisfaction and some personal resentment; but I think the entire bar and the entire community, which receives its impressions from the bar, will unite with me in saying that the conscientious and consistent performance of duty, the successful accomplishments of the task which he set before him, on the part of your presiding justice, has commanded the assent, the cordial agreement and the admiration of all. He has brought order out of chaos in the administration of the law, and has accomplished a great work. I hope this expiring term will not be the last of Justice Van Brunt's judicial service, but that a just recognition of his work, and of the service which he has rendered, will lead the people of New York to continue him for many years in rendering a like service to the cause of justice; and that for many years we may be able to rely upon his sound discretion, his decision of character, and his underlying sense of justice, for the determination of our clients' rights."

Joseph H. Choate next spoke. "I never addressed your honors before," he said, "when you were supported on the one side by the entire force of the judges of the Supreme Court of this district, over whom you hold a mild and gentle sway [laughter], and on the other by another body of justices, who hold a still milder and more gentle sway over you, but from whose final dictates you never dare appeal. [Applause from the ladies.]

"How you can stand us at our best in our prolix and tedious argument about cases as to which you know nothing [laughter] has always been to me a mystery. Without the utmost good will on both sides, it would be an actual impossibility. I would like to have made the proffer of the portraits of all the members of this court; but I doubt

the wholesome effect of that upon the administration of justice.

"It might operate in two ways. If you could see yourselves as others see you, you might be able to cultivate that self-knowledge which Socrates declared to be the supreme of human wisdom. But on the other hand, your thoughts might be distracted, and in the contemplation of your own dignity and your own comeliness you might lose sight of the cases in hand. It is better that this honor should be reserved for the head of the court, and I think if you will recall other tribunals where the plan suggested has been tried you will find that the honor should be justly and properly reserved to those who, in succession, occupy the chief seat here.

"Let me call to your recollection that magnificent temple of justice, the Court of Appeals room in the Capitol at Albany. There the custom has grown up of having the portraits — so-called — of all the members of the court as they depart, one after the other, hung up to disfigure the walls. Sitting there, I have often thought that portrait-painting was becoming a lost art, for certainly those judges never looked in life as they do as presented there, where they seem to be entering their dissent against final judgment. [Laughter.]

"I have known Judge Van Brunt for forty years, and have known him better, and liked him better year by year; but one thing I know, that he does not like to be talked about, and I am afraid that this speaking likeness might whisper in his ear anything I might say that was personal to himself. I would like to say one word more; there is a word which has not been spoken that I think, if I utter, will not shock even his modest ears. It was my good fortune to be here on the day the court first held a session under the new Constitution, and to hear Judge Van Brunt's response to the greetings which fell from the bar. He made a promise then, which now has been redeemed. He said in substance of this new experiment, of this new court, which under this Constitution was then to be tried, if it should fail of success it would not be for want of entire devotion on the part of himself and his associates. It was an experiment; it has succeeded; a great and powerful tribunal has here been established, and from the benefits we have received from it in the brief past we may expect greater benefits in the future. We owe, it seems to me, a great part of the full measure of this success to the courage, the wisdom and fidelity, and the vigor with which Mr. Justice Van Brunt has presided over your counsels."

Justice George C. Barrett, in receiving the portrait on behalf of the court, said: "Upon the inauguration of this court, a little over a year ago, we were welcomed by our brethren of the bar with many kind expressions of respect, esteem and good will. The gratifying assurance of fraternal support which we then received has cheered and encouraged us in the performance of what you

know to be arduous and responsible duties. To-day we find a new greeting, a little different from the first; less formal, more intimate; a greeting which is suggestive of the idea that respect and esteem have deepened into sympathetic interest and fraternal affection. For you could not express the sentiments which I have named in a more gratifying manner to us than by this splendid tribute to our chief — our loved and honored chief. This is indeed an exceptional occasion. It is not only that you present to us the portrait of the first presiding judge of the Appellate Division of this court, but it is presented to us by typical representatives of all that is honorable, all there is of experience and ability at the bar. You have presented it to us with eloquent words, approving kindness, sympathy and good will. We accept the tribute in the spirit in which it is offered, and we reciprocate the kindly and generous words which accompany it.

"You may expect me to say a few words in response to what has been so eloquently and fittingly said with regard to the subject of this beautiful tribute. Gentlemen, they must, indeed, be very few. I cannot speak as I would wish with regard to the presiding justice. It would not be appropriate at the present time. One does not laud the members of his own household; we do not indulge in public panegyric of our father or our brother; we leave that to others. Our hearts may be full, but our tongue must be reserved with regard to such a matter. But this I may say: I may say it with entire delicacy; and that is, that the presiding judge is not only constitutionally such, but naturally and ideally the head of this court. If the Constitution had given the suffrage in that regard to the members of the court rather than to the governor, the result would have been the same. There is no one member of this court, I apprehend, who would have hesitated a single moment as to the person for whom his ballot would be cast. And if the presiding justice himself had been required at that moment to cast his vote, I imagine that, with the sincerity and modesty for which he is noted, he would have been constrained to vote a blank.

"Now, gentlemen, while I may not say any more about the subject of the tribute, I may say something about the portrait itself. I may say that it is a credit to all concerned; it is a credit to those who initiated the idea, a credit to the great artist who has so splendidly executed the design, and a credit to the patient subject who, with sweet composure and unrepining resignation, has sat for many pleasant hours to obtain the necessary artistic pose which you observe. What shall I say more about it? I have had a chance of looking at it a moment yesterday. I think I may say it is indeed a speaking likeness. Of what does it speak, and how does it speak? Certainly it speaks to us of a masterful mind in a giant frame; it speaks to us, does it not, of extraordinary capacity

for work; of great integrity of mind; of natural ability of a high order; of sound common sense, and, above all, of ingrained fairness. And in what language does it speak? Surely in no measured tone, in no uncertain language; frankly, independently, courteously, firmly; in good, plain, honest, unvarnished Anglo-Saxon, which conveys precisely what he means. That face, gentlemen, is it the face of a respecter of persons? Could that face ever be the face of a courtier? Those eyes that look straight at you, are they not the eyes of an intense lover of truth and a generous hater of meanness and duplicity? That hand, that powerful hand, seems so well fitted to wield the sword of justice; is it a hand into which you would put a light Damascus blade, or would you not rather fit it adequately with one of the great rapiers wielded by one of the giants of the past? You observe that I have spoken interrogatively. I have expressed no opinion. The old-time habit of the charge comes over me; so I have asked you whether, upon these facts—I now ask you whether, upon all these facts, leaving it entirely to you to say, and putting it to you with my old-time colorless manner, whether this is not the portrait of a great character, and a grand *young* judge. [Applause.] I leave it to somebody many years hereafter to talk of the grand *old* judge. For, gentlemen, it is my prayer and belief that my brother Van Brunt is now in the prime of life, the zenith of his vigor, in the full height of his usefulness. May he be spared—may he be spared, with the will of Providence, and I venture to echo Mr. Root's words—venture to echo the hope that he may be also spared by the unanimous suffrages of a discerning and generous people, to preside in this great court usefully and honorably for many, many happy years." [Great applause.]

#### CONVICTS NEVER REFORMED BY WORK.

**D**O the people expect profit from convict labor? I think not. All that the public expects is that these institutions shall be made self-supporting, less expense of maintenance. The State of Mississippi has recently demonstrated the practicability of the system I advocate. The matter largely depends upon the men in charge.

There is no labor performed by prisoners that does not compete in some degree with free labor. The problem before us is how to reduce this convict competition to a minimum, and if those in charge of this work in this State will attempt to make the penal population supply the food, clothing, etc., for all public charges, I think the battle will be won, and all lovers of fair play will have cause to rejoice that another species of slavery has been abolished. As to the reformatory influence of labor in our prisons, and the statement that constant employment is the only check to insanity, so often referred to by eminent penolo-

gists, I wish to say that when I was a member of the prison commission in this State, I examined minutely into the workings of the Elmira Reformatory as compared with our regular State prison. The conclusion reached by our commission was not flattering to the Elmira Reformatory. In fact, the consensus of opinion was that there is no reform unless the prisoner has reformatory tendencies. Those who are reformed do not owe their reformation to rigid rules rigidly enforced, but rather to their own determination to remain out of prison and live a decent life. Work never reformed criminals. The fact that men do not want to work makes them criminals, which is a distinction with a difference.

I believe that the clause of the new law which classifies criminals so that, after a person has been sentenced for the third time, he will be compelled to remain in prison until pardoned, will have more influence in reforming convicts than all the rigid rules adopted by wardens or city boards.—From "Another Word on Prison Labor," by George Blair, in North American Review for June.

#### KAFFIR LITIGATION.

**I**T seems that some very primitive people have a law procedure fixed by recognized usage, says Benjamin F. Burnham, in his interesting work, "Leading in Law and Curious in Court." The "Hand-book of Kaffir Laws and Customs" tells that when a Kaffir ascertains that he has grounds to enter on an action against another, he goes with a party of his friends armed to the defendant's residence, and they sit down in some conspicuous position. The male residents of the kraal assemble and sit together at a short distance. Presently one in the defendant's group exclaims: "Tell us the news." The plaintiff's mentor details the case, occasionally prompted by some other one of his adherents, or interrupted by cross-questions from the news-seeker. With this long opening, the first day's proceedings terminate by the plaintiff's being informed that the "men" of the place are from home, that there are none but "children" present, who are not competent to discuss such important matters. Next day the parties muster in augmented force, and the discussion is resumed, each disputant well versed in the Socratic method, contesting inch by inch, and with surprising adroitness endeavor to throw upon his opponent the burden of answering. (It must be racy in a case of wife-stealing.) This intellectual gladiatorship closes the second day, and the parties adjourn—each *advise vult*. If the defendant feels worsted, he prepares to offer the smallest satisfaction the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal to the chief. Should the plaintiff at length accede to the proposed



terms, they are fulfilled, and the case is ended by a formal declaration of acquiescence.

Our surmises of the subject-matters of these African cases may be aided by Stanley's account of a case he was called upon to adjudge between Mpigwa, a chief, and a member of another tribe who was the plaintiff. A man had married a girl of Mpigwa's tribe, paid two cows for her, and taken her to his home. After she had borne him three children he died. His tribe accused her of contriving his death by witchcraft, drove her and the children back to her own tribe, and demanded back the cows. Judgment for the defendant. Mpigwa's tribe had earned title to the cows.

### Notes of Cases.

A testator, residing in Massachusetts and owning property in that State and in New York, executed his will at a time when he was married, but had no children. Said will, after bequests to the testator's wife, gave the residuary estate to a trustee, to receive the income and pay the same to his wife during her life. It further provided: "I give the reversion of all said residue and remainder hereinbefore given in trust, for the benefit of my wife for life, to those persons who, if my death occurred at the time of her death, would then be my heirs-at-law by blood." After the execution of said will a child was born to testator, and subsequently the testator died, never having revoked the will or changed it in any way. Considerable property of the testator is situated in the State of Massachusetts, where he resided at the time of his death. It was held by the Appellate Division of the New York Supreme Court, first department (per Rumsey and Parker, JJ.), that an adjudication by the Supreme Court of Massachusetts, with reference to property situated in that State, that the will contained a provision for said child of the testator, in an action to which said child was a party, was conclusive in the present case that said child was provided for in the will, and, therefore, that he takes under it, and does not take a distributive share, as though his father had died intestate. *Held* by the court that, under the law of New York, said child of the testator took a vested remainder according to the terms of the will, and therefore that said child was provided for in the will, and was not entitled to the same portion of the real and personal estate as would have descended or been distributed to him if the parent had died intestate. (2 R. S. 65, § 49.) (Wm. Minot, as Executor, etc. v. Francis Minot.)

The Supreme Court of Indiana held, in the recent case of *Townsend v. The State*, that the Indiana act of 1891, declaring it to be a misdemeanor, punishable by a fine, to burn natural gas for illuminating in flambeau lights, was constitu-

tional. The court said that the Constitution only guarantees to citizens the inalienable right to liberty and pursuit of happiness so far as the exercises of these rights does not conflict with the exercises of similar rights on the part of others, or with the good of the general public; that the right of the owner of the gas well to draw from the common reservoir of stock beneath the ground is analogous to his right to take wild animals or fish on his own land; that he may be restrained by law from needlessly and wastefully destroying that part of the common stock which is drawn to the surface through his well; that the legislature is the sole judge of the justice or expediency of a law which does not conflict with the State or Federal Constitutions; that the recital in a statute of the facts which moved the legislature to pass it is no cause for overthrowing the law, although the judges should be convinced that the facts recited do not exist; that such recital is in no sense a judicial determination of the existence of the facts recited, and that it is not a necessary part of the statute.

James Carples appealed from a judgment for \$397 rendered on a verdict in his favor in his suit for personal injuries against the New York and Harlem Railroad Company, because he was not allowed to prove his damages up to the time of the trial. The First Appellate Division granted a reversal, holding, in an opinion by Presiding Justice Van Brunt, that in all actions for damages, those which have been sustained up to the time of the trial may be recovered, except those which may be special in their nature, in respect to which an allegation of special damage must be made in the complaint. Under an allegation that he was compelled to remain away from his business for six weeks, and was deprived of the use of his foot, and otherwise injured, the plaintiff, the court holds, was entitled to prove that his loss of earnings was the result of his absence from business — it being one of the natural and necessary results of the injury.

Alexander S. Kirkman and others, as surviving partners, brought a suit in Kings county against May Louise Kirkman, as administratrix, to have the value of the interest of a deceased partner ascertained and paid. Justice Gaynor, before whom the case was tried, held that, while the firm name belongs to surviving partners, the good will is property in which the representatives of a deceased partner participate. A provision in articles of copartnership that the value of the interest of a deceased partner shall be ascertained and paid will prevent the survivors from continuing the business without purchasing such interest, and gives to the interest of the deceased in the good will a substantial value.

**Notes of American Decisions.**

**Banks and Banking — Bills and Notes.** — A bank which has not received a certificate from the bank commissioner authorizing it to transact business may negotiate promissory notes, so as to bind itself, and pass a valid title thereto. (*Kellogg v. Douglas County Bank* [Kan.], 48 Pac. Rep. 587.)

**Beneficiary Association — By-Law — Incapacity of Member "by Reason of Sickness or Accident" — Blindness Caused by Injury.** — A by-law of a society, providing that "a member who shall find himself incapable of working, by reason of sickness or accident," shall receive a certain sum weekly, applies to a member whose incapacity to work arises from total blindness caused by an accidental injury to one eye, the effect of which gradually extended to the other eye. (*Godfroy Mogé v. Société de Bienfaisance St. Jean Baptiste*, 167 Mass. 298.)

**Bills and Notes — Non-Negotiable Note.** — Where a note, otherwise negotiable in form, contains the following clause, "In case of the breach of any of the covenants or conditions in the mortgage deed securing this bond contained, to which said deed reference is hereby made, and which is made a part of this contract, in either such case the said principal sum, with all accrued interest, shall, at the election of the legal holder or holders hereof, at once become due and payable without further notice, and may be demanded and collected, anything herein contained to the contrary notwithstanding," held, that this clause renders the note a non-negotiable instrument. (*Chapman v. Steiner* [Kan.], 48 Pac. Rep. 607.)

**City — Injury to Property by Water from Sewer — Action — Contributory Wrong — Waiver.** — The fact that a city on several occasions pumped water out of a person's cellar which had overflowed from a sewer will not justify a finding, in an action against the city for damages caused by such overflow, that a breach by him of the ordinances relating to sewers, in connecting his premises with the sewer, had been waived by the city. A city is not liable to an action for injury occasioned to the plaintiff's property by the overflow of water from a sewer, if the evidence tends to show no damage which was not caused in part by the connection of his premises with the sewer, made and maintained by him contrary to the city ordinances. (*Brenck v. City of Holyoke*, 167 Mass. 259.)

**Corporation — Contract Made by Foreign Corporation.** — A contract made by the agent of a foreign corporation in the State of Indiana is valid, although the agent may not have complied with sections 3453, 3454. 2 Burns' Rev. St. Ind. 1894, requiring the agents of foreign corporations to do certain things before entering upon the duties of their agency in the State, as the only

inhibition of the statute is that the contract shall not be enforced in the courts of the State before compliance with these sections. (*Sullivan v. Beck*, U. S. C. C., D. [Ind.], 79 Fed. Rep. 200.)

**Criminal Law — Demurrer to Indictment.** — Under Penal Code, §§ 1008, 1009, providing that the allowance of a demurrer to an information is a bar to another prosecution, and that defendant must be discharged unless the court "directs" a new information to be filed, a mere permissive order, sustaining a demurrer, "with leave" to file a new information, entitles defendant to a discharge. (*Ex parte Williams* [Cal.], 48 Pac. Rep. 499.)

**Criminal Law — Homicide — Insanity.** — Where insanity is set up as a defense to an indictment for murder, unless it appears that the prisoner was not conscious, at the time of the killing, that the act which he was doing was morally wrong, he is responsible, even if it be shown that he was impelled to its commission by an impulse which he was unable to resist. (*Genz v. State* [N. J.], 37 Atl. Rep. 69.)

**Deed — Restriction — "Single Dwelling-House" — Evidence.** — If a building is maintained as a single dwelling-house, without structural change, either inside or outside, from its original construction, but is used also as a private institution for the treatment of persons suffering from the liquor habit and kindred habits, who are boarded and lodged there while undergoing treatment, such use cannot be said to be a violation of a restriction in the deed by which the land was conveyed, that "no building other than one single dwelling-house \* \* \* shall be \* \* \* maintained on said lot." Evidence as to the meaning of the words "single dwelling-house," among real estate men, is inadmissible at the hearing of a bill in equity to restrain an alleged violation of a restriction upon the use of an estate, it not appearing that the original or subsequent purchasers of the property were dealers in real estate. (*Stone & Others v. Pillsbury*, 167 Mass. 332.)

**Divorce — Desertion.** — It is no bar to the wife's suit for divorce by reason of desertion by the husband for the statutory period, that she in fact, during that period, did not desire her husband to return, and felt unwilling to live with him, provided such state of feeling on her part was the result of her husband's misconduct, involving cruel treatment of her. (*Smith v. Smith* [N. J.], 37 Atl. Rep. 49.)

**Insurance — Loss.** — One to whom a policy was issued without his knowledge, and who did not intend to accept it when it was issued, cannot accept it after a loss, and therefore the filing of proofs of loss on such a policy is not an acceptance, and does not violate a condition of a previously issued policy against additional insurance. (*Nelson v. Atlanta Home Ins. Co.* [N. Car.], 27 S. E. Rep. 38.)

**Master and Servant—Negligence — Obligation of Master as to Machinery — Duty of Instruction.**—In order to save himself from liability to his employes, an employer is not bound to provide the safest machinery, or the newest or most approved appliances; it is sufficient if the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employe. An employer is not bound to instruct an employe of mature years, who claims to be experienced in the business upon which he is about to enter, although he may not be familiar with the particular machine to be used by him. An employer who puts an employe to work upon a steam mangle of a kind in general use is not liable for an accident to the employe, which occurs through the absence of a guard rail, when it appears that machines of the kind were not constructed with guard rails, and could not be operated with such rails attached, although other steam mangles were made which were protected by rails. (Pa. Sup. Court, Weekly Notes of Cases, May 28, 1897.)

**Parol Evidence Inadmissible to Vary Written Agreement — Instructions.**—Parol evidence is inadmissible to vary a written agreement which is clear in its terms, and expresses the result of the conversation of the parties to it. (Pike v. McIntosh, 167 Mass. 309.)

**Personal Injuries — Landlord and Tenant — Negligence — Due Care — Law and Fact.**—If the roof of a tenement-house is retained in the possession of the landlord as a place to be used in common by his tenants for hanging clothes, and for other uses to which the yard of a dwelling-house is commonly put, it is his duty to keep it in a reasonably safe condition for the uses for which it is intended; and he owes to a tenant's boarder, who, at the tenant's request, goes upon the roof to do gratuitously for him work which he had a right to do there, the same duty in that respect which he owes to the tenant. (Wilcox v. Zane, 167 Mass. 302.)

**Petition for Writ of Review — Discretion of Judge.**—Where it is a mere question of fact whether justice and equity require that a writ of review should be granted, no exception lies to the refusal of a judge to grant it. (Scituate Water Co. v. Simmons, 167 Mass. 313.)

**Promissory Note — Forged Indorsement — Finding.**—If a person, whose indorsement of a promissory note was forged, received no benefit from the forgery, and the forger was not his agent for any purpose, he is not bound, as a matter of legal duty, to repudiate at once the genuineness of the signature. His failure to do so is evidence, in an action upon the note, in the nature of an admission which may be considered as bearing upon the question whether he assumed the signature as his own; but it is not conclusive. (Traders' National Bank v. Rogers, 167 Mass. 315.)

**Railroad Relief Association — Certificate — Release — Public Policy — Agreement by Railroad — Acceptance of Benefits — Estoppel of Member.**—An agreement in a certificate of membership in a benefit association organized by a railroad company to which it contributes, and the expenses of which are paid by it, that, in case any member or his beneficiary accepts benefits due by reason of accident on account of his membership, the company shall be released from liability on account of sickness, injury or death of such member, is not against public policy. A railroad company organized a relief department solely for its benefit and the benefit of its employes who became members thereof. Each member was required to contribute a fixed amount monthly to the relief fund, to be used to furnish relief to its members in cases of accident or sickness, and, in case of their death, to provide something for their beneficiaries, and to make certain, in cases where the benefits of the department were accepted, the liability of the company for injuries caused by its negligence. *Held*, that an agreement by the company to aid the department by paying its expenses and making up any deficiency in benefits due members was not outside of its powers. An employe of a railroad company, which had a relief department for the benefit of its employes, was injured. His membership certificate provided that, by accepting benefits due him by reason of accident, the company should be relieved from liability on account thereof. *Held* that where he accepted some benefits under a mistake, supposing his injuries were only temporary, and he made no effort to return the money after the mistake was made, the company was not liable. In such case a member could not avoid the election he had made by pleading the mistake for the first time in an amended reply in an action brought by him for such injuries, filed more than two years after the action was commenced, and offering to allow it as a credit on the amount claimed to be due him from the company. Judgment for railroad company below. Here affirmed in favor of company. (Maine v. Chicago, B. & Q. Ry. Co. [Iowa S. C.], 70 Northwestern Reporter [April 24, 1897], 630.)

**Tenants in Common — Lapsed Devise.**—A testator by his will devised the residue of his estate, consisting of realty, to his wife J. and his two children F. and R., "to hold the same in equal portions to them \* \* \* and their heirs and assigns forever." He declared that to his two grandchildren A. and B., children of a deceased son by a former marriage, he gave nothing. R. died before the testator, intestate, without issue and unmarried. *Held*, that J. and her two children, F. and R., took as tenants in common, and not as a class or as joint tenants, and that, R. having died before the testator, the devise to him lapsed. (Frost v. Courtis & Ano', 167 Mass. 251.)

**Unauthorized Sale of Wife's Personal Property**

by Husband. — The acts of a husband in selling his wife's personal property during her absence, under an assurance to the purchaser that she is dead, do not deprive her of her title, or of her right to maintain an action to enforce it. (*Ago v. Canner*, 167 Mass. 390.)

Usury — Conflict of Laws. — A note on its face payable in Mississippi, though dated in Louisiana, and secured by mortgage on lands in that State, being given for a loan effected in Mississippi, where the money was paid and was to be paid back, and being given without any reference to performance under Louisiana laws, is subject to the usury laws of Mississippi. (*Commercial Bank v. Auze* [Miss.], 21 South. Rep. 754.)

### Notes of Recent English Cases.

Landlord and Tenant — Forfeiture — Relief — Breach of Covenant Not to Assign Without Consent. — Appeal from *Day, J.* In 1894 the plaintiffs demised certain houses to Mrs. Oakshette for twenty-one years, and she covenanted not to assign or underlet without their consent. In the same year she, without such consent, demised one of the houses to Mrs. Adams for twenty-one years less ten days. By this lease rent was reserved and covenants made with Mrs. Oakshette, her heirs and assigns, but power of re-entry was reserved to her, her executors, administrators, and assigns. Mrs. Adams underlet the house (also without consent) to Mrs. Muspratt for the remainder of the term less twelve days, and she assigned it to the defendant Lyons, who entered into possession and spent £500 upon the house. In an action by the original lessors to recover possession for breach of contract, Lyons applied for relief against the forfeiture and to have the house vested in himself. *Day, J.*, refused the application, and Lyons appealed. Their lordships dismissed the appeal. They said that section 4 of the Conveyancing act, 1892, did not amend section 14 of the act of 1881, but was an independent section giving powers for the relief of under-lessees different from those which existed in the case of lessees; therefore the court had power to relieve an under-lessee from forfeiture caused by breach of a covenant not to assign without consent. Here the appellant had constructive notice of a defect in the title, and ought to have investigated it before spending his money. What had happened arose from his neglect, and he was not entitled to be relieved. (*Imray v. Oakshette*, Ct. of App. L. T. Adv. Rep., May 29.)

Solicitor — Authority — Authority to Compromise Claim Before Action. — The plaintiff brought this action to recover damages for personal injuries. The plaintiff had sustained personal injuries for which he alleged that the defendant was liable to pay damages. While the plaintiff was in a hospital, suffering from his injuries, he was visited by

the clerk of a solicitor, who said he had been sent by the plaintiff's daughter. The plaintiff gave to the clerk particulars of his injuries, and instructed him to act in the matter of his claim against the defendant. The solicitor, without any further communication with, or authority from, the plaintiff, negotiated with the defendant's solicitors, and ultimately compromised the matter by accepting £15 in satisfaction of the plaintiff's claim against the defendant. The plaintiff was not then informed of the compromise. The money was paid to the solicitor, who kept it, and never paid any part of it to the plaintiff. The plaintiff subsequently brought this action, and the defendant applied at chambers to have the action stayed, upon the ground that the claim had been satisfied. The judge at chambers dismissed the application, and the defendant appealed. *Held* (dismissing the appeal), that, in the absence of express authority, a solicitor has no authority to compromise a claim on behalf of his client before an action has been commenced. *Duffy v. Hanson* (16 L. T. Rep. 332) approved. (*Macauley v. Polley*, Ct. of App. Law Times, Adv. Repts., June 5, '97.)

### Legal Notes.

John A. Dunn, a Gardner chairmaker, was recently tried in the Superior Criminal Court (Worcester, Mass.) for violation of the weekly payment law. A verdict of guilty was returned, and the case will go to the Supreme Court. The action is a test case, and was brought under the statute of 1895, which so extends the weekly payment law passed the year before that it applies to persons employing over twenty-five hands. One of Dunn's foremen testified that he received no pay between two dates a fortnight apart. No defense was offered. The case will be taken to the Supreme Court on the contention that the law is unconstitutional, that it vitiates the rights of contractors and infringes on the rights of citizenship.

The well-known firm of Banks & Brothers recently published the Code amendments made by the legislature of 1898, under what is known as Mayer's system, the work being done by Amasa J. Parker, Jr., of Albany. Without even remarking, "by your leave," Messrs. Baker, Voorhis & Co. seem to have appropriated this work, bodily, helping themselves not only to the fruit of Mr. Parker's labors, but using also the system of which Banks & Brothers hold the copyright. The fact subsequently leaked out that James B. Lyon, of Albany, furnished the plates belonging to Banks & Brothers to the New York firm. The present outlook is for a lawsuit, for damages, in which the metropolitan publishers will be the defendants, and the outcome will be watched with a good deal of interest by publishers, printers and the public at large. The question whether matter belonging to one publisher can be taken and used bodily by another pub-

lisher, without consent, does not appear to be a very difficult one for court or jury to answer.

The Delaware legislature, which has just adjourned, passed no less than 100 divorce acts. The highest previous number was 65, in 1889. The new Constitution will, happily, take divorce acts out of the hands of the legislature.

Murder is not an extra hazardous performance nowadays. A writer in the Davenport Outlook, who has been investigating the subject, says that in Wisconsin 33 per cent. of the life prisoners are released by executive clemency, while in Massachusetts the percentage is 50, and in New York 63. In Massachusetts the average time served by life prisoners who are pardoned is six and a quarter years, and in New York it is six and a half years. In other words, any prisoner in New York who is sentenced to the penitentiary for life has three chances out of five that he will be a free man inside of six and a half years.

An important promotion in the Federal judiciary has been made by the appointment of William W. Morrow to succeed Attorney-General McKenna as circuit judge of the United States in the ninth circuit, which comprises the States of the Pacific slope. The nomination was promptly confirmed by the senate. The new circuit judge was appointed district judge of the district of California by President Harrison, and his promotion will leave a vacancy in the District Court, to be filled by President McKinley. Judge Morrow, Attorney-General McKenna and President McKinley were all members of congress at the same time. Judge Morrow is a native of Indiana, where he was born in 1843, but has lived in California since 1859. He was admitted to the bar ten years later, and for four years, from 1870 to 1874, he was assistant United States attorney for the district of California. He was subsequently counsel for the State board of harbor commissioners for a number of years, and then served three terms in congress before he was appointed to the bench.

William Edmond Curtis has resumed his membership in the New York law firm formerly Stearns, Curtis & Colt, of which Augustus N. Hand has also become a member. Hon. John G. Carlisle, ex-secretary of the treasury, will be associated with the firm as counsel, as will also Charles H. Hamlin, of Boston, as counsel in customs cases. The new firm name will be Curtis, Mallet, Prevost & Colt, with offices at 30 Broad street.

### Legal Laughs.

A Rochester exchange tells of a young lawyer of that city whose wedding day was approaching, and who was in court, when the question arose as to the date at which a case, in which he was attorney, should be set down. The fact that he was to be married had been kept rather quiet, and when

his opponent strenuously insisted that it should be the following Thursday, the situation was embarrassing, especially when the latter called for an explanation of our friend's objection. The groom-to-be wriggled and evaded an answer as long as he could, but was at last cornered, and blurted out: "Next week will be a very bad week for me. I am to be married."

While the bulliest bulls are Irish, some John Bulls are good. An English judge, sentencing a prisoner, is credited by the "Law Notes" of London with this: "Are you aware that for these repeated breaches of the law it is in my power to sentence you to a term of penal servitude far exceeding your natural life? And, what is more, I feel very much inclined to do it." He doubtless knew the maxim, *Boni judicis est ampliare jurisdictionem*.

### English Notes.

Three hundred and fifty barristers have expressed their wish to attend St. Paul's on the 20th June. Unfortunately, there are seats for 150 only.

A correspondent of a Manchester paper quotes Temple gossip to the effect that Lord Justice Lopes and Mr. Justice Hawkins will shortly retire and be raised to the peerage. The Law Times adds further rumor to the effect that Lord Esher will also retire and be raised to an earldom, whilst the honor of knighthood will be conferred upon the treasurers of the Four Inns of Court, viz.: Mr. Gates, Q. C. (Inner Temple); Mr. Hemming, Q. C. (Lincoln's Inn); Mr. J. P. Murphy, Q. C. (Middle Temple), and Mr. Mattinson, Q. C. (Gray's Inn).

The Law Times is authority for the statement that the prosecution of the Balfour group cost the country £14,036 11s. 11d.; and that of Dr. Jameson and his co-defendants £14,004 6s. 2d.

It is announced that Mr. Justice Cave, who recently completed fifteen years of judicial service, will retire at the end of the Long Vacation. The Pall Mall Gazette hopes that other members of the bench will imitate his example, and adds: "We are justly proud of our judicial bench, but it would be well if some of its present members could be brought to see that, as much in their own as the public interest, the precedent set by Mr. Justice Cave might advantageously be followed." Justice Cave is 64 years of age. The other judges who have completed fifteen years' service on the bench are Lord Esher, Lord Justice Lindley, Lord Justice Lopes, Lord Justice Chitty, Mr. Justice North, Mr. Baron Pollock, Mr. Justice Hawkins, Mr. Justice Mathew, and Mr. Justice Day. Two of these judges, Lord Esher and Mr. Justice Hawkins, are octogenarians.

Applications of various sorts in relation to the queen's diamond jubilee have been numerous in the courts in London lately. The ecclesiastical

tribunals have received many requests for permission to put up temporary stands and seats on church property. Such permission can be obtained only by means of a regular legal proceeding, which, if successful, results in the granting of an order called a faculty by the presiding officer of the court. Thus on one day recently the Consistory Court of London, held by Dr. Tristram, the chancellor of the diocese, granted a faculty for the erection of seats in St. Paul's churchyard, and another for the erection of seats in the churchyard of St. Clement Danes. For the latter privilege the rector will receive £5,750, which is to be spent in repairing and adorning the church.

A London court has recently done something to settle the social status of artists' models. A young woman brought suit for breach of promise against a man who had promised to marry her, but had been alarmed by the discovery that, instead of sitting for the head alone, she had also sat for the figure, though not without drapery. The decision of the court was that the profession is respectable, and that she was entitled to damages.

A solicitor, who declines to have his name made public, has given £5,000 to the Solicitors' Benevolent Association.

### Communications.

*To the Editor of the Albany Law Journal:*

A misconception by a Pennsylvania court of the intended scope of a New York practice statute has latterly caused some embarrassment, and I write you on the subject in the hope that, attention being attracted to it and the matter gone into by others, what amounts to-day to rather an absurd position may be remedied.

A statute of this State (now embodied in the Code of Civil Procedure) requires leave of court to sue on a judgment. I am informed that the statute was originally passed, and has been continued, to prevent an abuse which was possible, and, it is stated, was practised, under some such circumstances as that "A" being indebted to "B" in a trifling amount, and unable to pay, would be sued and judgment recovered. Thereupon a new suit upon the judgment would be immediately instituted; upon the judgment therein recovered a third suit would be promptly brought, and so on *ad infinitum*, whereby, by the addition of the taxable costs and similar items, an indebtedness of perhaps \$50 would grow into an indebtedness of perhaps several thousands. This fraudulent, but unavoidable, claim would then be collected from "A" at any time when he might become possessed of property. Whence the statute.

Necessarily such a statute passed, for the indicated purpose has no extra territorial force, though, if such a practice should arise or be existent in any other jurisdiction, unquestionably some such statute should be embodied in the law of such

other jurisdiction. The result in Pennsylvania, however, I am informed, has been that there are now three decisions in the Court of Common Pleas in Philadelphia to the effect that a suit cannot be there sustained upon a New York judgment, unless the record of the judgment is supplemented by proof of an order having been made by the court in which the same was recovered permitting suit to be brought in Pennsylvania upon the judgment, the argument being, I presume, that the New York statute is a self-imposed limitation upon the faith and credit which is to be given (under the Constitution of the United States) by the courts of any other State to a New York judgment. This would be possibly a simple matter to correct were it not that the New York courts do not feel always authorized to undertake to direct what shall or shall not, or may or may not, be done in an entirely independent jurisdiction. Also the New York statute (section 1913, Code of Civil Procedure) provides that, where an order is sought granting leave to bring an action upon a judgment, notice must be given to the adverse party; or, on proof that he cannot be served with due diligence, such notice as the court may direct must be given.

In the two cases with which the writer was concerned, the adverse party, being present here, could be, and was, served, and, not appearing to oppose the motions, leave to sue in the other jurisdiction was granted, upon a showing being made to the court of the condition of the decisions in Pennsylvania. But it is quite apparent that the substantial object of suit in another jurisdiction may be wholly defeated by the delays incident to the giving of notice here, while in the interval proceedings can be taken there, upon judgments recovered in other States than New York which do not have this statutory regulation. Since the incidents to which I refer, I have been communicated with by a member of the bar who has just had an action, brought for his client on a New York judgment, dismissed in Philadelphia, because of the absence of an order permitting suit in Pennsylvania.

It is doubtful whether the courts here would be justified in giving a general order allowing suit in such a case, and therefore our courts are placed in the position of apparently undertaking to say what shall or shall not be done in the other jurisdiction, by specifying in the order what particular action shall be permitted to be brought.

It would seem as though the matter might be adjusted by an amendment of the Code, adding to the phrase, "*cannot be maintained between the original parties to the judgment*," the words, "*in this State*," leaving other jurisdictions to deal with the question of any abuse of process for themselves; i. e., if any attempts were being made in another jurisdiction to bring a number of suits, one after another, upon the same original indebtedness, it could be regulated there, upon proof of the facts or by statute, without reference to the original suit in that jurisdiction being founded upon a judgment

recovered here. As it stands at present, any one desiring to have suit brought in Pennsylvania upon a New York judgment would do well to direct the bringing of the action in the United States courts, in which, I am informed, the apparently erroneous view referred to does not prevail.

Yours respectfully,

CHARLES STEWART DAVISON.

NEW YORK, June 9, 1897.

### New Books and New Editions.

The Village Laws of New York, containing the new Village Law of 1897, the General Municipal Law, the Statutory Construction Law, the Provisions of the Public Health Law, the Labor Law of 1897, the Railroad Law, Town Law, Transportation Corporations Law, and of all other General Laws directly affecting village affairs. With explanatory notes, cross-references, decisions and forms. By Robert C. Cumming and Frank B. Gilbert, of the Albany County Bar, and Assistants to the Statutory Revision Commission. Matthew Bender, Albany, N. Y. 1897.

The legislature of 1897 enacted, among several other general statutes, the so-called Village Law, and repealed all prior general laws relating directly to villages. It is the aim of the work under review to give this new law and cognate statutes in convenient form for general use. At the end of each section is printed the revisers' note as contained in their original report to the legislature. Following the revisers' note is an editorial note, indicating changes in the bill made by the legislature, together with explanatory suggestions and cross-references. Such of the decisions of the courts rendered under the old law as are deemed of application under the new are also added, and, in addition, such provisions of other statutes as affect villages as municipalities. The table of forms at the end of the book cannot fail to prove of value to village officers and others interested in or connected with village government. Like all the works of Messrs. Cumming and Gilbert, this book is carefully edited. It consists of 358 pages, with copious index.

Matthew Bender has also issued, in pamphlet form, the new Lien Law of New York, being chapter 418, Laws of 1897, and constituting chapter 49 of the General Laws.

The Law of Crimes and Criminal Procedure, Including Forms and Precedents. By Lewis Hochheimer, of the Baltimore Bar. Baltimore: Harold B. Scrimger. 1897.

This work is divided into four parts. Part first treats of the law of crimes in general, presenting

the general doctrines of the substantive criminal law, including chapters on the subjects of "Statutes and Statutory Construction" and "Constitutional Guarantees and Limitations." Part second relates to criminal procedure, State and Federal, containing the law relating to criminal jurisdiction, pleading and evidence, and the numerous chapters following under the general head of "Practice." Part third contains the law relating to "special proceedings and remedies," including search warrants, surety of the peace, inquisition of homicide, foreign and interstate extradition, *certiorari*, *habeas corpus*, mandamus, prohibition and injunction. Part four presents the law relating to "special offenses," arranged in alphabetical order. In each chapter there is stated the entire law relating to the particular offense, including procedure and precedents of indictments, as also citations of important Federal statutes. A chapter is devoted to the law in relation to "contempt." In an appendix there is given, together with explanatory matter, a list of authors and works cited as direct authority on questions of criminal law. As will be seen from this brief and necessarily imperfect description, the author has sought to make his work a compendium of the subject treated, and an examination of the book shows that he has succeeded admirably in epitomizing the common law, including such statutory enlargements and modifications as are of general application. He has purposely sought to avoid mere commentary and discussion, confining himself to explicit statement of the existing law, and has attained a high degree of accuracy and clearness. The work will undoubtedly prove of distinct and positive value to the profession.

The Elements of Law: An Introduction to the Study of Constitutional and Military Law of the United States. By Lieut.-Col. George B. Davis, of the Judge-Advocate-General's Department, U. S. A. First edition. John Wiley & Sons, New York. 1897.

Mr. Davis, in his work on the Elements of Law, enters a field hitherto made familiar by the names of Chase and Robinson. The book is written with a view to acquainting the laity with the first principles of law and the elements of jurisprudence sufficient to lead the reader up to the better appreciation of the Constitution of the United States. The author has treated his subject in a very able manner, and has made points of law, which ordinarily are clear only to the student, intelligible to the average reader. Mr. Davis has digested in a short work much law which will be found of great advantage to general readers, merchants and men of affairs, who have not the time to go deeper in the study of the law. The subject is condensed, and many of the definitions are well worded, evidencing the fact that the writer is well versed in the subject he has treated.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JUNE 26, 1897.

### Current Topics.

THE question whether or not the judges of the Supreme Court shall wear judicial gowns is being agitated in Illinois.

The Chicago Legal News learns that, at the annual meeting of the State Bar Association to be held in July, a resolution will be introduced requesting the judges of the Supreme Court to wear gowns upon the bench. The News strenuously opposes the proposed innovation, declaring that "kingly crowns and gowns should find no place upon the American bench." "American judges," it thinks, "should be dressed as American citizens." If it is really necessary to clothe judges in gowns to give them dignity, the News suggests that women be elected judges, for they alone can appear dignified in gowns. Our contemporary appears to fear that when the gown resolution is introduced, it may go further and include wigs as well as gowns, and adds that it would be but another step to ask the Supreme Court to adopt a rule requiring counselors who appear before that august tribunal to wear gowns, and carry green bags, like the counselors of old England. It appears to us that the News is inclined to attach altogether too much importance to this matter. It can make very little difference, in the administration of the law, whether the judges appear in gowns, in the plain, customary suit of solemn black, or in clothes of any other suitable judicial

cut and color. If the judicial gowns lend additional dignity to the bench, then by all means let us have them. It may be worthy of note that the judges of the New York Court of Appeals have, for some years, worn gowns. Prior to the innovation here there was the same sort of agitation, and similar objections to the custom were urged. The donning of judicial robes by the highest New York court, following the custom of the U. S. Supreme Court justices, is not now objected to or apparently offensive to any one, and it certainly adds dignity to these august tribunals. But it is really not a matter of any importance. The judges themselves might properly be left to decide it, according to the individual preference of the majority of the court.

The result of the recent judicial election in Illinois proved a splendid victory for non-partisanship in the selection of judges. The Democratic candidates who were not on the Republican non-partisan ticket, those who were on the Silver and anti-machine, the Crumb faction and the anti-Crumb faction, the candidates of the Citizens' and Lawyers' non-partisan league, candidates on the Constitutional Rights of the People and candidates on the United Silver ticket, were all routed, "horse, foot and dragoons." All the old members of the bench in Cook county on the Republican non-partisan ticket for re-election came in with flying colors and handsome majorities. The victors on the ticket were Judge Benjamin D. Magruder, re-elected to the Supreme Court; Judge Theodore Breñaño, re-elected to the Superior Court, and the following re-elected judges of the Circuit Court: Francis Adams, Oliver H. Horton, Frank Baker, Elbridge Hanecy, Murray F. Tuley, Edmund W. Burke, Edward F. Dunne, Abner Smith, Arba N. Waterman, Richard W. Clifford, Charles G. Neely, Richard S. Tuthill, Thomas G. Windes and John Gibbons. Lawyers and litigants are to be congratulated on the result. The implied understanding that when a lawyer is elected to the bench he shall not be sent back to the bar so long as he performs his



duties honestly and with ability ought to be held sacred, for it certainly conduces to the efficiency and purity of the bench.

A trial in which the newspaper editors and publishers of the country were deeply interested was concluded last week, in Washington, D. C., the result being a victory for the defendant, John S. Shriver, a newspaper correspondent, who was on trial charged with contempt in refusing to answer questions as to the source of his information in relation to the sugar trust investigation, in 1894. Judge Bradley, who presided at the trial, ordered the jury to bring in a verdict of not guilty, which they did without leaving the box. The court based its decision on two points, viz.: First, that the witness had not been legally summoned by the Senate investigators; and, second, that the question asked him was not pertinent. The contention of the defense, which was ably conducted by former Judge Dittenhoeffer, that newspaper men are privileged as a class, the same as are priests, lawyers and physicians, with respect to communications made to them in confidence, the court refused to sustain, but as the court did, on the other hand, hold that to ask the witness the name of his informant was not a pertinent question, counsel for the defense assert that a precedent is established which virtually brings newspaper witnesses within the privileged class.

It is to be regretted that the principle for which leading newspapers have been contending, viz.: The inviolability of confidential communications received in the discharge of journalistic duties was not specifically passed upon, but under Judge Bradley's ruling, the imperfect character of the summons, would have been sufficient to throw the prosecution out of court.

A decision of particular interest to attorneys and bankers was rendered recently by the Supreme Court of South Carolina, in the case of *Sylvester Bleckley Co. v. Alewine et al.*, in which it was held that a provision for an attorney's fee in case of default

renders a note containing the same non-negotiable. It was an action upon a promissory note which contained the following provision: "And if this note is collected by suit, or placed in the hands of an attorney for collection, we promise to pay ten per cent. attorney's fees for collection, in addition to principal and interest." Judge Gary, who delivered the opinion, referred to the conflict of authority on the question, and the desirability of having the legislatures of the different states make the laws upon the subject of non-negotiable paper uniform throughout the United States. It was shown, however, that the decisions in South Carolina are to the effect that uncertainty in the note, whether existing prior or subsequent to the maturity of the note, renders it non-negotiable (*Bank v. Strother*, 28 S. C. 517). As to the question whether the provision in the note for attorney's fees rendered it non-negotiable, the court held that whether the owner of the note, after maturity, would place it in the hands of an attorney for collection before payment thereof, was an uncertain event; and if, after maturity, the parties on the note should proceed to pay the same, it would be uncertain where they would find the note — whether in the hands of the owner or an attorney. If they should find the note in the hands of the owner, they would have to pay principal and interest, but if the note had been placed in the hands of an attorney for collection, they would not only have to pay principal and interest, but attorney's fees of ten per cent. This uncertainty, in the opinion of the court, made the note non-negotiable.

The Supreme Court of Massachusetts holds, in the case of *Samuel C. Burney v. The Children's Hospital of Boston*, that it is actionable for a hospital to perform an autopsy on the dead body of a child without the father's consent. This was the plain question for decision in this case. The sole contention of the defendant, who filed a demurrer to the plaintiff's declaration, was that the action could not be maintained be-

cause there is no right of property in a dead body. The Superior Court, holding that this was a valid objection, ruled that the action could not be maintained, and sustained the defendant's demurrer. The Supreme Court holds that it is not a good objection, and decides the action will lie. The father brought the action as the natural guardian of his child, which had been entrusted to the hospital to undergo a surgical operation. This is the first time the question had been decided in Massachusetts. The opinion is published in full in this issue of the ALBANY LAW JOURNAL.

Commenting on an editorial article in a recent issue of the ALBANY LAW JOURNAL, on the subject of the congested condition of the legal profession, our esteemed contemporary, the Rochester Democrat and Chronicle has this to say:

"In considering this state of affairs the ALBANY LAW JOURNAL seems inclined to attribute it largely to the 'widespread notion that manual labor is unworthy and, in a sense, degrading.' We do not think that this silliness is as general as the ALBANY LAW JOURNAL thinks it, nor that it has as much to do with the overcrowding of the professions as the general belief that the right man can make bigger money and a bigger reputation in a profession than he could ever make in any trade. If successful mechanics made more money than successful lawyers, it is not at all likely that the 'notion that manual labor is degrading' would have very much effect in keeping out of the mechanical trades young men with the normal allowance of brains. Nor are we sure that it is true, as the ALBANY LAW JOURNAL says it is, that 'thousands of young men who are struggling to win a precarious living at the bar could, doubtless, have done well \* \* \* in some trade.' Perhaps the mechanical trades would be as overcrowded as the professions, if the trade unions had not taken more or less effective measures to artificially prevent overcrowding. At any rate the trade unions say so and act as if they

believed what they said. It is all very well to advise young men to arm themselves for the battle of life by learning a trade, but the trades are not open, as the professions are, to everybody who chooses to enter them. The trade unions have a good deal to say about the number of apprentices that can be taken into a trade. Possibly that fact is among the reasons why the professions are so overcrowded. Possibly the very fact that there are, as yet, no 'unions' in the liberal professions makes them more attractive to ambitious and self-reliant young men than the trades. In the professions individuality finds a fair field and no favor. In the trades it doesn't."

Our contemporary's suggestions are interesting if not valuable. We are by no means convinced, however, that the notion with regard to manual labor being degrading is not a potent factor in the overcrowding of the professions. While we are not arguing, by any means, against education, of which no young man can have too much, we do deprecate the tendency of it to foster and cultivate a distaste for any but purely mental labor. Without doubt the notion that more money is to be made in them than in a trade, has something to do with the overcrowding of the professions, but that this idea is to a large extent erroneous is amply proven by the many professional misfits and failures, a significant indication of which is found in the advertisements which formed the text for our previous comments on the subject. We are still firmly of the opinion that thousands of young men who are struggling to win a precarious living at the bar could have done much better, pecuniarily, in one of the mechanical trades, for good mechanics are in much better demand, and are paid much higher wages, than poor lawyers — poor in the sense of being ill-equipped by nature for the successful practice of the profession.

As to our contemporary's suggestion that the article which it criticises is "not likely to be read with pleasure by law-school graduates of this year's crop," we have to say that we deem it much more important to give good counsel than to give pleasure;

and that our advice to young men who are anticipating the study of the law, to be sure they are fitted by nature, talents, individuality and self-reliance before entering upon so arduous and exacting a profession, is good advice, we have no manner of doubt. We are not arguing in favor of the establishment of any artificial barriers against admissions to the bar, other than rigid, properly conducted practical bar examinations, such as we now have, but we believe we are doing the rising generation of young men who are crowding into the learned professions a valuable service in urging them to look before they leap, to indulge in introspection, to make their choice fairly, carefully, understandingly, and when it is made, to press forward ploddingly, perseveringly, persistently, stooping to no meanness, hesitating at no labor. Then, if the choice has been rightly made, will they prove benefits to society and ornaments to their profession — one of the grandest and noblest in the whole range of human activity.

John Davis recovered a verdict of \$200 damages against the Ottawa Electric Railway Company, for being forcibly ejected from a street car because he insisted upon keeping his feet, proudly incased in "new and rare-glistening boots," upon an empty seat opposite to the one on which he was sitting. But the defendants carried the case to the Divisional Court, which set aside the verdict, with costs. The Canada Law Journal remarks that Mr. Davis' varnished boots may not have been so altogether lovely as Trilby's bare feet, but nevertheless they have won quite as enduring a fame.

The Canada Law Journal does well to call public attention to the fact that, while the introduction of the type-writer into the field of law is one of those modern improvements which has greatly tended to facilitate business, there is a danger which ought to be guarded against arising from the ephemeral character of some of the work done on type-writing machines. One of the impor-

tant requisites of most legal documents is permanency, and yet documents are frequently struck off on such machines whose legibility will not endure beyond a very few months. The copies produced by means of carbon sheets are especially open to this objection, and it is quite true, as the Journal says, that deeds type-written in this way will, in a comparatively short time, become quite illegible. The reckless use of these carbon copies for settlements, deeds and agreements of any importance is very much to be deprecated, and we entirely agree with our contemporary that the use of such prints for pleadings and other documents required to be filed in court should be prohibited.

Apropos of the question of stenographers' speed in the reporting of speeches and witnesses' testimony, to which we not long ago referred, Fred S. Irland, one of the expert shorthand writers of the National House of Representatives, recently told a newspaper reporter that no man could speak in the House at the rate of 300 words a minute, and he reported, a statement which entirely coincides with what a correspondent of the ALBANY LAW JOURNAL had to say on page 236, *ante*. Mr. Irland, who is certainly in a position to speak understandingly, expresses doubt whether a man could be understood while speaking in the House at that rate of speed. In routine testimony, where frequently recurring phrases such as "Where do you live?" and "What is your name?" are expressed by brief arbitrary signs, he says a stenographer can write as fast as a man can think; but it is a very different matter where a congressman makes a speech. Asked what is the fastest record in the House, Mr. Irland cited the case of Representative Johnson, of Indiana, who once talked for an hour and a half, when discussing a contested election case, at the average rate of 220 words a minute. This statement of an acknowledged expert goes far to prove that the claims made on behalf of certain stenographers, that they have reached or exceeded 400 words a minute, should be taken *cum grano salis*.

---

**Notes of Cases.**

A remarkable decision has recently been rendered by the Michigan Supreme Court, a tribunal said to be famous for sound and logical views. The Constitution of the State provides that "in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury." It appears that a man was on trial before Judge Chapin, of Detroit, for criminal assault, and that the court ordered the exclusion from the court-room of all persons not connected by ties of friendship or blood with the accused or complaining witness. Newspaper reporters were also permitted to remain. The order was made in the interest of public morality, to prevent undue publicity of details of the crime. The question presented to the Supreme Court was whether the trial was "public" within the meaning of the constitutional provision. The decision is that the word public must be interpreted in the broadest sense, and that any restriction of the public's right to be present renders the trial illegal.

---

Julia Ann Dayton, of New York, has secured the reversal, by the Appellate Division of the New York Supreme Court, First Department, of an adverse judgment in her suit upon two policies of insurance for \$5,000 each, issued by the Mutual Life Insurance Company upon the life of her husband, Henry W. Dayton, who, about three years ago, at the age of about thirty years, committed suicide. Mr. Dayton had been for about fourteen years in the employ of the H. B. Claflin Company, starting as an office boy, and, after serving as assistant in the credit department, attended to the payment of taxes, water rates, assessments and public charges on real estate held by the company, and was intrusted with the collection of interests and principals of purchase-money mortgages held on behalf of the copartnership. Mr. Dayton's salary had never exceeded \$1,200. After the suit was begun against the insurance company, the Claflin Company were substituted as defendants, that company claiming that Dayton for five years before his death had been systematically embezzling the company's funds, and that the premiums on the policies had been paid with the stolen money, which, it was alleged, amounted in the aggregate to \$31,250. The referee, before whom the case was tried, found that all the premiums on both the policies were paid from moneys stolen by the assured from the Claflin Company, except one premium of \$76, which Mrs. Dayton paid. The court, in an opinion by Justice Williams, holds that there should be a new trial. "We are not at all satisfied," Justice Williams says, "with the findings of the referee, upon the evidence before him. The defendant had the burden of proving that the payments of premiums upon the policies were made from stolen moneys,

and we do not think the evidence was such as to authorize the finding as to the first premiums on the two policies, and as to several others, that they were made from moneys embezzled and stolen from the defendant company. Nor do we think the defendant company showed itself entitled to claim the benefit of any moneys used in the payment of premiums which had been embezzled and stolen from the old firm."

To George Halbert's suit for an alleged balance of \$6,014 for work and materials upon Albert B. Gibbs' private residence in New York city, the latter, besides denying liability, interposed a counter-claim for upward of \$20,500 for improper work and other items. The action, which was begun in February, 1893, is still pending before a referee, and there have been 144 hearings, averaging two and one-half hours each. The fees already paid amount to \$6,600, more than the plaintiff's original claim. The referee has been paid \$1,700, and the stenographer about \$1,900. Last February, Augustus B. Prentice, the defendant's attorney, who has received in all about \$1,500, and claims that \$3,410 is now due him from his client, wrote him that he declined to go a step further unless the client sent him a check for \$500 on account. He persisted in refusing to proceed with the trial or to permit any one else to represent his client until he was paid. The Second Appellate Division has reversed an order of the Trial Term denying defendant's motion for the substitution of another attorney. The court holds, Justice Hatch giving the opinion, that the attorney, by his refusal to proceed, thereby discharged himself from his employment, terminated the relation of attorney and client, and lost any lien given him by section 66 of the Code for services. In order to maintain such a lien, the court says, the attorney must show performance upon his part, or such a condition of affairs as clearly justifies his withdrawal.

In a suit by Ruth Lansing, by guardian, against the Coney Island and Brooklyn Railroad Company, based upon the alleged negligence of the defendant, it appeared that Ruth, who was about seven years old, had been lifted by her father upon the front seat of an open car of the defendant, which had stopped on a curve, with her back to the motorman; that, just as the father was stepping into the car, and before he could move the child to another seat, as he testified he intended to do, the car started with a quick motion; he was jerked back into his seat, and the child fell out and was injured. The Second Appellate Division has reversed judgment, given on the trial, dismissing the complaint, holding, in an opinion by Justice Bradley, that the question as to the negligence of the railroad corporation and as to the contributory negligence of the father should have been submitted to the jury, the inference being permissible that the accident happened because

the car started suddenly, before the father had time to give the plaintiff any attention, and because the defendant, in starting its car, had not exercised the care for the safety of the plaintiff which the circumstances required. The court holds that a passenger may, by his situation on a car, be so exposed to danger or injury by a rapid movement of the car upon a sharp curve as to require the motorman, advised of the situation and having the car under his control, to use care for the safety of the passenger.

Flora Evans, a young girl of Portland, Jay county, Ind., who lost a leg and arm by being struck by a Lake Erie and Western train, recently secured a judgment in the Federal Court against the company for \$7,000 damages. As soon as it was rendered, attorneys in the case filed liens on the judgment for its full amount. Judge Baker heard of the action of the attorneys, and called them before him. M. S. Williamson, a Portland lawyer, who had taken a lien on the judgment for \$3,500, was called upon by the court for a statement of services, and confessed that he had an agreement with the girl's guardian by which he was to give him one-half of his fee. Judge Baker denounced the transaction as an outrage, but the guardian declared that the statement was false. Williamson finally admitted that his services were not worth more than \$300. After all the attorneys had been heard, Judge Baker declared that he would not allow the fees claimed, and said that the aggregate going to the lawyers should not exceed \$2,000. "It too frequently happens," said the court, "that the victim, who is crippled and maimed, is forgotten: that the poor victim goes through life with a maimed and mangled body to remind her that it furnished the basis of an action out of which attorneys reaped large rewards. The judgment in this case is covered by liens that amount to more than the judgment. If they were to be allowed, this unfortunate girl would have the satisfaction of going through life with an arm and leg gone, while the whole of the \$7,000 recovered from the corporation had gone to the attorneys in the case."

The right of a widow to remove her husband's body from a cemetery lot owned by his daughter, in which he was buried by his own request, is denied in *Thompson v. Deeds* ([Iowa], 35 L. R. A. 56), if the only reason for removal was their disagreement respecting a monument and the care of the grave. The widow is held entitled to erect a suitable monument to him on that lot, but not to place on it any reference to the daughter or her first husband, who was buried on the lot, or to erect a coping around the lot. The court allowed both parties to decorate the grave with flowers, but recommended them to exercise a little Christian charity.

A judgment against a railroad company for a death loss occurring in the operation of the road is held, in a case recently decided by the Circuit Court of the United States for the district of Indiana (*Security and Trust Co. v. Railroad Co. et al.*, 79 Fed. Rep. 386), not to be regarded as a necessary operating expense and not entitled to priority of payment over a mortgage upon that ground.

#### THE INVIOABILITY OF CONFIDENTIAL COMMUNICATIONS TO NEWS-PAPER REPORTERS.

JUDGE BRADLEY, at Washington, D. C., on the 18th inst., in the case of *John S. Shriver*, Washington correspondent of the *New York Mail and Express*, instructed the jury to bring in a verdict of acquittal of the charge of contempt in failing or refusing to answer a question put to him as a witness during the senate's Sugar Trust investigation of 1894. The dismissal of the case, and the similar one of *E. Jay Edwards*, was based upon two main points—first, that the defendant was not properly subpoenaed by the senate committee, and second, that the question concerning the source of his published story was not pertinent. The question of the inviolability of confidential communications received in the pursuit of journalistic duties was not passed upon. Referring to this contention on the part of the defense, Judge Bradley said:

"Communications by client to attorney in the course of professional employment, and confidential communications between husband and wife, are privileged at common law, and protected from disclosure in judicial proceedings. In some of the States of the Union this protection has been extended by statute to confidential communications made by a patient to a physician in his professional capacity, and to information obtained by the physician in his attendance upon the patient. It has been extended by statute in some of the States to communications made to spiritual advisers.

"It appears that communications made to editors or reporters, or correspondents of newspapers have received such legislative protection in but one of the States. The congress of the United States has not yet so yielded to the force of the demands of public policy for such legislation, strenuously urged in argument, as to provide a statute protecting newspaper men, called as witnesses before a congressional committee or before a court of justice, from disclosing relevant facts within their knowledge. Until it does, I shall not be able to distinguish the public duty of the news-gatherer from that of other individuals to make such disclosure when called to do so by a court of justice, or by an inquisitorial body having jurisdiction of the subject."

The court next considered the contention of Mr.

Shriver's counsel that the defendant was not summoned to appear before the committee of investigation, and that his refusal to answer was not a misdemeanor under section 102 of the Revised Statutes of the United States.

"It appears by the evidence," said the judge, "that no writ was issued, but that he was sent for by the committee, and by their messenger asked to appear before them; that he was informed that a summons would be served upon him if he did not appear voluntarily; that he did appear, was sworn as a witness and answered many questions. It is claimed that this was a sufficient summons under the statute, and that the summons need not be by service of a writ."

Judge Bradley said that a witness appearing before a court of law can be punished for contempt only after he has been properly served with a subpoena, yet if he voluntarily appears he waives the right to the writ and to its service. But the court held that the question as to whether an unserved witness before a congressional committee can be punished by the legislature for refusing to answer a question was not before the court.

The question before the court was, "Can this penal statute be held to apply to a witness refusing to answer questions who has not been summoned, but who has appeared before the committee voluntarily? Is it essential that the writ of summons should have been issued and served? The indictment alleges that the defendant did appear before the committee, 'having been, by the authority of said senate, duly summoned as such witness to appear before the said committee to give testimony upon the matter under inquiry before the committee under the said resolution.' It might be sufficient to dispose of this case upon this motion to say that the evidence recited fails to support this allegation."

After referring to the fact that the statute applying in the case is a penal one, Judge Bradley said that it could not be extended beyond the plain meaning of its words, and no doctrine of estoppel can avail to supplement insufficient evidence in making out the offense.

"I am of opinion," said the judge, "that no one can be found guilty of a misdemeanor, under the terms of this statute, for refusing to answer questions pertinent to the question under inquiry, who has not been summoned as a witness by authority of either house of congress to give testimony."

The last ground considered by Judge Bradley was that as to the impertinency of the question asked Mr. Shriver, the judge remarking that "unless the question asked the defendant that he refused to answer were pertinent to some one or more of the matters under inquiry, his refusal, even if he had been lawfully summoned as a witness, was not a violation of the statute."

"The defendant had testified," explained Judge Bradley, "that a member of congress had informed him that a wire manufacturer had told him

that he had overheard from his room adjoining the room at the Arlington Hotel, used as the Headquarters of the Sugar Trust, a conversation between sugar men and senators, and from that conversation the wire manufacturer had reached the conclusion that the Wilson bill, which affected his interests, would not pass the senate. He was asked the name of the wire manufacturer, and he declined to give it, and having also refused to give the name of the member of congress, this indictment is based upon the latter refusal. Would the name, if given, have been a fact pertinent to any of the specified charges, having any probative force to prove or disprove them?"

After discussing the definition of the word "relevant," a synonym of "pertinent," Judge Bradley said that either may be accurately applied to evidence adduced by an investigating committee for the purpose of ascertaining the truth or falsity of a charge.

"It was evidently," said the judge, "the purpose of congress in the statute in question to limit the responsibility of witnesses summoned to testify in an investigation of charges to answering such questions only as would elicit facts that would tend to prove or disprove the charges. If a congressional committee sees fit to roam in the realm of collateral, irrelevant, immaterial, impertinent matters, the witness who refuses to accompany it will not be amenable to the penalties of this statute. The answer giving the name might have been a matter of convenience to the committee, but it does not indicate that the name would be a material fact in proving or disproving the charges specified."

In conclusion, Judge Bradley said that it is plain that the name was not a pertinent fact, and had it been asked in a judicial proceeding and objected to it would have inevitably been ruled out. Further, the judge said that it cannot be properly claimed that a witness violated this statute when he refused to answer a question propounded merely to ascertain the name of a person whom the committee might desire to call, who, if called, might give the name of another person, whom the committee might desire to call, who might, if produced, have some personal knowledge of facts pertinent to the question under inquiry.

"It is difficult," remarked the court, "to give serious consideration to the contention that the question asked was pertinent to the charges under investigation. Giving to the word 'pertinent' the meaning that congress must have intended it should receive, the statement of the proposition is its own refutation. Being of opinion that the statute applies only to persons who have been lawfully summoned, and also that the question asked the defendant, which he refused to answer, was not pertinent to the question under inquiry, it follows that the motion must be granted."

In discussing this case, the Rochester Democrat and Chronicle says:

"Mr. Shriver was the Washington correspondent of the Mail and Express. In the course of his duties he learned some alleged facts in regard to the conduct of United States senators, and wired them to his paper. He was called before a senate committee and asked to divulge the source of his information. This he declined to do, on the ground that he had promised not to betray his informant, and that to do so would tend to degrade him and destroy his usefulness as a newspaper correspondent. The right of a witness to stand upon this privilege has never been satisfactorily defined, and the practice differs widely in different courts. It would seem to be clear that while a witness should not be allowed to interpose the plea of privilege frivolously or for the mere purpose of defeating the ends of justice, he should not be punished for availing himself of his privilege when other sources of information are open to the court or investigating committee, as the case may be. In the case under consideration it was clearly within the province of the committee to summon the accused senators and ascertain whether the statements of the correspondent were based upon facts. On the contrary, the sole object of the proceedings seems to have been to punish the correspondent, not for divulging the facts, but because he would not tell how they came into his possession. The case is almost strictly parallel to one which occurred in this city several years ago. In the latter instance the reporter refused to divulge the source of his information, and pleaded his privilege on exactly the same grounds as those advanced by Mr. Schriver. The question was propounded by a grand jury, which made the course of procedure somewhat different. The reporter was presented to the court by the grand jury, and, persisting in claiming his privilege, he was at once committed to jail for contempt of court, without the formality of a trial. That the practice was erroneous was demonstrated in the Rochester case, as the still contumacious witness was released twenty-four hours later without having complied with the order of the court, and on the court's own motion. This action of the court clearly showed that the witness, in the mind of the committing judge after reflection, was clearly within his privilege.

"It would seem that the Mail and Express correspondent was absolutely right in maintaining his attitude of silence, looking at the case from the standpoint of public policy. It is certainly the proper province of the newspaper to fairly criticise the acts of public servants—for such United States senators must be conceded to be. There is a halo which surrounds a judge, which seems to scarcely adapt itself to the makers of the law. Newspapers are continually preventing the enactment of legislation which, if allowed to run riot without the check placed upon it by proper publicity, would soon render existence under the commonwealth unbearable. In both of the cases cited

there is a clear violation of the constitutional right of free criticism of existing government. Were the contention of the committee in the one case and the grand jury in the other to prevail, corruption in high places would exist with immunity. In both instances the animus was, not to obtain the facts, but to gratify the desire to learn how the facts were brought to the attention of the public.

"Whatever the result of the Washington trial may be, but one course remains for the correspondent. It is not contended that he transcended his duty in giving the facts, and he must accept whatever punishment may be meted for his refusal to divulge the source of his information. No court or committee has a right to demand that a man should destroy his usefulness in an honorable and useful profession, in order that mere curiosity, or the desire to punish somebody for divulging the facts, may be gratified."

#### THE NEW NEGOTIABLE INSTRUMENTS LAW.

A NEW Negotiable Instruments Law has recently been enacted in the States of New York, New Jersey, Connecticut and Colorado. It has also been favorably reported by the judiciary committee in Michigan and Florida. It has been introduced in Massachusetts, Rhode Island, Iowa and North Carolina. The measure either has been or will be introduced in the following States: Delaware, Georgia, Maryland, Mississippi, Wisconsin, Kansas, New Hampshire, North Dakota, Wyoming, Minnesota, Nebraska, Illinois, South Dakota, Montana, Maine, Missouri, Virginia and Vermont. Many of the States have been waiting the action of New York, but now that the legislature of this State has passed the bill, it will probably be enacted in the other States at the next session of their legislatures. The law was prepared at the direction of the conference of commissioners on uniformity of laws. These commissioners are State officers, appointed under the various State statutes for the promotion of uniformity of legislation in the United States. These commissioners exist in twenty-nine different States, and the commissioners hold an annual conference, at which all the States having such commissions are represented. In 1895 the committee on commercial law was instructed by the conference to procure a codification of the law of negotiable instruments to be made. The subcommittee having charge of the matter employed John J. Crawford, Esq., of the New York bar, to draft the proposed law. The draft, as prepared by Mr. Crawford, with his notes and annotations, was then sent to all the commissioners, and also to many prominent lawyers in different parts of the country, and to some of the judges and lawyers in England, and criticisms and suggestions

invited. The draft was then presented to the conference, which met at Saratoga in August, 1896. The conference spent several days in considering the draft, and it was adopted. The law has received high commendation from the best authorities on the subject. The movement is one in which the banking community is particularly interested, as it is of especial importance to bankers that the rules of law governing negotiable instruments should be the same in all States; but lawyers throughout the country are also much interested in the new law. While the statute referred to will not go into effect in New York State until October 1 next, its application will not be limited to instruments made after that date. All instruments made and delivered after the day the law was approved by the governor (that is, on May 19) will be equally within its operation after October 1. For example, if a note payable four months after date should be dated and delivered July 15, it must at maturity be presented for payment in the manner prescribed by the statute; and if dishonored, the statutory rules as to giving notice of dishonor must be complied with. But in the case of a note dated and delivered May 1, and payable six months after date, none of the provisions of the statute will apply, for by section six it is provided that the provisions of the act do not apply to negotiable instruments made and delivered prior to the passage of the act.

There are several points wherein the statute makes changes in the existing law, and these have been summarized by the Bankers' Magazine, from which we quote for the benefit of the legal profession. One of these changes is with regard to the time of presentment of notes payable on demand. Prior to the statute the rule in New York was that such a note was a continuing security on which an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time (*Merritt v. Todd*, 23 N. Y. 28; *Parker v. Stroud*, 98 N. Y. 379, 385). But by the statute such notes must be presented for payment within a reasonable time after their issue. (Section 131.) What will be a reasonable time will depend upon the facts of the particular case. (Section 4.) If they are not so presented the indorsers will be discharged. In Connecticut the former statute required promissory notes payable on demand to be presented within four months. The Negotiable Instruments Law, therefore, also changes the law in that State.

Another important change, and one which specially affects banks, is that in regard to restrictive indorsements. In *National Park Bank v. Seaboard National Bank* (114 N. Y. 28), the Court of Appeals of New York held that where a bank, which had acted merely as a collecting agent, had paid the proceeds of a check over to its principal, the bank making the payment could not recover from

the collecting bank upon subsequently discovering that the check had been raised. In this case the check was presented by the Seaboard Bank through the clearing-house, and does not appear to have been indorsed by that bank; and hence there was no question as to liability of the Seaboard Bank as an indorser. But in the case of *United States v. American Exchange National Bank* (70 Fed. Rep. 232), the United States District Court for the southern district of New York, proceeding upon principles similar to those relied upon in the New York case, held that the indorsement of a bank to which paper has been indorsed for collection does not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper, and that in such case the collecting bank was not liable after it had paid the proceeds to its principal, though a prior indorsement was a forgery. But by the Negotiable Instruments Law all indorsers who indorse without qualification, that is, without recourse, warrant the genuineness of the instrument in all respects; and there is no exception in favor of those indorsers to whom the instrument has been indorsed restrictively as agents only. Hereafter, therefore, in all cases governed by the statute, banks may rely upon the indorsement of the transmitting bank, though the prior indorsement was "for collection" only.

Another very important change is that which makes an antecedent indebtedness a sufficient consideration to constitute one a holder for value. The statute abolishes the rule in the leading case of *Coddington v. Bay*, and the numerous other New York cases based upon that decision. The rule adopted is that of the Supreme Court of the United States.

The statute also changes the law in regard to the liabilities of persons signing for or on behalf of a principal. Formerly a person so signing was not liable in the instrument, notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not he became liable upon such warranty for the damages resulting from the breach. (*Miller v. Reynolds*, 92 Hun. 400.) But no action could be maintained against him on the instrument when by its terms it did not purport to bind him. But the effect of the statute is to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal.

The law provides that every negotiable instrument is payable at the time fixed therein, without grace. As days of grace had already been abolished in New York, New Jersey and Connecticut, this makes no change in the laws of those States. But it does change the law of Colorado. The statute also makes Saturday, after twelve o'clock, a half-holiday; and provides that instruments fall-



ing due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. This does not alter the present practice in New York and New Jersey; but it does change the law of Connecticut and Colorado.

### THE RIGHT OF PROPERTY IN A DEAD BODY.

THE full bench of the Supreme Judicial Court of Massachusetts has decided that an autopsy, made without the consent of a father, who has entrusted his child to a hospital for treatment, renders the hospital liable *civiliter*.

The question arose on a general demurrer to the plaintiff's declaration, the demurrer having been sustained in the Superior Court and the case taken up on appeal therefrom.

The court hold, as was argued by Mr. R. W. Gloag, counsel for plaintiff, that the father, as the natural guardian of his child, had such a right to the possession of its dead body as rendered the hospital liable to him civilly for the unauthorized autopsy.

The case is one of considerable importance, and, as the court observe, is one not before passed upon in that State. The opinion in full follows:

LATHROP, J.—The demurrer in this case is a general one, and the question is whether the father of a child, who is its natural guardian, and who has entrusted the child to a hospital for treatment, can maintain an action against the hospital for an autopsy performed on the dead body of his child without his consent.

The sole contention of the learned counsel for the defendant in support of the demurrer is, that the action cannot be maintained because there is no right of property in a dead body. (2 Bl. Com. 429; 3 Inst. 202.)

Even in England, before a dead body is buried, while there is no right of property in it, there is a right of possession for the purposes of burial or other lawful disposition of it. Thus in *McQueen v. Fox* (2 Q. R. 246), where a prisoner in jail on execution died, and the jailer refused to deliver the body to the executors of the deceased unless they would satisfy certain claims made against him, the Court of Queen's Bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. So in *Williams v. Williams* (20 Ch. D. 659), while it was held that there is no property in a dead body, it was also held that the executors had a right to the possession of the body, and that it was their duty to bury it.

In this Commonwealth the precise question before us has not been passed upon. It is, however, apparent from the decisions that a right of posses-

sion is recognized which is vested in the husband or wife, or next of kin, and not in the executors.

In *Lakin v. Ames* (10 Cush. 198), the defendants were sued in trespass for tearing down a horse-shed. The defense was that the shed was on the public common of the town, and was erected in front of a tomb lawfully on the burying-ground adjoining the common so as to obstruct the entrance thereto, and that the first-named defendant, having the legal right to open the tomb and deposit the body of his deceased brother therein, peaceably removed the shed, doing no unnecessary damage. Liberty given by the town to a man to build a tomb was held to be a grant to the man and his heirs. The first-named defendant had no legal interest in the tomb, nor had he express authority from his mother, one of the heirs of the former owner. But it was said by the court: "The law will imply a license from the nature and exigencies of the case, the relation of the parties and the well-established usages of a civilized community."

In *Durrell v. Hayward* (9 Gray, 248), it was held that a husband, who had buried his wife in a public burying-ground, was not liable as a trespasser for removing a gravestone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. It was said by Mr. Justice Bigelow: "The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowledge or consent. The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long-established usage of the community."

In *Meagher v. Driscoll* (99 Mass. 281), it was held that if the plaintiff owns the lot in which the body of his child is buried, he may maintain an action of tort in the nature of trespass *quare clausum fregit* for the unlawful removal of the body; and, in measuring damages, jury may take into consideration the injury to the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights.

In *Weld v. Walker* (130 Mass. 422), the right of a husband to bury his wife was again recognized, and it was held that if he had not freely consented to the burial of her body in a lot of land owned by another person, with the intention and understanding that it should be her final resting-place, a court of equity would permit him, after such burial, to remove her body, coffin and tombstone to his own land.

In *Driscoll v. Nichols* (5 Gray, 488), cited by the defendant, the plaintiff was a stranger in blood to the deceased. The action was in contract or tort for carrying the dead body. The case was decided on the ground that the plaintiff had no

legal interest in the dead body, by reason of which he could maintain the action against the carrier without proof of a special contract with himself.

The case differs widely from the case at bar.

In Rhode Island it is held that there is a *quasi* right of property in a dead body which the law will protect. Thus, in *Pierce v. Swan Point Cemetery* (10 R. I. 227, 237), it is said by Mr. Justice Potter: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation. It may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case."

So in *Hackett v. Hackett* (18 R. I. 155), it was held that there was a *quasi* right of property in a dead body, and that as a general rule a widow had the primary right to control the burial of her husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise.

In the case at bar there was no executor, and there could be none, as the deceased was a minor. The father, as the natural guardian of the child, was entitled to the possession of its body for burial.

Being entitled to the possession of the body for the purposes of burial, is not his right against one who unlawfully interferes with it and mutilates it as great as it would be if the body was buried in his lot and was thus unlawfully removed? That an action may be maintained in the latter case we have already seen; and we are of opinion that it may be in the former.

This is so held in a well-considered case in Minnesota, where, in an action brought by a widow for the unlawful dissection of the body of her dead husband, an order overruling a demurrer to the complaint was affirmed. (*Larson v. Chase*, 47 Minn. 307.) This was followed in a similar case in New York (*Foley v. Phelps*, 1 N. Y. App. D. 551), where the right of possession was defined thus: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative." (See also *Renihan v. Wright*, 125 Ind. 536; *Young v. College of P. & S.*, 81 Md. 358; 19 Am. Law Rev. 251; 10 Alb. L. J. 71; 4 Am. Law Times, 127; and 3 Chicago Leg. News, 378; *Perley on Mortuary Law*, 26 *et seq.*)

The question has not been argued by the defendant whether the nature of the defendant hospital is such that an action against it cannot be maintained for the alleged illegal acts of its officers and servants, and we express no opinion upon it. Nor do we need to inquire under what circumstances an autopsy is justifiable, as this question has also not been argued. These questions can be better determined when the facts are before us after a trial of the case. All that we need now to decide is whether the objection raised by the defendant is valid or not. As we are of opinion that it is not valid, the order sustaining the demurrer and directing a judgment for the defendant must be set aside.

#### SUCCESS AT THE BAR.

WE expected that our editorial of last Friday upon the overcrowding of the legal profession would cast a damper upon the ambitious zeal of many a law student and young practitioner, but we did not expect so general a remonstrance on the part of the young men who have not yet discovered the fallacy of Webster's famous declaration, "There's plenty of room at the top." "What are we to do?" writes a law school student. "Must we wait for the old fellows to die off?" "Are not the rewards of industry and merit and high attainment just as sure in the legal profession as any other?" asks another, who has just thrown out his shingle, and is waiting for his first client.

Unfortunately, merit and industry and scholarship are not alone sufficient to guarantee success in the law, certainly not in this great city of New York. To them must be added "opportunity," and while the young man may prepare himself to seize opportunities, he cannot create them. Some of the best educated and most brilliant young lawyers, admirably qualified by nature and training to achieve eminence at the bar, have utterly failed, because "opportunity" was absent. There is no more difficult place in the country for an unknown man to win success at the bar than here in New York. We have frequently advised young men who had secured a fair start in interior cities or country towns, against yielding to the temptation to seek a broader field for their talents in the metropolis. Without powerful friends, without what is vulgarly known as "the pull," the struggle for success under such circumstances would be almost hopeless.

Nor is the condition of things ameliorating. On the other hand, it is growing more difficult every year for a young lawyer, or a practitioner without a practice, to get business in New York. There would be plenty for all were the business evenly distributed among the 7,500 lawyers of New York, but, as a matter of fact, it is distributed among only a fortunate few. A great part of the law business of New York is inherited, passing

from father to son, or from generation to generation, inside of the great law firms. We could name a dozen law firms in this city which are in effect great corporations, and which receive fully one-half the legal fees paid in the course of a year. These law "corporations" have sometimes eight or ten first-rate lawyers as partners, associated in such manner that each has a "specialty" in which he excels; so that, while circumstances force almost every lawyer of standing to become more or less a "specialist," the firm or corporation of lawyers is prepared to accept and carry through every form of legal work. These combinations of legal talent tend, as in any other business, to squeeze out the small operator.

Nor is this the only consideration which reduces the amount of business available to the individual. The examination of titles to real estate, a generation ago the most lucrative branch of professional work, is now largely done, with more rapidity and precision, and with a guaranty of millions against the occurrence of error, by the great real estate title companies. Collections, too, are largely done by corporations. Court trials are now avoided wherever possible, and the cases sent to a referee to be tried. Every judge who awards these references has his own little coterie of pet referees, and without influence no lawyer can hope to get his name on the list. In spite of these discouraging tendencies, the law schools are grinding out hundreds more every year, and the number of lawyers is annually increasing.

We do not like to discourage the laudable ambition of any aspiring young student; but we want to bring home to him the real conditions he must face at the very outset of his career, and urge him to examine well his qualifications and his natural bent before deciding that his chances for success are surer in the legal profession than in any other. — New York Mail and Express.

#### PROPORTIONAL REPRESENTATION IN ILLINOIS.

In a recent number of the ALBANY LAW JOURNAL appeared some statements by Mr. Robert McMurdy in relation to the plan of "cumulative voting" for representatives in Illinois which invite correction.

Instead of a method of "minority voting," as he styles it, a more accurate definition would be a mode of minority electing. In every senatorial district three representatives are chosen. Therefore every elector has three votes in the choosing of these three persons. The law simply secures to him the rational privilege of giving one vote for each of three persons, or one and a half votes to each of two persons, or three votes to one person. Thus, a minority of the electorate, if their number exceed one-fourth of the whole number of votes delivered, may elect one representative, and the majority may elect two representatives.

The objection that this renders an election "wholly unnecessary unless there be a fourth candidate" is far-fetched. The same objection applies to the old method, by which every elector might give one vote for each of three persons, but was not permitted to cumulate his votes on a less number. As the majority party could and did elect their three candidates, and the minority were thus disfranchised in the representative assembly, an election after the nomination was a quite unnecessary farce. "When a political party can name officers instead of candidates the people suffer." They suffered in Illinois by consequence of a division of the State in the general assembly on a geographical line from east to west, the northern part, containing the greater population and wealth, being overruled in the general assembly by the party of the southern part, containing the smaller population and wealth. This unrepugnant and undemocratic division of Illinois legislatures was witnessed biennially during half a century before the introduction, in 1870, of the existing plan of proportional representation, but has never been witnessed since.

The gentleman's second objection, that this proportional representation "promotes treachery between party candidates," is mere assertion. Treachery among party candidates is a vice of the human nature that has been practised under all systems and modes of party government, and doubtless will continue to be practised so long as politicians are not made angels. But that it has been practised more in Illinois under this system than any other cannot be shown. Probably it has been practised less, because the danger to the practitioner certainly is greater than under the old plan.

Mr. McMurdy may be safely challenged to adduce a single instance in which it has resulted in defeating the more worthy candidate; in which it has resulted in minority control; or in which it has not made it less difficult for the electors to defeat an objectionable candidate whenever or wherever they have desired so to do.

Instead of removing representatives from the people, it has brought them nearer to the people by enabling the minority of almost every constituency in the commonwealth to send its representative.

Its effect in Illinois certainly has been, not to lower, but to elevate the tone of political morals, and to improve, in a perceptible degree, the character of the more numerous branch of our legislative body. The people that are not embarked in the trade of politics have recognized this fact, and the managers of the "party machines" also have manifested their recognition of it by bringing forward a number of propositions to abolish it, all of which public opinion was swift to condemn.

It did not originate with Mr. Joseph Medill, as

Mr. McMurdy seems to suppose. It had been introduced in other representative systems long before Illinois heard of it. All the reading world knows that among its strongest advocates was the illustrious John Stuart Mill. Mr. Medill was chairman of the committee in the constitutional convention of 1870 to which the subject was referred, and from which the provision was favorably reported; but its ablest advocate in that notable assembly was the Hon. O. A. Browning, of Quincy. Judge Underwood, of St. Clair, was another strong supporter of the measure; so also was Hon. Charles Hitchcock, president of the convention, and many others whose names are not at this moment recalled. Outside of the convention, the Hon. John A. Jameson, one of the judges of the Superior Court of Chicago, was president of a society that was organized especially to promote this plan. Judge Farwell, Hon. J. Young Scammon and a number of other notable men were his associates. Almost all these eminent citizens have passed from the realm of the perceptible; but proportional representation in Illinois "has come to stay." So will it be elsewhere.

ANDRE MATTESON.

CHICAGO, June, 1897.

### Legal Notes.

The chair of commercial and international law at the Washington and Lee University, Lexington, Va., which was made vacant by the death of John Randolph Tucker, has been filled by the selection of his son, H. St. George Tucker.

The ALBANY LAW JOURNAL acknowledges the receipt of a copy of the address which was delivered before the National Association of Credit Men, at Kansas City, Mo., on the 10th inst., by James G. Cannon, vice-president of the Fourth National Bank, New York. The subject, "Individual Credits," was fully and ably treated.

James P. Harlan, a brother of Justice Harlan, of the United States Supreme Court, was killed by a train at Louisville, Ky., on the 15th of June. Mr. Harlan, who was 70 years of age, was once one of the most prominent lawyers in Kentucky, and held a high judicial office. He was, however, the victim of an appetite for liquor. Three years ago he voluntarily entered an alms-house, where he had since resided.

The Supreme Court of Arkansas decided, in *Grow v. Cockrill*, that a national bank is not authorized to engage in the business of lending money for its customers; and it cannot be held liable for the acts of its officers in so doing. The Supreme Court of the United States decided, in *re California National Bank v. Kennedy*, that a national bank has no power to deal in stocks, the prohibition being implied from the failure to grant the power.

Governor Black, of New York, not long ago established a precedent in the matter of issuing requisition papers, which, it is understood, he intends to follow hereafter. The creditors of a bankrupt broker sought to bring him within the jurisdiction of the courts of this State, and asked for a requisition to enable him to be arrested in Illinois and brought to this State. Governor Black declined to accede to the request, on the ground that no distinctly criminal act was charged in the application, holding that it is not the function of the State to aid creditors in trying to collect bad debts, in the absence of allegation of crime.

In *People v. McElroy* (48 Pac. Rep. 718), decided by the Supreme Court of California, it was held that stealing money from trousers folded and placed under the owner's head as a pillow, while he slept, did not constitute a "taking from the person," within the definition of grand larceny. The money, the court held, was no more on the person, in any proper sense, than if it had been concealed under his bed, or elsewhere about it, or left in his clothes upon a chair, or hanging on the wall, and its taking while so placed would not constitute a larceny from the person.

### THE ALBANY LAW SCHOOL FOR 1897-98.

THE ALBANY LAW JOURNAL has received a copy of the Albany Law School's Circular of Information for 1897. This excellent institution, as is well known, constitutes the law department of Union University, which embraces, in addition, Union College, the Albany Medical College, Dudley Observatory and Albany College of Pharmacy. The Albany Law School is one of the oldest institutions of the kind in the country, having been established in 1851. It became a part of Union University in 1873, and begins its forty-seventh year as a law school with the coming scholastic year. During its long and successful career this school, in common with others, has done much to demonstrate what was at one time doubted, but is now accepted almost as an axiom, that a law school course is a well-nigh necessary prerequisite to a professional career. Mr. Franklin M. Danaher, one of the State Board of Law Examiners, has pointed out that under modern conditions, an education in law cannot be obtained exclusively in a law office, and that those who have had the benefit of a law school training are better equipped to enter upon their career, and are more likely to succeed therein than those who come to the bar through an office. In enumerating the reasons for this, Mr. Danaher shows how the methods of office work have been revolutionized during the past twenty years. Those who seek admission to the bar through an office are not, as a rule, properly treated by the men who morally assume the responsibility of their legal education. He also shows how the articulated clerk

whom, for a consideration and a contract of long service, the attorney agreed to instruct, has entirely disappeared. It is an interesting fact, in this connection, as shown by the records of the New York State Board of Law Examiners, that of 1,050 applicants examined up to August 1, 1896, 793 had law school training. The Albany Law School will begin the scholastic year of 1897 with a complete reorganization of the board of trustees and the faculty, which cannot fail to secure a more thorough organization in all its departments, while the addition of new members to the faculty as special lecturers must add very much to the value of the course of instruction.

With respect to the one-year course at this institution, the trustees and faculty make it plain that this has been adopted in order to meet the needs of those who, either from lack of time or indisposition to incur large pecuniary responsibilities, desire to devote but a single year of the two or three years required under the statutes of the State before admission, to study in a law school, the design being to give the student an opportunity to spend a portion of his time in an office, in accordance with the method in vogue in this State, and to complete the period of his study by attendance upon a course arranged so that it may be completed in a single year. The faculty is a strong one, and the local advantages of the city of Albany as the seat of a professional school need no rehearsing.

#### WANTED—A FULL-STOP.

[In the Practice Court last week his honor, Mr. Justice Hood, looking at the report of *Ray v. The Justices of Melbourne and Whitney* (17 V. L. R. 186), which had been cited in argument, said: "There is a misprint on page 191, in the fifth line" (pause, during which the reporters looked conscious); "there is a Full-stop that ought not to be there."]

#### I.

Now listen, good reporters, ye that throng the Practice Court,  
And cast around your commas in a way you didn't ought,  
Perchance, 'twill profit you to ponder o'er this brief narration;  
Or if you sound a disapproving Note of Exclamation,  
I'll try to face your punctuating fury like a lamb,  
Be it the mild, corrective dash—or editorial d—n.

This is the purport of the words of wisdom I would drop:  
To show a sphere wherein to use that unemployed Full-stop.

#### II.

There's the litigant in person, who is always hovering round  
To break all practice-rules by which his adversary's bound.

There's the writer to the papers, who one never fails to find

Knows more of law and common-sense than bench and bar combined.

There's the ardent law reformer, who regards as so much fudge

Suggestions from an expert such as, say—a learned judge

Who seeks a sordid system by self-interest to prop—

Won't some one shut them up with that superfluous Full-stop?

#### III.

There's the lady lawyer, who will come our ranks to reinforce,

And shield the blushing criminal, or speed the dull divorce;

There's the Chinese regulation for admission to the bar,

That keeps our starving juniors from the golden fields afar;

For Victoria in its addle-pated wisdom has thought best

To let the other colonies monopolize the West.

Our lack of litigation soon will make the bench *de trop*\*—

Will not Higgins' commission bring these woes to a Full-stop?

#### IV.

There's the legislative prattler, who will raise a great guffaw

By quips tabooed in Noah's ark directed at the law;

A cultured country member states no lawyer earns his fees,

And crowds of cackling colleagues straight explode in ecstasies!

'Tis a subtle shaft that never fails its idiot-mark to hit,

While its perpetrator poses as a parliamentary wit.

Won't some Fitzsimmons of the law swift seize him by the crop,

And introduce the boulder by his boot to that Full-stop?

—W. Lewers, in *Australian Law Times*.

\*By special poetical license, for this occasion only: all rights reserved.

#### A \$2,000 PRIZE FOR A LEGAL ESSAY.

THE American Philosophical Society, held at Philadelphia, for promoting useful knowledge, announces that an award of the Henry M. Phillips prize will be made during the year 1899, essays for the same to be in the possession of the society before the first day of May, 1899. The subject upon which essays are to be furnished by competitors is: "The Development of the Law, as

illustrated by the Decisions Relating to the Police Power of the State." The essay shall not contain more than one hundred thousand words, excluding notes. Such notes, if any, should be kept separate as an appendix. The prize for the crowned essay will be \$2,000, lawful gold coin of the United States, to be paid as soon as may be after the award.

The essays must be sent, addressed to Frederick Fraley, president of the American Philosophical Society, No. 104 South Fifth street, Philadelphia. The rules adopted by the society to govern the competition are as follows:

"Competitors for the prize shall affix to their essays some motto or name (not the proper name of the author, however), and when the essay is forwarded to the society it shall be accompanied by a sealed envelope, containing within the proper name of the author, and, on the outside thereof, the motto or name adopted for the essay.

"At a stated meeting of the society, in pursuance of the advertisement, all essays received up to that time shall be referred to a committee of judges, to consist of five persons, who shall be selected by the society from nomination of ten persons made by the standing committee on the Henry M. Phillips prize essay fund.

"Essays may be written in English, French, German, Dutch, Italian, Spanish or Latin; but if in any language except English, must be accompanied by an English translation of the same.

"No treatise or essay shall be entitled to compete for the prize that has been already published or printed, or for which the author has received already any prize, profit, or honor, of any nature whatsoever.

"All essays must be *clearly* and *legibly* written or printed on one side of the paper only.

"The literary property of such essays shall be in their authors, subject to the right of the society to publish the crowned essay in its transactions or proceedings."

## THE BREAK DOWN OF LEGISLATURES

WHY do our legislators decline in intelligence and character as the standard of each of these qualities rises among the masses? Why has the relation of the law-maker to the general public undergone so revolutionary a change that the ancient title, "representative of the people," has become often an absurd misnomer? Why do we have to hold public meetings and to organize committees to visit State capitals while our legislatures are in session to keep them from passing unwise, unjust, and corrupt measures, to which the great majority of the voters are opposed?

The answer to all such questions, puzzling as they seem at first thought, is really very simple. Legislatures as they were originally conceived are breaking down because the representative character of their members has changed. They have not

ceased to represent somebody. They are as responsible now as they ever were in the past. But they represent a small organized element of the voters which is under the control of the "machine," and they are responsible to the boss of that machine. The founders of our system of government expected that legislators would heed the wishes of those to whom they owed their seats. They do recognize that obligation still. The only difference is that a large proportion of the members now secure the nomination which results in their election from an "organization" of a small number of the voters in one party.

The best proof of this is the fact that in the rare cases where a legislature makes a good record investigation always shows that it has been free from control by this intermediary body. The verdict of the Wisconsin press upon the session which recently closed at Madison is extremely favorable. The general opinion of those who have watched the proceedings closely is that the majority of the members manifested a purpose to serve the people, showed a great respect for public sentiment, and acted in the interest of their constituents. This favorable judgment as to the record of the session is accompanied by the significant statement in the Milwaukee Sentinel that "there has been no Wisconsin legislature more nearly free from bossism or one-man power." — Harper's Weekly.

## English Notes.

The Victoria pension fund has now reached £6,387 13s.

The Globe says that in Sydney, recently, on account of the great heat, the judge and barristers in the Appeal Court discarded their wigs, gowns and bands. The thermometer stood then at 90 degrees, and it was calculated that if it rose to 100 degrees the court would only be able to administer "bare" justice.

New Zealand, says the St. James's Gazette, is still showing the way in the emancipation of woman. The mail just received announces that "Miss Ethel Rebecca Benjamin, LL. B., had been admitted by Mr. Justice Williams as a barrister and solicitor of the Supreme Court of New Zealand." So that, on the heels of the lady mayor, the female voter, etc., comes the lady lawyer. In New Zealand the ordinary branches of the legal profession are amalgamated, which accounts for the phraseology of the foregoing announcement. Miss Benjamin is, it is stated, the first lady duly admitted to practice in our colonial courts.

A verdict of £100 has been recovered against the London and Southwestern Railway Company by Mr. Compton-Smith, a barrister at law, who was illegally detained one night last summer in the station at Totton by the station agent there, because he would not give up his ticket. Mr. Compton-Smith had bought a ticket to Lyndhurst Road,

and had taken passage on a train which he was told went there; but it stopped at Totton. This was very inconvenient for him, but he determined to go on to his home on a tricycle which he had with him. The station agent, however, would not permit him to leave the building unless he gave up his Lyndhurst Road ticket; and the plaintiff was obliged to remain there ninety minutes until another train came along. Under the English railway regulations act the passenger had a clear right to retain the ticket under such circumstances.

An important international arbitration between Great Britain and the Netherlands has recently been terminated by the payment to Lord Salisbury of a sum considerably in excess of \$50,000, being the amount awarded against the Dutch government by the arbitrator, who was M. de Martens, a distinguished Russian jurist nominated by the czar at the request of the contending parties. The case is known as that of the Costa Rica packet, a British whaler, whose captain was arrested by the Dutch authorities in the East Indies some years ago because he had picked up a derelict vessel in the eastern seas which was claimed by Dutch citizens, and had appropriated and sold her cargo. The arbitrator decided that whatever rights the claimants had, they were not enforceable in the Dutch tribunals or by the harsh and arbitrary methods adopted by the colonial officials in the Dutch East Indies. The seizure of the derelict took place, not within the territorial jurisdiction of the Netherlands or any other nation, but upon the high seas; and as that seizure was made by a British ship, any remedies growing out of the wrong, if a wrong was committed, must be sought in the courts of Great Britain. The amount of the award was somewhat smaller than that demanded by the captain and owners of the Costa Rica packet, although it was evidently deemed satisfactory. The cost of the arbitration was \$1,250.

#### INDIAN JUSTICE.

##### HOW SOME PENOBSCOT INDIANS FITTED THE PUNISHMENT TO THE CRIME.

"ACCORDING to the books that I studied when a boy," began an oldish man at the club the other night, "the Indians looked down on their wives, and made them simply beasts of burden. That may have been so in some places, but it wasn't always so, or so everywhere.

"A good many years ago there were some Penobscot Indians near my people's place in New Hampshire, who evidently thought a good deal of their squaws, and made one of the bucks appreciate the fact that his wife was not a beast of burden. This buck went on what we now call a bat, and got drunk — 'drank too much *ocapee*, and Cheepie [devil] got in him.' When he came home he was in a bad humor, and finding his wife in his

way, he stuck her feet in the fire and burned them off.

"The other Indians discovered this very promptly, and tried him by a very summary process. The general opinion was that he should be executed at once; but one of the elder bucks interposed and gave this advice: 'No shoot him; make him live long as squaw live; him carry squaw when she want walk; when squaw die bimeby, then we shoot.'

"This advice appealed to the other men, and they decided to punish the buck as the old chief suggested. So the buck carried his wife around on his back, whenever the tribe moved, whenever she wanted to go any place. So far as I learned, she did not hesitate about moving around. Of course, the buck hated to carry her; but the beauty of the arrangement was that he didn't dare to illtreat her, much less to kill her, because his life depended on hers. If she died, he knew the tribe would kill him.

"I don't know how long this punishment lasted — who died first, or if after her death he was pardoned or executed. If those Indians didn't make the punishment fit the crime I don't know who did, either; not Gilbert's 'Mikado,' at any rate."

#### Legal Laughs.

"Now, your honor," argued the attorney in the court of Justice Brown, of Santa Rosa, "I move dismissal of this case on the ground that the *corpus delicti* has not been established."

Judge Brown rubbed his chin in a perplexed way, fixed his gaze on the ceiling for a moment, and then, clearing his throat, said: "Of course it is an old principle of law that the probator must correspond with the alligator, and in this case I am of the belief that the *corpus* is all right, but I don't know about the *delicti*."

"Your honor, I want that to go into the record," demanded the opposing counsel. "I want the record to show that your honor said the *corpus* is all right, but you do not know about the *delicti*."

Judge Brown realized that he had blundered and sat staring at the attorney for a moment. Then, pulling himself together, he said: "All right, let that go into the record, but you fellows know danged well I was only joking when I said it, and that will go into the record, too." — San Francisco Post.

Judge — "Prisoner at the bar, have you anything to say why sentence should not be pronounced against you?"

Prisoner — "Only this. I think you ought to hang the man the prosecution has been talking about; but the man my lawyer has told you about you ought to acquit, and beg his pardon for arresting him."

**Notes of American Decisions.**

**Banking — Rediscounts — Authority of President to Make.** — It is within the scope of the implied power of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business, and a special authority for this purpose need not be conferred by the board of directors. The rediscounting by a bank of its negotiable paper is not a transaction so far outside the scope of ordinary banking transactions as to impose upon the bank buying such paper the duty of ascertaining that the act has been specially authorized by the board of directors. (*U. S. National Bank v. First National Bank of Little Rock*, U. S. Circuit Ct. of App., March 1, 1897.)

**Banking — Liability of National Bank as Stockholder in Other Bank.** — A national bank which appears on the books of another national bank as a stockholder therein cannot set up as a defense to an assessment that the purchase of such stock was *ultra vires*. The liability of a stockholder in a national bank is not contractual, but exists by force of the statute. (*First National Bank of Concord v. Hawkins*, U. S. Circuit Court of Appeals, First Circuit, March 5, 1897.)

**Criminal Law — Abortion.** — A person who furnishes to a pregnant woman drugs to produce an abortion is properly indicted under Penal Code, article 641, with "administering" such drugs as a principal, not under section 642, providing that one furnishing means to procure an abortion "is an accomplice," since the woman was not a principal, and he who furnished her the drugs could not therefore be an accomplice. (*Moore v. State* ([Tex.], 40 S. W. Rep. 287.)

**Criminal Law — Burglary.** — The removing of props from a warehouse door, in order to open and enter, is a breaking; but if a door or window be partly open, it is not a breaking to push it further open. (*Rose v. Commonwealth* [Ky.], 40 S. W. Rep. 245.)

**Construction of Will — Termination of Trust — Heirs at Law — Legal Representatives — Widow.** — A will contained the following provision: "Upon the decease of said N.'s children, said sum of \$20,000 is to be distributed to and among their heirs-at-law, \* \* \* that is to say, as the children of said N. shall decease successively, a proportion of the fund is to be distributed among the children or legal representatives of each child so dying. And on the decease of said N.'s children said houses, \* \* \* or, if sold, the proceeds thereof, are to be conveyed in fee, paid over, and distributed to and among the heirs-at-law of said children in the same manner as I have directed in regard to said \$20,000." *Held*, on the death of one of N.'s children, a son, leaving a widow, but no child, that the widow, by virtue of the statute, was an heir to the amount of \$5,000, and no more.

(*Olney, Trustee, etc. v. Lovering and Others*, 167 Mass. 446.)

**Courts — Jurisdiction — Injunction.** — A court which has jurisdiction of the parties may enjoin a threatened trespass on land lying in another county. (*Clad v. Paist* ([Penn.], 37 Atl. Rep. 194.)

**Deed — Prior Unrecorded Conveyance — Mortgage — Equity.** — Under Pub. Sts., c. 120, § 4, a prior unrecorded conveyance of land is invalid as against a subsequent grantee of the land, who has no actual notice or knowledge of it, and whose deed is duly recorded. One who takes a conveyance of a mortgage, either by a formal assignment or a quitclaim deed, from a person who appears of record to be the owner of it, will acquire a good title as mortgagee, unless he has actual notice or information of a defect in the title. (*Stark and Others v. Boynton*, 167 Mass. 443.)

**Life Insurance — Contract — Illiteracy of Party — Presumption.** — A policy of life insurance provided that if any statement or answer in the application was in any respect untrue, etc., "then this policy shall be void." The application contained a similar provision. To the questions propounded a number of false answers were made. After the death of insured, the beneficiary brought this action on the policy and sought to avoid the effect of these untruthful statements by showing that the insured could not read, and could only write his name. There was no evidence in the case tending to show that the application of the insured was not read to him. *Held*, that the presumption is that a person able or unable to read, who executes a contract, knows its contents, and it will not do to hold that because a person is unable to read a contract the presumption is that he was unacquainted with its contents. (*McDonald v. John Hancock Mutual Life Ins. Co.* [N. Y. S. C., App. Div.], 44 New York Supplement [May 6, 1897] 818.)

**Notes of Recent English Decisions.**

**Landlord and Tenant — Building Agreement — Right of Landlord to Terminate.** — The plaintiff and defendant were respectively the landlord and tenant under a building agreement, whereby the tenant was bound to erect buildings to the value of £20,000. The tenant was to proceed forthwith with the buildings, and was to complete them by a specified date. Upon completion he was to be entitled to a lease for ninety-nine years, and at any time prior to a specified date he was to have an option of purchasing the property for £16,000, but in the event of a failure on the part of the tenant to perform the stipulations of the agreement, the landlord was to be entitled to determine the agreement and re-enter. Something was done towards commencing the buildings, but the progress with them was slow, and in January last the plaintiff treated the delay as a default, and gave notice to



terminate the agreement. Shortly before this, however — namely, in December, 1896 — the defendant had given notice to purchase the premises under the option conferred upon him. It was a question, therefore, whether this exercise of the option had changed the relation of the parties into that of vendor and purchaser, or whether, pending the completion of the purchase, the relation of landlord and tenant was still predominant, so that the landlord was entitled to enforce his right of determining the agreement and regaining possession. The situation was novel; but Romer, J., does not seem to have had much difficulty in deciding that the relation of vendor and purchaser prevailed, and that, pending completion of the purchase, the tenant was entitled to be left in possession. There was the difficulty that he might not complete the purchase, and that, in this case, the landlord would be prejudiced by not having been allowed to exercise his right of re-entry. But under the circumstances it appeared that completion would in all probability take place, and, in any event, the tenant and purchaser was, until the time for completion had elapsed, in the position of beneficial owner of the property; and the landlord and vendor was not entitled, as against him, to interfere with the existing tenancy. In other words, the tenant, by turning himself into a purchaser, had suspended the operation of the agreement so far as it was a building agreement. (*Rafferty v. Schofield*, 45 W. R. 460.)

**Fraudulent Misrepresentation as Ground for Annulling a Marriage.** — In the nullity suit of *Moss v. Moss*, the proposition on which the petitioner's case was founded was that the concealed pregnancy of the wife at the date of the marriage was a sufficient ground for declaring the marriage null and void, the argument being that the concealed pregnancy of the wife constituted a fraudulent misrepresentation as to one of the essentials of the marriage contract, and was therefore sufficient to avoid it *in toto*. But it is one of the many distinctions between the contract of marriage and ordinary contracts that such misrepresentation as would avoid a mercantile bargain is not necessarily sufficient to nullify a marriage. The essentials which go to make a marriage valid are clearly defined by the learned president, Sir Francis Jeune: there must be the voluntary consent of both parties, compliance with the requirements of the law as to publication and solemnization, and no incapacity, either physical, or of age, or relationship. If these requirements have been fulfilled the marriage is not void or voidable. Marriages have often been set aside on the ground of fraud or duress, but this has only been where the fraud or duress was such as to negative the first essential of a valid marriage — the voluntary consent of the parties. Under this head fall cases of personation, and cases in which a weak-minded person has been induced by deception or threats to go through the marriage ceremony without under-

standing it and without giving any real consent. Although there is no decided English case in which the question raised by *Moss v. Moss* came up for decision, the precise point is dealt with in the canon law, and is there decided in favor of the validity of the marriage. So far, therefore, as concerns the English marriage law and the ecclesiastical law on which it is mainly founded, there was no precedent for the contention of the petitioner in *Moss v. Moss*. In foreign courts there is considerable authority in his favor, and this is so even in America. Sir Francis Jeune discussed some of these foreign cases at length, and pointed out what seemed to be a fatal defect in the logic of the learned judges who decided them — that while they treat actual concealed pregnancy at the date of the marriage as a ground for a decree of nullity, previous unchastity, whether coupled or not with previous pregnancy, and whether or not concealed from the husband, is not so treated. Surely the unchastity, and not its complement, the pregnancy, is the more serious matter. At the close of his judgment the president points out the very grave consequences which would result from a contrary decision. Suppose the case of a man who, owing to absence from home soon after his marriage, or for some other reason, only discovered years after his marriage that his wife had been pregnant by another man when he went through the ceremony of marriage with her. Is he then to be permitted to set aside the marriage and to bastardize the children born of it? Or is there to be a statute of limitations running from the date of the marriage and not from the date of the discovery? Is the illogical distinction of the American courts to be adhered to? Or if prior unchastity on the part of the woman is to be a ground for a decree of nullity, is the same to hold good in the case of the man?

### New Books and New Editions.

**American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the American Decisions and the American Reports, Decided in the Courts of Last Resort of the Several States.** Selected, reported and annotated by A. C. Freeman and the Associate Editors of the American Decisions. San Francisco: Bancroft, Whitney & Co. 1897.

This is volume 54 of the American State Reports, and contains cases selected and re-reported from the State reports of Alabama, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, North Carolina, Oregon, Tennessee and Vermont. The cases are all of first importance, and cover a wide range of subjects. The citations at the end of each reported case are particularly valuable to the legal profession.

# GENERAL INDEX.

	PAGE.	BOOK REVIEWS—Continued.	PAGE.
ABANDONMENT OF EASEMENTS.....	249	Historical Development of Code Plead- ing .....	192
A BUSINESS BY ITSELF.....	183	Law of Crimes and Criminal Procedure.....	424
A GOOD HINT FOR ALL LEGISLA- TORS .....	272	Law of Receiverships.....	224
AIDING THE CUBANS.....	158	Law Relating to Private Trusts and Trus- tees .....	96
A KENTUCKY LAWYER'S EXPLANA- TION .....	328	Leading in Law and Curious in Court....	370
ALBANY LAW SCHOOL FOR 1897-8....	437	Mechanics' Liens.....	80
ALEXANDER, HAROLD D.—Survival of causes of action.....	71	Negligence—Rules, Decisions, Opinions.....	297
A LEGAL PROPOSAL.....	151	Private Corporations, Handbook.....	176
A LEGISLATIVE NUISANCE.....	124	Probate Reports Annotated.....	388
A LIE WHICH CAUSED A SHOCK WHICH CAUSED AN ILLNESS.....	381	Specific Performance of Contracts.....	297
ANCIENT JAPANESE LAWS.....	87	Treatise on Express Trusts and Powers..	112
ANDREW D. WHITE ON THE JUDICI- ARY .....	188	Treatise on Law of Fire Insurance.....	32
AN OLD BACHELOR'S WILL.....	187	True Doctrine of Ultra Vires.....	406
AN \$118,000 PUZZLE.....	156	Village Laws of New York.....	424
ANTICIPATION OR ALIENATION.....	172	BREAK-DOWN OF LEGISLATURES....	439
ANTIQUITY OF SHORTHAND WRIT- ING .....	255	BRITAIN'S CONSTITUTION.....	43
ANTI-TRUST LAW DECISION.....	254	CASES—How decided by the United States Supreme Court.....	47
A PLEA FOR DIVORCE REFORM.....	364	CAT FIGHT IN COURT.....	155
A PRIZE COMMISSION.....	383	CHIEF JUDGESHIP OF THE NEW YORK COURT OF APPEALS.....	204
A QUAIN OLD DEED.....	312	COMMERCIAL PAPER—Conflict of au- thorities respecting.....	61
ARBITRATION TREATY.....	57	CONDITIONS IN RESTRAINT OF MARRIAGE .....	272
ARCHITECTS' CHARGES.....	26	CONTEMPT CASES.....	363
ARE PUBLIC CORPORATIONS SUB- JECT TO GARNISHMENT OR CREDI- TORS' SUITS? John C. Kleber.....	153	CONTEMPT OF COURT ABROAD.....	251
"A SAD ACCIDENT".....	271	CONTRIBUTORY NEGLIGENCE.....	43
ASSIGNABILITY OF BILLS OF LAD- ING .....	188	CONVICTS NEVER REFORMED BY WORK .....	417
A \$2,000 PRIZE FOR A LEGAL ESSAY..	438	COULD NOT SENTENCE HIS SON....	347
A UNIQUE PETITION TO CO. RT.....	136	CORRESPONDENCE:	
A WHOLESOME DECISION.....	124	Alleged shorthand speeds.....	236
BALKING A BEHEMOTH.....	330	A misconception.....	423
BANKRUPT JUDGES.....	310	Justice Field's service on the bench.....	16
BELL, CLARK—Has the physician ever the right to terminate life?.....	136	Palmer v. Utica Observer.....	80
BENCH BADINAGE.....	30	Pettigru, not Pettigru.....	238
BENHAM, GEO. A.—The Cuban question..	167	Registration of lawyers.....	175
BIG FEES.....	55	CRIMINAL LAW.....	23
BOOK REVIEWS:		CRIMINAL RESPONSIBILITY UNDER ITALIAN LAW—Gino C. Speranza.....	411
A Famous Murder Trial.....	298	CUBAN QUESTION—Geo. A. Benham....	167
American State Reports, Vol. 51.....	112	CURIOSITIES OF WILLS.....	252
—Vol. 52.....	176	CURRENT TOPICS:	
—Vol. 54.....	442	Absence of judge from court-room dur- ing trial.....	356
Beach on Receivers.....	112	A cat case.....	193
Bender's Lawyers' Directory.....	64	Accident insurance company, liability of..	356
Calman's Code Time-Table.....	298	Address of Judge Herrick before Albany Law School graduates.....	393
Commentaries on the Laws of England..	95	Alienating wife's affections, heavy verdict.	101
Digest of Insurance Cases.....	160	Altgeld's penchant for pardoning murder- ers .....	21, 81
Digest of New York Code of Civil Pro- cedure .....	298	American "advanced journalism".....	213
Elements of Law.....	424	American Bar Association.....	279
Excise and Hotel Laws of the State of New York.....	406	American jurisprudence, peculiarities of..	177
Federal Courts.....	240	Anti-Cartoon bill.....	146, 259
General Digest, American and English..	370	Anti-department store legislation.....	407
Greene's Practice Time-Table.....	298	Anti-high theatre hat ordinance.....	19
Handbook of the Law of Partnership....	208	Anti-monopoly question.....	225
		Anti-railroad ticket scalping.....	302

CURRENT TOPICS—Continued.	PAGE.
Anti-trust movement.....	129
Anti-Vaccinationists in Illinois.....	357
Appeals to Court of Appeals in New York .....	146
Are there too many lawyers?.....	389
Armorial bearings, right to use.....	132
Asexualization of feeble-minded and Criminal Persons.....	375
Assembly committees, legislature of 1897.....	50
Attorney, disbarment of.....	229
Bankruptcy Law, need of.....	20
Bar Association of the State of New York .....	18
Barristers' bureau.....	81
Beach v. Baker, Voorhis & Co.....	193
Bequests to charitable organizations.....	407
Bicycle rider criminally liable for recklessness .....	231
Bicycles, specifying of, in insurance policy .....	183
Biennial sessions of legislature.....	145
Bram murder trial.....	33
Breach of promise of marriage.....	145
Canal commerce, protection of.....	37
Chancery suit, famous one in England....	101
Chester S. Lord, election of as regent....	66
Church suing a benefactor for interest.34,	98
Claim for services in preventing the finding of an indictment.....	227
Code of Medical Ethics, violation of.....	299
Codes of New York, appropriation for purchase of.....	97
Cohabitation, legal meaning of.....	35
Collisions between bench and bar.....	276
Confidential communications to newspaper reporters, inviolability of.....	426
Congested condition of legal profession..	427
Conspiracy against trade.....	180
Consular representative, exemption from arrest in this country.....	243
Contempt of court, what constitutes.....	132
Contract not against public policy.....	263
Contract to give life employment, validity of .....	410
Controversy between bench and bar in Massachusetts.....	409
Corrupt Practices Act in Ohio, prosecution under.....	357
Cost of governing New York city.....	21
Covenant made by husband to wife.....	51
Cuban belligerency, effect of recognition by United States.....	371
Curfew bells not to ring.....	37
Danger of blending fact and fiction.....	279
Death penalty, bill to reduce infliction of.	85
Decision in strike cases of 1893.....	280
Deeds and mortgages, drawing of by any persons except lawyers.....	99
Delaware's new Constitution.....	354
Department stores, legislation to abolish.	225
Desertion, what constitutes.....	85
Dingley Tariff Act, retroactive feature of.	241
Disbarment of attorney in Ohio.....	392
Distribution of estates in Surrogate's Court .....	339
District judges, salary of.....	259
Divorces, increase of in the United States.	2
Divorce scandal in Delaware.....	318
Divorce system in North Dakota.....	163
Divorces, validity of.....	133
Dogs, legal disability of.....	300
Driven well litigation in Albany.....	69
Druggists, liability of.....	70
Duties of judges presiding at trials.....	182
Effect of a woman's marriage with an alien on property rights.....	372

CURRENT TOPICS—Continued.	PAGE.
Effect of mutual mistake in conveyance of property in performance of ante-nuptial agreement .....	303
Eight-Hour Law, constitutionality of in Utah .....	83
English law, proposed codification of....	227
Equality before the law.....	391
Estranged husband liable for wife's burial expenses .....	229
Ex-Post Facto Law, what constitutes....	210
Ex-President Harrison a father.....	133
Firemen, injuries to caused by street obstructions .....	199
Fisheries, Game and Forest Laws, constitutionality of in New York.....	99
Fool legislation.....	375
Gamblers, conviction of on testimony of fellow-gambler .....	147
Good roads legislation in New York....	98
Governor Black on biennial sessions....	66
Governor-Mayor Pingree's claims.....	196
Governor Pingree's recommendations....	20
Greater New York Charter Commission.	36
Guests of hotels, right of to remain indefinitely .....	133
Harlan, John M., handsome vote given to .....	242
Heavy insurance risks.....	84
Honors for a colored attorney.....	339
Immoral plays.....	114
Indeterminate Sentence Law of Illinois constitutional .....	355
Indeterminate Sentence Law in Indiana..	228
Inheritance Tax bill veto.....	353
Innovations in law courts.....	302
Insane person, firing insured buildings..	259
Insanity as defense in criminal cases....	97
Introduction of bills in legislatures, restriction of.....	131
International rules to prevent collisions at sea.....	262
Iowa State Bar Association.....	164
Is a gun always a gun?.....	148
Judge Baker, case of.....	320
Judge, sued in his own court.....	147
Judges who were once artisans.....	38
Judgment creditors, suits to set aside assignments .....	100
Judgment of State court, effect of.....	162
Judicial elections in Illinois.....	425
Judicial gowns, wearing of.....	425
Juries, locking up in criminal cases....	147
Juries, serving of liquor to.....	147
Jury awards, injustice of.....	230
Jury, discharging of during trial.....	179
Jury dodging.....	373
Justice of peace, right of legislature to abolish .....	319
Justice Van Brunt, presentation of portrait .....	408
Kinetoscope pictures, prevention of....	211
Laws, unconstitutionality of.....	336
Lawyers in flooded districts of Mississippi .....	242
Legal publications in England.....	102
Legislature, biennial sessions of.....	6
Liability of common carrier.....	50
Liability of insurance company.....	182
Libel Law in Pennsylvania.....	318
Libel laws.....	194
Libel laws in New York State.....	263
Life insurance, interest in attachable....	263
Life insurance policy, exemption from creditors' claims.....	213
Liquor licenses, limitation of.....	86

CURRENT TOPICS—Continued.	PAGE.	CURRENT TOPICS—Continued.	PAGE.
Little v. Banks.....	113	Right of prisoner to recover money found on his person.....	335
Lloyds associations, liability of.....	83	Right of property in a dead body.....	426
Loss of arm, damages for.....	179	Rights of individual labor.....	178
Lottery, unconstitutionality of.....	1	Right to name the baby.....	337
Loud bill, opposition to.....	3	Right to project stereopticon pictures on dead walls of buildings.....	229
Marriage scandal in New Jersey.....	301	Rulings by United States solicitor of treasury.....	357
Matthew Hale, demise of.....	210	Salvation Army and the law.....	371
Medical experts.....	148	Seamen, rights of under United States laws.....	115
Merchants' Exchange, power of to suspend member.....	197	Sheldon murder trial.....	198
Mileage book, right of conductor to confiscate.....	164	Sherman Anti-Trust Law.....	197, 209
Milk, purity tests.....	69	Singular case of hardship.....	242
Mob violence, laws to suppress.....	373	State Reporter, demise of.....	65
Mob violence, meaning and effect of.....	393	Statutory revision in New York.....	17, 353
Mortgage tax laws.....	164	Steamboat companies, liability of.....	4
Municipal corporation, power of to pay reward.....	51	Steamship company, liability of.....	317
National Guard officers, powers of.....	2	Stenographers' speed.....	196, 428
Negligence, what constitutes.....	357, 261, 180	Street car passengers, rights of.....	428
New Jury Law in New York criticized.....	409	Street musicians, regulation of.....	38
New trial granted by reason of inefficiency of counsel.....	211	Street railway franchises.....	119
New York Court of Appeals calendar.....	51	Success at law without law school course.....	20
New York Court of Appeals chief judgeship.....	275	Succession Tax bill in New York.....	241
New York Law School.....	130	Sweet corn case, decision of.....	117
New York State legislative index.....	197	Taxation of life insurance policies.....	390
Officers foregoing salaries.....	3	Taxation of personal property.....	1
Ohio Supreme Court's excellent record.....	20	Tax exemption of household furniture.....	302
Oleomargarine Law constitutional.....	164	Telegraph companies, liability of.....	277
Operatic costumes, ownership of.....	49	Teller Bankruptcy bill, substitute for.....	321
Over-legislation, evils of.....	299	Theosophy not a religion.....	354
Patent decision.....	374	Tobacco Trust, attempt to break up.....	199
Personal property escaping taxation.....	1	Torrens Law in Ohio.....	20
Physicians, liability of.....	179	Trade-mark, right to use.....	212
Pirating of dramatic works.....	4	Train wrecking made a capital offense.....	130
Police justice, abolishment of in New York.....	182	Trap doors, regulating use of.....	38
Policeman, dismissal of.....	100	Treaty of arbitration with Great Britain.....	49
Police, power of to enter premises covered by liquor license.....	262	Twiss, Sir Travers, death of.....	101
Premature sleighriding, fine for indulging in.....	102	Tyndale Palmer v. E. P. Bailey & Co.....	65
President's power of removal.....	372	Typewriters' mistakes.....	390
Press censor in New York.....	181	Type-written records, permanency of.....	428
Prison Label Law unconstitutional.....	146	Un-American boycott.....	281
Prison labor problem.....	5	Unanimous verdict, what constitutes.....	390
Prison labor problem in New York.....	163	United States Circuit Court of Appeals, jurisdiction of in criminal cases.....	83
Privileged communications made in good faith.....	339	United States v. Steamer Three Friends.....	119, 161
Professional misconduct.....	337	United States Supreme Court, work of.....	374
Professional secrets, disclosure of by physicians.....	407	Usurers, blow at.....	318
Proposed reform in methods of trying cases.....	335	Usury in Canada.....	230
Prosecuting attorney, liability of in action for libel.....	114	Validity of Berliner telephone patents.....	338
Public Defenders bill.....	66	Venezuelan Arbitration Commission.....	132
Pullman Palace Car Company, liability of.....	282	Verdicts by less than unanimous juries.....	4, 115, 214
Queer laws on English statute books.....	212	Wheelmen, insurance against accident.....	260
Railroad receiverships in 1896.....	37	When a note is non-negotiable.....	426
Railroads, rights of on streets, etc.....	70	Wife, domicile of.....	36
Railroad travelers, rights of.....	301	Wife poisoning with prussic acid.....	85
Recalcitrant witnesses, power of congress to imprison.....	280	Will, construction of.....	101
Receiver of hotel, proper compensation of.....	84	Witnesses not liable in action for slander or libel.....	392
Reform in digesting reports of decisions.....	226	Work of New York Supreme Court, Appellate Division, Third Department.....	355
Rejection of arbitration treaty.....	317	Woman's feet and legs, exhibition of on witness stand.....	82
Restaurant patrons, rights of.....	163	Woman suffrage advocates active.....	132
Restriction of immigration.....	20	Women, admission of to bar in Kentucky.....	81
Right of counsel to shed tears before jury.....	131	Women serving in National Guard.....	259
		Youngs murder trial.....	70
		DAMAGES IN DIVORCE SUITS.....	271
		DEAN, BEN S.—Interstate rendition in its constitutional aspects.....	102
		DEAN, BEN S.—Is the president's power exclusive?.....	376

	PAGE.		PAGE.
DEAN, BEN S.—Mr. Ellsworth's Anti-Car-		LETTER FROM NEW ZEALAND.....	403
toon bill.....	246	LIABILITY OF COMMON CARRIER...	270
DEATH PENALTY.....	56	LIFE INSURANCE POLICIES NOT	
DIVORCE—Law of.....	44	TAXABLE .....	394
EMPLOYER'S LIABILITY.....	188	LOUD POSTAL BILL.....	89
END OF A LONG LITIGATED CASE....	152	LYNCH LAW.....	254
ENGLISH NOTES.....		McMURDY, ROBT.—Results of minority	
257, 295, 314, 332, 350, 385, 404, 422,	439	voting in Illinois.....	171
FAMILIAR QUOTATIONS, legal authors		MAGAZINES.....96, 158, 239, 315.	387
of .....	92	MAN, POOR MAN.....	252
FRATERNAL ORDERS AS INSURERS.	11	MANUSCRIPT OF THE "MAY-	
GERMAN LAWYERS.....	206	FLOWER" .....	249
GRAND JURIES.....	59	MATTESON, ANDRE—Proportional repre-	
HAS THE PHYSICIAN EVER THE		sentation in Illinois.....	431
RIGHT TO TERMINATE LIFE? by		MEASURE OF DAMAGES IN CASES OF	
Clark Bell, Esq.....	136	INABILITY TO CONVEY GOOD	
HER MAJESTY'S ROYAL COURTS OF		TITLE TO LAND.....	221
JUSTICE (Illustrated).....	289	MILLION HINGES ON A WORD.....	251
HINTS ON SPEAKING.....	10	MINISTER WILLIS AS AN ATTORNEY.	91
HISTORIC COLLISIONS BETWEEN		MIXED METAPHORS.....	187
BENCH AND BAR.....	293	MR. ELLSWORTH'S ANTI-CARTOON	
HOW GREAT LAW OFFICES WORK...	39	BILL—Ben S. Dean.....	246
HOW A LAWYER GOT INTO HEAVEN.	184	NEW NEGOTIABLE INSTRUMENTS	
HOW MEDICOS ARE VICTIMIZED BY		LAW .....	432
STUPID JURIES.....	311	NEW YORK CO. RT OF APPEALS AB-	
HUNTING AN ESCAPED CONVICT....	77	STRACTS.....344, 345, 346,	367
HYPNOTISM AND CRIMINALS.....	76	NEW YORK LEGISLATURE.....	88
ILLINOIS SUCCESSION TAX UNCON-		NEW YORK STATE BAR ASSOCIA-	
STITUTIONAL .....	342	TION .....	89
IMPEACHMENT OF OWN WITNESSES.	159	NO ALIMONY FOR HUSBANDS.....	185
IMPRISONMENT FOR DEBT—Marshall		NOTES OF CASES.....398, 418,	429
Van Winkle.....	282	OBITUARY:	
INDIAN JUSTICE.....	440	Avery, Edward.....	13
INFRINGEMENT OF COPYRIGHT BY		Beasley, Mercer.....	156
REVIEWS .....	268	Brooke, Chas. W.....	108
INSTRUCTION TO LAND BUYERS....	47	Emmett, Robt. S., Jr.....	108
INTERSTATE COMMERCE LAW, pro-		Lowell, John.....	348
posed amendments.....	90	Morse, Isaac S.....	14
INTERSTATE RENDITION IN ITS		Reed, Gen. John Meredith.....	14
CONSTITUTIONAL ASPECTS—Ben S.		Storrow, J. J.....	271
Dean .....	102	Walker, Gen. Francis A.....	13
INVIOABILITY OF CONFIDENTIAL		OLDEST WILL ON RECORD.....	185
COMMUNICATIONS TO NEWS-		OUR LAW-MAKERS.....	188
PAPER REPORTERS.....	430	PAROL LAW—Is it invalid?.....	46
IS THE PRESIDENT'S POWER EXCLU-		PENALTY FOR ADULTERY.....	253
SIVE?—Ben S. Dean.....	376	PETTIFOGGER AND SHYSTER.....	248
JUDICIAL VERBOSITY.....	124	PLEADING NEGLIGENCE—Linton D.	
JUSTICE VAN BRUNT IN OIL.....	414	Landrum .....	215
KAFFIR LITIGATION.....	417	POETRY IN COURT RECORDS.....	308
KIND WORDS OF CONTEMPORARIES.	329, 368	PRIZE OFFERED FOR LEGAL ESSAY.	9
KLEBER, JOHN C.—Are public corpora-		PROPORTIONAL REPRESENTATION	
tions subject to garnishment or creditors'		IN ILLINOIS—Andre Matteson.....	436
suits? .....	153	PROTECTING WILLS.....	77
KLEBER, JOHN C.—The alienation and		PUNISHMENT NOT CRUELTY.....	91
hypothecation of corporate franchises and		PUNISHMENTS UNDER THE ITALIAN	
corporate property.....	231	PENAL CODE—Gino C. Speranza.....	121
LABATT, C. B.—The retroactive provisions		QUEER BEQUESTS.....	270
of the new tariff act.....	243	QUEER LEGAL REASONING.....	313
LABOR COMBINATIONS AND THE		RAILROAD LABOR PROBLEM.....	13
LAW .....	250	RAILROAD POOLING UNLAWFUL....	200
LANDRUM, LINTON D.—Pleading Negli-		RECEIVER AND MANAGER'S INDEM-	
gence .....	215	NITY .....	26
LAW SCHOOL CATALOGUES.....	405	REGULATING COLLEGE DEGREES...	61
LAWS OF 1897.....141, 152,	253	REGISTRATION OF LAWYERS.....	134
LAWYERS AS LEGISLATORS.....	60	RESULTS OF MINORITY VOTING IN	
LAWYERS QUOTE SCRIPTURE.....	156	ILLINOIS—Robt. McMurdy.....	171
LEARNED FEMALES—An English view		RETROACTIVE PROVISIONS OF THE	
of them.....	12	NEW TARIFF ACT—C. B. Labatt.....	243
LEARNED WOMEN.....	184	RIGHT OF HUSBAND TO ALIMONY...	25
LEGAL LAUGHS.....		RIGHT OF PROPERTY IN A DEAD	
14, 30, 80, 95, 111, 128, 144, 174, 191, 208,		BODY .....	434
224, 238, 256, 272, 314, 333, 349, 367, 382, 422,	440	RIGHTS OF ILLEGITIMATE OFF-	
LEGAL METHODS IN MOROCCO AND		SPRING UNDER WILLS.....	347
CHINA .....	51	ROBERT G. INGERSOLL.....	269

	PAGE.		PAGE.
RUFUS W. PECKHAM (with portrait supplement), by L. B. Proctor.....	286	THE KISS IN COURT.....	231
SCHEME FOR CODIFYING ENGLISH LAW .....	189	THE LAW AS A CALLING.....	141
SELF-DEFENSE .....	267	TRESPASSERS WILL BE PROSECUTED .....	185
SHYSTERS—suppression of.....	87	TRIBUTES TO THE LATE MATTHEW HALE .....	214
SOME FOOL BILLS.....	252	VALID MARRIAGE, WHAT CONSTITUTES A.....	8
SOME OLD LAW BOOKS.....	365	VAN WINKLE, MARSHALL—Imprisonment for debt.....	282
SPERANZA, GINO C.—Criminal responsibility under Italian law.....	411	VERDICTS BY LESS THAN UNANIMOUS JURY.....	22
STANDARD OF A TRUE LAWYER.....	189	VERDICT OF A HUNGRY JURY.....	30
STAR CHAMBER SENTENCES.....	312	WAGES UNDER PUBLIC AND PRIVATE CONTRACT.....	59
STATEMENTS IN PRESENCE OF ACCUSED .....	108	WANTED—A FULL STOP.....	438
SUBSTITUTE FOR HANGING.....	252	WEALTHY ENGLISH LAWYERS.....	135
SUCCESS AT THE BAR.....	435	WHAT CONSTITUTES NEGLIGENCE..	344
SURVIVAL OF CAUSES OF ACTION, by Harold D. Alexander.....	71	WISE WORDS TO YOUNG LAWYERS—Hon. D. Cady Herrick.....	399
TAXATION—Judgment in favor of non-residents .....	27	WOMEN AS PLEADERS.....	205
THE ALIENATION AND HYPOTHECATION OF CORPORATE FRANCHISES AND CORPORATE PROPERTY—John C. Kleber.....	231	WOMAN'S VOTE IN THE WEST.....	25
THE CHIEF JUSTICESHIP OF THE UNITED STATES SUPREME COURT. 269		WORK OF THE NEW YORK STATUTORY REVISION COMMISSION.....	358
		W. & A. MCKINLEY.....	186

# INDEX-DIGEST

TO

ABSTRACTS, CASES IN FULL AND NOTES OF CASES.

	PAGE.		PAGE.
ACCIDENT INSURANCE—murder of insured	351	CARRIERS—failure to furnish cars	351
policy—blood poisoning—direct proof—		injury to passenger on street car	93
forfeiture	191	negligence—assisting passenger on train	231
violation of game laws	93	passenger—insult—damages	257
voluntary exposure to unnecessary danger	64	who are passengers	125
ACCORD AND SATISFACTION	236	CARRIER OF GOODS—construction of contract	109
ACTION ON SEPARATE CONTRACTS—parties	274	when relation begins	125
ADMINISTRATION—appointment of administrator	93	CARRIER OF PASSENGERS—contract—packages	257
ADMIRALTY PRACTICE—release on stipulation	236	reasonableness of regulations	160
ADULTERATION OF FOOD—false warranty	386	rejection of passenger	236
ADVERSE POSSESSION—parental relation	48, 93	CHARITABLE LEGACY—lapse	48
possession of guardian	351	CHATTEL MORTGAGE—construction	351
AGENCY—master and servant	28	release	257
ARREST—assault and battery	351	satisfaction	274
ASSAULT AND BATTERY—self-defense	351	taking possession	109
ASSIGNMENT—claim of damages for fraud	274	CHATTEL MORTGAGE OF SHEEP	258
ASSIGNMENT FOR BENEFIT OF CREDITORS	78	CHECK—legal tender	142
ATTACHMENT—damages	351	CITY—injury to property by water from sewer	419
fraud	274	CIVIL SERVICE LAW—constitutionality	344
garnishment	274	COMPANY	15
property subject	78	COMPROMISE	78
trespass by officer	160	CONTINUING CONTRACT	236
ATTORNEY—disbarment	109	CONTRACT—agreement to arbitrate	160
lien for services	191	anti-trust statute—validity	125
ATTORNEY AND CLIENT—negligence in passing title	339	construction—payment in instalments	274
BANK—deposits—payment	257	parol evidence	125
BANKING—liability of National bank as stockholder in other bank	441	parol evidence to vary	351
note given to bank without consideration	367	personal service	126
rediscounts	441	public policy	93
BANKS AND BANKING—bills and notes	419	release	296
officers	257	rescission—false representations	78
BENEFICIAL ASSOCIATIONS—beneficiaries	351	rescission—illegal consideration	191
BENEFICIARY ASSOCIATIONS	419	right to rescind	125
BENEVOLENT SOCIETY—assessment—waiver	160	services rendered in expectation of marriage	221
BILL OF EXCHANGE	175	CONTRACT FOR FUTURE DELIVERY	296
BILLS AND NOTES—antecedent debt—innocent purchasers	191	CONSTITUTIONAL LAW	274
collateral attack	274	actions against State	221
non-negotiable note	419	interstate commerce—privilege tax	296
payment	160	taxation	351
promissory note—conditions	351	CONVERSION—ownership of crops	93
void consideration	109	CONVEYANCE—expectant interest	274
BREACH OF PROMISE TO MARRY	149	CONVICTION FOR MURDER—jurisdictional defect	379
		COPYRIGHT—picture—infringement	256
		CORPORATION	15
		contract made by foreign	419
		insolvency—fraudulent conveyance	93
		meetings—proxies— <i>viva voce</i> vote	222
		stock subscriptions	160
		COURTS—jurisdiction	441

	PAGE.
COVENANT OF HUSBAND IN DEED OF WIFE'S PROPERTY.....	346
COVENANTS IN LEASE — insurance money .....	191
CRIMINAL EVIDENCE — rape — age of prosecutrix .....	109
CRIMINAL LAW—abortion.....	274, 441
burglary .....	441
confessions .....	78
burglary—possession .....	191
demurrer to indictment.....	419
false pretenses.....	351
false pretenses—bogus check.....	237
forgery—order for goods.....	191
homicide — insanity.....	419
homicide — self-defense.....	191
larceny .....	109
larceny from the person.....	237
larceny—stealing note.....	78
qualification of judge.....	125
DAMAGES — contracts.....	352
DEATH BY WRONGFUL ACT.....	48
DEED — conditions — construction.....	191
delivery .....	64
delivery of—waiver of vendor's lien.....	64
prior unrecorded conveyance.....	441
reformation .....	352
restriction .....	419
DEED OF GIFT—setting aside.....	405
DISTRIBUTION—residue of estate.....	386
DIVORCE—adultery of defendant committed with connivance of plaintiff.....	264
contract to facilitate.....	351
desertion .....	419
DOWER — lease.....	78
EASEMENT — license — revocation.....	207
EJECTION OF PASSENGER FROM STREET CAR FOR NON-PAYMENT OF FARE.....	45
EJECTMENT — title.....	258
EQUITY—discovery—forged letters.....	221
EVIDENCE .....	15
executor not competent witness to prove conversation with decedent.....	367
principal and agent—varying written instrument by parol.....	40
FACTORIES AND WORKSHOPS.....	333
FISHERIES—grantees of exclusive right to fish with rod and line.....	369
FIXTURES—stuffed birds and animals.....	405
FEDERAL COURTS—rights created by State statutes.....	237
FELLOW-SERVANTS .....	15
FIRE INSURANCE — waiver — power of secretary .....	207
FRAUD .....	15
FRAUDS, STATUTE OF—debt of third person .....	160
FRAUDULENT CONVEYANCE.....	125, 15
notice .....	237
preferred creditor.....	109
GAMING .....	15
boxing match—money lent for deposit.....	206
GARNISHMENT — judgment.....	160
GIFT — delivery.....	237
GUARDIAN AND WARD—loss of funds deposited .....	206
liability of sureties.....	109
HABEAS CORPUS—remand of prisoner.....	352
HORSE RACING.....	105
HUSBAND AND WIFE.....	315
agency .....	160
domicile .....	222
permanent maintenance and allowance for child .....	352

	PAGE.
INJURIES BY RAILROAD TRAINS—trespassers .....	15
INSANITY—management of estate.....	109
INSOLVENCY — preference.....	405
INSURANCE — loss.....	419
parol contract to renew.....	109
policy against burglary.....	126
policy payable to mortgagee.....	352
valued policy law.....	174
warranties .....	258
INSURANCE POLICY—misrepresentation as to age.....	48
JUDGE—misconduct on trial.....	221
JUDGMENT — lien — fraud.....	109
mortgage foreclosure.....	352
JUDGMENT AGAINST MARRIED WOMAN .....	296
JUDGMENT OF CONVICTION REVERSED .....	344
LABORER'S LIEN — chattel mortgage—priorities .....	48
LANDLORD AND TENANT—alteration of premises.....	274
building agreement—right of landlord to terminate .....	441
construction of lease.....	174
damages from defective water fixtures.....	258
erection of fire escapes.....	93
forfeiture — relief.....	421
lease of hotel .....	334
LANDLORD'S LIEN.....	48
LIBEL—fact of libel—question for judge....	142
newspaper libel.....	296
privileged communication.....	175
when malice implied.....	202
LIEN ON CHATTEL EXEMPT FROM EXECUTION .....	15
LIFE INSURANCE—illiteracy of party.....	441
payment of premiums in notes.....	15
LIGHT—interference with .....	333
LIMITATIONS—carriers of goods.....	237
seduction under promise of marriage.....	395
MALICIOUS PROSECUTION — probable cause .....	174
MARINE INSURANCE—intoxication.....	109
policy—loss of freight.....	207
MARRIAGE — fraudulent misrepresentation as ground for annulling.....	442
MARRIAGE SETTLEMENT—covenant to settle wife's after-acquired property.....	352
MARRIED WOMAN—disability of coverture .....	315
partnership with husband.....	93
MASTER AND SERVANT.....	16
assumption of risk.....	78, 258, 315
contract of employment.....	237
negligence .....	142, 420
MECHANICS' LIEN—claim of lien.....	370
MEMORANDUM IN WRITING OF SALE OF LAND.....	48
MORTGAGE — consideration.....	370
extension of payment.....	174
priority of lien.....	237
receiver — foreclosure.....	334
tenants in common—power of sale.....	237
MORTGAGE OF MARRIED WOMAN—estoppel .....	109
MUNICIPAL CORPORATION—improvements—special tax.....	370
negligence .....	222
street railroad.....	125
street railway—damage to franchise.....	258
unreasonable ordinance.....	78



	PAGE.		PAGE.
MUTUAL BENEFIT SOCIETY—non-liability of individual member for amount due on policy.....	327	RAPE — complaint — evidence.....	126
NATIONAL GUARD—armorers' compensation .....	345	REAL ESTATE AGENT—commission.....	174
NEGLIGENCE — highways — contributory negligence .....	258	RELIGIOUS SOCIETIES—capacity to sue .....	15
master and servant.....	405	REMOVAL OF CAUSES.....	110
proximate cause—railroad crossing.....	48	RIGHT OF INDORSER TO SUE ON NOTE .....	94
street railroad accident.....	307	SALE—damages for breach.....	94
NEGLIGENCE IN DELIVERY OF TELEGRAPHIC MESSAGE.....	264	damages—measure of.....	258
NEGOTIABLE INSTRUMENTS — parol evidence .....	334	fraud — rescission.....	370
NOTARY PUBLIC—contempt of court—punishment .....	334	unauthorized .....	420
OFFICERS— <i>quo warranto</i> .....	370	waiver of defects.....	370
PARENT AND CHILD—services.....	208	SALE OF GOODS.....	126
PAROL EVIDENCE.....	420	SEDUCTION—promise to marry.....	125
PARTNERSHIP — dissolution.....	258	SOLICITOR — authority to compromise claim before action.....	421
liability for debts.....	296	STEAMBOAT COMPANY—liability of....	6
powers of surviving partner.....	110	TAX—review of assessments.....	346
PAYMENT — mistake.....	274	TELEGRAPH COMPANY—delay in delivery of message.....	28
right of party paying to recover.....	93	TENANT .....	16
PERSONAL INJURY.....	420	TENANTS IN COMMON—lapsed devise....	420
caving in of sewer.....	385	TENDER — sufficiency.....	334
PHYSICIANS—refusal of board of health to grant certificate of admission to practice....	222	TESTAMENTARY POWERS—bad faith of executor .....	386
PLEDGE—collateral security.....	274	TORTS—joinder of actions—animals.....	222
PRACTICE—disposition of case—power of court .....	405	TRADE FIXTURE.....	142
pleading—action for libel.....	387	TRADE-MARK—use of one's own name....	208
PRACTICE OF MEDICINE—conviction of felony .....	218	TRANSFER OF PERSONAL PROPERTY BY MORTGAGOR TO MORTGAGEE .....	367
PRINCIPAL AND AGENT—authority of agent .....	334	TRESPASS—measure of damages.....	110
doctors—good faith.....	334	TRUST — evidence — declarations.....	258
contract .....	174	precatory trust.....	237
husband and wife.....	370	TRUSTEES—breach of trust.....	222
PRIVATE CHARITABLE INSTITUTIONS .....	345	USURY—conflict of laws.....	421
PROMISSORY NOTE—forged endorsement .....	420	elimination of consent.....	125
PUBLIC LANDS—cutting timber.....	370	VENDOR AND PURCHASER.....	16
rights of pre-emptor.....	125	misrepresentation .....	386
RAILROAD COMPANY—contributory negligence .....	208	VENDOR'S LIEN.....	334
ejection of trespasser—servant's authority.....	94	homestead .....	258
frightening horses—crossings.....	125	WAREHOUSEMEN — conversion.....	274
killing stock.....	331	who are.....	78
liability of lessor.....	94	WILL—conclusive as to facts alleged.....	125
loss of life—conjectural cause of death.....	385	conditions and restrictions.....	110
receivers—claims for supplies.....	110	construction .....	206, 441
RAILROAD POOLING—unlawful.....	200	distribution of lands.....	208
RAILROAD RELIEF ASSOCIATION—public policy.....	420	charitable bequest—limitation.....	386
		gift for life.....	237
		interpretation .....	386
		joint will—probate.....	237
		power of appointment.....	237
		WRIT OF REVIEW.....	420
		WRITTEN AGREEMENT—parol evidence of condition—precedent.....	175

# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD

OF THE

LAW AND THE LAWYERS.

---

VOL. LVI.

FROM JULY, 1897, TO JANUARY, 1898.

---

ALBANY, N. Y.:  
ALBANY LAW JOURNAL COMPANY.  
1898.

---

Entered, according to act of Congress, in the year eighteen hundred and ninety-eight,  
By THE ALBANY LAW JOURNAL COMPANY  
In the office of the Librarian of Congress, at Washington.

---

# TABLE OF CASES

REPORTED, NOTED, ABSTRACTED AND DIGESTED.

	PAGE.		PAGE.
Allaire v. St. Luke's Hospital.....	276	Darst v. Mathieson Alkali Works.....	234
Allyeyer et al. v. State of Louisiana.....	36	Davidson v. Davidson.....	293
Animarium Co. v. Bright.....	396	Davis v. Commonwealth of Mass.....	36
Arnold v. Flanders.....	5	Denver & Rio Grande R. R. Co. v. Lorentzen.	340
Armstrong v. Maybee.....	71	Doyle v. State.....	216
Attorney-General v. Mayor, etc., of Newcastle-on-Tyne .....	378	Dunham v. St. Croix Soap Co.....	95
Barabosz v. Karat.....	304	Eastman v. State of Ohio.....	72
Bartlett v. Goodrich.....	291	Elkstrom v. Hall.....	143
Bean v. Scheffer.....	72	Erwin v. Jersey City.....	143
Beecher v. Common Council of Detroit.....	330	Erb v. German Ins. Co.....	36
Bickel, etc., v. Kraus.....	36	Evans-Snider-Buel Co. v. Holder.....	161
Bird v. Rochester Mutual Union Association.	95	Evey v. Mexican Central Ry. Co.....	150
Blanc v. Blanc.....	365	Ex Parte Thomas Phillips Bryant.....	71
Bloomington v. Hodges.....	131	Fairbank Co. v. Nicolai.....	161
Boatwright v. Chester & Media Electric Ry. Co.....	41	Fairman v. Boston & A. R. Co.....	324
Bond v. Holloway.....	348	Fidelity & Casualty Co. v. Willey.....	186
Boyd v. American Carbon Block Co. et al.....	216	Fisher v. Paxon.....	413
Boynton v. Roe.....	377	Fisk v. City of Hartford.....	238
Bradford v. Clark and Thompson.....	203	Fitzpatrick v. Fitzpatrick.....	293
Brewster v. Miller.....	150	Fly v. Screeton.....	234
Bruce et al. v. Beall.....	223	Fletcher v. B. & P. Ry. Co.....	380
Bryan v. Adler.....	366	Foley v. State.....	77
Caledonia Ry. Co. v. Warwick.....	431	Forster v. Cantoni.....	165
Campbell v. Galloway.....	311	Fox v. Masons' Fraternal Acc. Ass'n.....	141
Carbondale Inv. Co. v. Burdick.....	414	Freedman v. The Providence Washington Ins. Co.....	149
Central Loan & Trust Co. v. Campbell Commission Co.....	124	Furness v. Forwood.....	126
C. H. & D. R. R. Co. v. Lally.....	288	Gamble v. City of San Diego.....	60
Chesapeake & O. Ry. Co. v. Lang's Adm'r.....	131	Garlick v. Karger.....	377
City of Chester v. Eyre.....	234	Gibbons v. Anderson.....	41
City of Indianapolis v. Navin.....	117, 167	Glasse v. Woolgar and Roberts.....	18
City of Livingston v. Woods.....	234	Golden Star Fraternity v. Conklin.....	486
City of St. Louis v. F. Meyrose Lamp Mfg. Co.....	118	Grannan v. Westchester Racing Asso.....	275
Clason v. Baldwin.....	61	Gregg v. Beane.....	70
Cleveland Nat'l Bank v. Morrow.....	383	Gulf, C. & S. F. Ry. Co.....	413
Clowdis v. Fresno Flume & Irrigating Co.....	347	Gunster v. Scranton Ill. Heat & Power Co....	89
Colonial City Traction Co. v. Kingston City R. Co.....	324	Hadden et al. v. Linville.....	206
Commonwealth v. Ainsworth.....	385	Hall v. Alford.....	359
Commonwealth v. Hufnal.....	58	Hall v. Murdock.....	340
Conservators of the River Thames v. Smeed, Dean & Co.....	144	Hamilton v. Chicago, M. & St. P. Ry. Co....	413
Cooley v. Lobdell.....	396	Hancock Life Ins. Co. v. Dick.....	324
Costello v. Downer.....	78	Hanna v. Nassau Electric Railroad Co.....	77
Creekmore v. Baxter.....	396	Harkin v. Crumbie.....	94
Cremore v. Huber.....	116	Hart v. Georgia Railroad Co.....	60
Crenshaw v. Harris.....	179	Hass v. Brown & ors.....	167
Crescent Horseshoe & Iron Co. v. Eynon.....	396	Heagy's Estate.....	71
Cundiff v. Cundiff.....	65	Hedrick v. Atchison, Topeka & Santa Fe R. Co.....	106
Cunningham Iron Co. v. Warren M'fg Co....	340	Henderson v. Dade Coal Co.....	486
Cunningham v. Syracuse Imp. Co.....	280	Hendricks v. Haskins.....	360
		Heywood v. Whitehead.....	106
		Hill v. Hatch.....	161

## TABLE OF CASES.

	PAGE.		PAGE.
Hill v. Rowlands.....	107	Martin v. Goldstein.....	275
Hoffman v. D. & H. C. Co.....	60	Mason v. Wierengo's Estate.....	89
Hoggs v. Hensley.....	106	Mather v. N. Y. C. & H. R. R. Co.....	259
Holiday v. American Mut. Acc. Ass'n.....	396	Maysville & Big Sandy R. R. Co. v. Holton..	89
Hollenbeck v. Hall.....	384	McDonald v. Quick.....	124
Home Ins. Co. of N. Y. v. Karn.....	36	McGorty v. Southern New England Tel. Co..	396
Home Savings Bank v. McLaren.....	198	McGowan v. McGowan.....	41
Hoover v. McChesney.....	258	McNuky v. Pa. Ry. Co.....	361
Hope v. Brash.....	203	Meredith v. Frank et al.....	89
Hovey v. Elliott.....	77	Mercer v. King.....	359
Howard v. St. Lawrence Life Asso.....	124	Merrill v. Colonial Mut. Fire Ins. Co.....	198
Hoyt v. Cleveland, C., C. Ry. Co.....	6	Merritt v. The St. Paul.....	359
Hudson v. Wilbur.....	311	Mertzbach v. The Mayor, etc., of the City of New York.....	17
Hummel v. Kistner.....	233	Mitchell v. The Torrington Union.....	72
Hunt v. Hunt.....	90	Moffett, Hodgkins & Clarke Co. v. City of Rochester et al.....	251
Hurley v. Bowdoinham.....	143	Montagu v. Montagu.....	162
Hyer v. Richmond Traction Co.....	179	Montagu v. Pacific Bank.....	340
In Arbitration Wright v. City of Toronto....	41	Motley v. Wickoff.....	106
Inhabitants of Cumberland Co. v. Central Wharf Steam Tow Boat Co.....	106	Mott v. Fowler.....	187
In re Arthur L. Weeks.....	272	Mott's Iron Works v. Clow.....	366
In re Appraisal of Estate of Jay Gould.....	39	Muir v. Miller.....	396
In re Donoghue's Appeal.....	147	Murfin v. Detroit & Erie Plank Road Co....	151
In re Estate of Mary E. McLarney.....	282	Murphy v. Davis.....	294
In re Hong Wah.....	487	New York Building Loan Banking Co. v. Fisher.....	340
In re Kynoch & Co.....	197	New York Life Ins. & Trust Co. v. Viele....	414
In re Lejee's Estate.....	90	New York Health Dept. v. Dassori.....	312
In Matter of Application for Removal of J. Lee Humfreville, as Executor, etc.....	155	Niblack v. The Park Nat'l Bank.....	418
In re Matthews Estate.....	431	Nommensen v. Angle.....	234
In re Murray Hill Bank's Application.....	29	Ogier v. Albany Railway Co.....	271
In re Shipowners' & Merchants' Tugboat Co.	117	O'Herron v. Gray.....	197
In re Wilbor.....	205	Opel v. Shoup.....	59
International & G. N. R. R. Co. v. Moore....	143	Othila Woehrl v. Metropolitan Life Ins. Co.	189
Jenkins v. State.....	400	Oxley Stave Co. v. Hoskins & ors.....	379, 420
Johnson v. Boyd.....	142	Paget v. Paget.....	432
Jones v. Merrill.....	117	Palmer v. Van Santvoord.....	324
Jones v. N. Y. Life Ins. Co.....	6	Pearce v. State.....	89
Kaufman v. Fye.....	377	Peck v. Heinrich.....	106, 146
Keep v. Walsh.....	117	Pennington v. Crossley & Sons.....	113
Kelly v. N. Y., N. H. & H. Ry. Co.....	23	Pennsylvania Co. v. City of Chicago.....	234
Knight v. Tripp.....	240	People, etc., v. Deehan.....	309
Knobeloch v. Germania Savings Bank.....	396	People v. Lewis.....	29
Koppel v. Downing.....	251	People v. Strait.....	385
Krall v. Forney et al.....	234	People v. Zucker.....	223
Lady Bateman v. Faber.....	90	People ex rel. Groton Savings Bank v. Barker et al.....	340
Lake Bisteneau Lumber Co. v. Mimms.....	323	Perkins v. Pendleton et al.....	79, 223
Latemer v. Buxton.....	241	Perth General Station Committee v. Ross....	130
Leach v. State.....	414	Petrie v. Williams.....	118
Leavenworth Coal Co. v. Batchford.....	70	Pfaffinger v. Gilman.....	54
Leigh v. Williams.....	161	Piehl v. Albany Railway Co.....	271
Liberty Ins. Co. v. Central Vt. R. R. Co.....	96	Pillsbury v. Eagle.....	365
Livingston v. Superior Court of Los Angeles Co.....	258	Pollard v. Wellford.....	377
Loddill v. Laboring Men's Mutual Aid Asso.	141	Pollock v. Cleveland Ship Building Co.....	198
Long Island Water Works v. City of Brook- lyn.....	17	Powers v. Powers.....	267
Loudoun v. The Eighth Ave. Railroad Co....	28	Ray v. Keene.....	204
Louisville, N. A. & C. Ry. Co. v. Wright....	234	Reinert v. Reinert.....	125
Lucas & Son v. Lucas.....	162	Reynolds v. Merchants' Woolen Co.....	161
MacGreal v. Taylor.....	340	Ritchey v. Ritchey.....	3
Mackall v. Ratchford et al.....	224	Robinson v. Texas Pine Land Ass'n.....	89
Mackall v. Willoughby.....	106	Robinson et al. v. Parker.....	150
Madden v. Penn. Electric Light Co.....	142	Rochester Bar Association v. Dorothy.....	14
Manchester Fire Assur. Co. v. Redfield.....	131	Rogers v. Equitable Mut. Life & Endowment Asso.....	413
Manda v. Wells, Fargo & Co.....	277	Ross, Admr's, v. Western Union Telegraph Co.....	223
Marshall v. Watson.....	71		

# TABLE OF CASES.

v

	PAGE.		PAGE.
Rush v. St. Paul City Ry. Co.....	419	Taylor v. Newblock.....	323
Russell & Co. v. Cox.....	54	Taylor v. Wands.....	71
Sage v. Mayor, etc., of New York.....	348	Taylor v. Wabash Ry. Co.....	312
Savoy v. Dudley.....	161	The Gretna Holme.....	162
Sawrie v. State of Tennessee.....	487	Thresher v. Atchison.....	17
Saxton v. Harrington.....	377	Tice v. Frazer.....	324
Seaward v. Paterson.....	70	Toledo & O. C. Ry. Co. v. Dages.....	410
Scranton & Pittston Traction Co. v. D. & H. C. Co.....	71	Tradesman's Nat'l Bank v. Looney.....	396
Seddon v. Rosenbaum.....	131	Treeby v. Hatton.....	148
Seidler v. Syms.....	431	Trenton Pass. Ry. Co. v. Guarantors' Liability Indemnity Co.....	96
Shepherd v. Carlin.....	198	Trimble v. Reid.....	340
Sioux City Ter. R. R. & Warehouse Co. v. Trust Co. of N. America.....	396	Trinder, Anderson & Co. v. North Queens-land Ins. Co.....	107
Smith v. Hawthorne.....	72	Twin City Nat'l Bank v. Nebecker.....	72
Smith v. Smith.....	431	Union Stove Works v. Klingman.....	239
South African Territories v. Wallington.....	36	United States v. Balbach Smelting & Refining Co.....	29
South Covington & Cin. Ry. Co. v. McCleave.....	17	United States v. Edgerton.....	89
Southern Express Co. v. Oskamp, Nolting & Co.....	197	United States Credit System Co. v. Rosenbaum.....	124
Springville City v. Thomas.....	36	Up River Ice Co. v. Denler.....	323
State v. Adams.....	142	Vandercook Co. v. Vance.....	198
State v. Bradneck.....	17	Vahue v. N. Y. C. & H. R. R. Co.....	168
State v. Higgins.....	413	Voight v. B. & O. S. W. Ry. Co.....	268
State v. Jones.....	22	Walker v. Lutyens.....	90
State v. Shedrick.....	359	Walker v. Walker's Assignee.....	179
State v. Slack.....	329	Waller's Adm'r v. Marks.....	187
State v. Smith.....	377	Watkins v. Hall.....	36
State v. Spaulding.....	293	Watt v. Gaus.....	161
State ex rel. Att'y-Gen. v. Circuit Court of Eau Claire Co.....	369	Western Assurance Co. v. Mohlman Co.....	384
Saint Louis, I. M. & S. Ry. Co. v. Paul.....	78	Weston v. Jordan.....	29
Steenerson v. Great Northern R. R. Co....	365, 419	West Jersey R. R. Co. v. Abbott.....	130
Stern v. Met. Tel. & Telephone Co.....	118	Whitcomb v. Harris.....	142
Strode v. Mt. Sterling Nat'l Bank.....	304	Williams v. Cox.....	377
Sturtevant v. Sarbach.....	233	Willoughby v. St. Paul German Ins. Co.....	124
Sullivan v. Pittsburg.....	304	Wise v. L. & C. Wise Co.....	316
Supreme Lodge of Order of Select Friends v. Dey.....	124	Woodcock v. First Nat'l Bank of Niles.....	89
Swan v. Mothre.....	413	Woods v. Gary.....	238, 260
Swan v. Mutual Reserve Fund Life Asso....	366	Yearance v. Powell.....	143, 205
Sykes v. Sykes.....	197	York Draper Mercantile Co. v. Lusk.....	359
Taliaferro v. Travelers' Protective Ass'n of America .....	29	Youmans v. Smith.....	30



# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

---

## The Albany Law Journal.

---

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

---

ALBANY, JULY 3, 1897.

---

### Current Topics.

---

THE result of the recent trial of Banker Spalding, in Chicago, on the charge of embezzling a very large sum of money which had been entrusted to his keeping, again illustrates the uncertainties of juries as well as the workings of a defective system of legal administration. Under the laws of Illinois, the jury in a criminal case is at liberty to interpret the law for itself, instead of following implicitly the instructions of the judge presiding at the trial. Although the evidence adduced by the prosecution was, in the opinion of high and unprejudiced legal authority, entirely sufficient to sustain the charge of embezzlement, the jury, which was the judge of both the law and the facts, solemnly concluded that the accused was not guilty "as charged in the indictment;" that, notwithstanding the contrary view of the grand jury, the State's attorney and the judge, the conversion of the university bonds did not constitute embezzlement. In the

words of certain of the jurors, "he took the university's money all right, but it was not just exactly embezzlement." The verdict, it would seem from the press reports, was as much of a surprise to the defendant as it was to the prosecuting officers and the court, and while the jury did not go beyond the power conferred upon it by law, it may well be doubted whether public opinion will approve and sustain such a verdict. If Spalding was not guilty of embezzlement in converting, as he did, the university securities, then it is exceedingly difficult to say what constitutes embezzlement. No doubt he had, at the time, a vague sort of idea of paying back the money, but such notion on his part did not at all relieve him of the charge of converting the money to his own use. The Chicago Post, in praying to be saved from what it terms hair-splitting and metaphysical juries, expresses the opinion that the Spalding verdict goes far to prove that too much "learning" is as dangerous to jurors as absolute ignorance. From this opinion we must record our emphatic dissent. The notion that the ideal jury is one whose members are the most ignorant was long ago exploded. Learning and intelligence are just as valuable in a jurymen as in a judge or a lawyer. The trouble in Illinois, we opine, is not with the jury, primarily, but with the system which permits it to be the judge of the law as well as the facts.

Should a prisoner ever take the stand and testify in his own behalf? Speaking from the standpoint of the accused, the answer would certainly be "no." The cases in which the chances of acquittal have by such



means been improved are very rare, while in most instances the effect is to forge still tighter the links of the chain which the prosecution seeks to bind about the prisoner. Attorneys of very large experience at the criminal bar aver that they never saw a prisoner who did not, when examined, play havoc with his own case. On the other hand, the opinion will be usually expressed that it would be exceedingly unjust that a prisoner should not have the opportunity, if he saw fit, or his advisers thought fit, to speak in his own behalf; that it is an anomaly in the law that he should not be at liberty to do so. In cases where it is possible to examine a prisoner in his own behalf, if he does not take advantage of the privilege it is always commented on that he could have done so, and has not done so, and that therefore it must be taken as an indication that he could not make a case in his own defense. It is pointed out that an innocent man might become so excited and nervous in the hands of a shrewd and clever cross-examiner that he would make it appear that he was guilty when he really was innocent. Looked at from the point of view of the public, there can be no doubt that the privilege accorded persons accused of crime, in this country, of testifying in their own behalf, if they see fit, tends materially to compass the ends of justice. The discussion of the subject is made timely by the pending proposition, on the other side of the water, to extend the operation of the Evidence in Criminal Cases Bill to Ireland. There ought to be no doubt about the passage of an amendatory statute for that purpose.

A novel and interesting phase of "the woman question" has arisen in California, which the courts are to be called upon to adjudicate. The controversy relates to the right of a railroad company to charge a lower rate of fare to female than to male commuters. The corporation in question, whose line connects San Francisco with San Rafael, not long ago issued an order giving women a monthly rate of \$3, while the rate for men commuters has been and is \$5. The

reasons assigned by the company for this discrimination in favor of the fair sex are not at hand. The legal right of the company to create the distinction has been challenged by the men, on the ground that it violates the requirement of uniformity in rates. The railroad has set up the original plea that women are "a class," and that under the State law, which leaves it optional with a railway to discriminate with regard to "classes of freight or persons," it is entitled to make a different rate for women than for men. The court will decide the question, which, we believe, is a new one.

The frequent and often very costly blunders made by engrossing clerks in the engrossment of legislative bills serve to call attention to the fact that it may be quite possible to do away with most of them by a change of system, through the abolition of the whole engrossing department. We agree with the New Jersey Law Journal that it would be difficult to assign a single reason which can be urged in favor of engrossed bills over printed bills, except that of furnishing employment and paying salaries to a number of clerks. A printed bill which has passed the proof-reading of the legislative printer, the introducer and a committee of the legislature to be designated for that purpose, and properly certified by the officials of each house of the legislature, would be more convenient, legible and permanent than any engrossed bill. The engrossing is probably usually done from printed bills, as copies, and, as we know, not always carefully done. There are absolutely no advantages, and many positive disadvantages, connected with the present system, which can easily be obviated by adopting the plan now advocated. The only thing that stands in the way of reform in this matter is politics and petty patronage.

Speaking of the law passed by the late legislature of New York, and signed by the governor, providing for special juries in certain cases, the principle underlying which has already been condemned in these columns, the New York Mail and Express has

this to say, which we commend to the careful perusal of all thoughtful persons:

"We are not more blind than our fellows to the existence of jury abuses, such as bribery and undue influence and the frequent extraordinary and absurd tests of eligibility. These, however, are not the result of faults in the system, but of faults in its operation. The system has justly become established in the popular mind as among the very foundation stones of our governmental structure; the surest guaranty for all classes and conditions of men of absolute equality before the law. To tinker with it at all is to shake popular confidence in the State and arouse popular suspicion of the law-making power. To tinker with it in the direction of creating class distinctions in the jury-box is both unwise and unsafe, and an invitation to the spread of socialism; yet this is precisely what has been done.

"The new law provides for special juries to be selected from a list of 3,000 men prepared by special commissioners for the trial of important cases—these 3,000 to be exempt from ordinary jury duty. These jurors will be examined not by the court, but by the commissioners—another distinction. Their qualifications are to be higher than those demanded of ordinary jurymen, the aim being to secure men of the highest intelligence and culture for cases peculiarly involved, and entice, by the exemption stated, those prominent and influential citizens who habitually dodge jury service by excuse or the payment of the statutory fine. This is treading on very thin ice. Who shall declare what is an 'important case' under this law? By what constitutional authority shall a litigant be denied the right of a trial before twelve men chosen in the usual way, if he prefers it? If the plaintiff be poor and the defendant rich, and the issues involved be intricate and of widespread commercial import, by what process of justice shall court or commissioner compel that plaintiff before a privileged class of jurymen on application of the defendant? But not alone does the law involve discrimination as to litigants. It is a serious reflection upon the average citizen. To the right-minded man jury duty

is a responsibility second only to the exercise of the suffrage. It is his right to sit upon important as well as unimportant cases. The general law already provides for guarding litigants against incapacity in the jury-box, and to legislate a man arbitrarily out of service in certain cases is to rob him of a portion of his birthright. It is wrong and fraught with peril. It is a blow at the fundamental principle of trial by jury, in that it arrays the classes in one jury-box and the masses in another. Its constitutionality is therefore open to challenge."

In *Ritchey v. Ritchey*, decided on June 18 by the United States District Court of Pennsylvania, it was held that a decree of divorce will be refused where the only testimony as to the respondent's alleged adultery consists of his own admissions of guilt, unsupported by corroborating circumstances or evidence. It appeared from the petition that the libellant (the wife) and respondent were married on April 17, 1880, and lived and cohabited together until November 4, 1895; that the respondent was guilty of adultery with a certain female, whose name was therein set forth, and "with other persons to your petitioner unknown." The defendant not appearing or answering the subpoena, a commissioner was appointed, and the testimony returned by him showed that only three witnesses were examined, the first being the libellant herself. She testified to her marriage with the respondent, and that they lived and cohabited together until "after I found out that my husband was the father of Nora Lowry's child, when I left him." No date was given. The libellant, after testifying that she went to Cincinnati in September, without stating the year and the length of time she remained there, said: "Our house was occupied by my husband and Nora Lowry during my absence, and the following May there was a child born to Nora Lowry, who still lived at our house. Nora Lowry and my husband both acknowledged to me that my husband was the father of her child." The next witness, after stating that she is acquainted with the libellant and re-

spondent, said: "The child of Nora Lowry resembles respondent, James G. Ritchey, in many ways, especially about the eyes; the eyes of the child are blue, just like Mr. Ritchey's." The third and last witness, the doctor who attended Nora Lowry at the time her child was born, testified: "She neither then nor at any subsequent time said anything about the paternity of the child. Prior to the birth of the child, and subsequent to it, James Ritchey admitted to me in conversation that he was its father. The child has such a striking resemblance to Mr. Ritchey that it would suggest the relationship existing between them at once, and to anyone."

It was upon this testimony that the court was asked to grant the divorce. The court refused to do so, holding that such testimony proved nothing except the husband's declarations and admissions, which might or might not be true. The circumstances under which these admissions were made were not given to aid the court in determining whether or not they were worthy of belief, nor were they supported by any sufficient or proper corroborating circumstances. The court added:

"If divorces are to be granted upon such evidence, the conjugal tie would become most insecure, as either party could at any time and at any place manufacture by loose conversations sufficient evidence to warrant the court in divorcing the parties. The testimony as to the resemblance of the child to the respondent is of such a character as to have no weight in determining this case; it practically amounts to nothing as corroborative evidence of the respondent's admissions. Again, the fact that the libellant does not show that she left her husband immediately upon learning of his infidelity, that she continued to live with him, according to her petition, for at least six months after the child of Nora Lowry was born, and that the respondent conveniently dropped into the sheriff's office to be served with the subpoena just fifteen days before its return-day, indicates collusion to my mind."

This decision is worthy of note as indicating the tendency of the courts to regard the marriage tie as binding, and to require the

most positive, clear and fully corroborated testimony before granting a decree of divorce—a tendency which, from every point of view, is to be highly commended.

---

The dissolution of the well-known law publishing firm of Banks & Brothers, of New York and Albany, announcement of which was made during the week past, serves to emphasize the flight of time, as well as to accentuate the fact that the men of the younger generation are rapidly entering upon the scene of business activity. Enjoying, as it does, the unique distinction of being the oldest law-publishing house in America, the change in the firm is all the more notable. Established simultaneously in New York and Albany, away back when the century now drawing to a close was in its swaddling clothes, in the year 1804, by David Banks, of New York, the father of ex-Mayor A. Bleecker Banks, of this city, the formation of a new partnership, under the old firm name, whereby Messrs. Wm. Lawrence Green and Mr. David Banks, Jr., become junior members, serves to call attention to the fact that this is one of the few firms in the country now in the third generation—first father, then son, and now grandson being actively identified with its growth and management. Mr. Green, of Albany, one of the new junior members, is a son of the late Henry A. Green, of Boston, Mass., who was for many years at the head of the firm of MacIntosh, Green & Co., of Boston and New York, and is a nephew of Hon. Samuel A. Green, who was mayor of Boston in 1883, and who is now actively identified with the Massachusetts Historical Society. The new junior member from Albany has had an exceptionally good business training, and having been for the past eight years connected with the Albany branch of the house, is in every way equipped for the new responsibilities which he has assumed. Of the senior member of the firm resident in Albany little need be said, for he is too well-known in the business and social circles of the Empire State to need any introduction. Mr. David Banks, Sr., the other senior part-

ner, is well-known in New York city. He was one of the organizers, and has for years been actively interested in the New York University, and is commodore of the Atlantic Yacht Club, being an enthusiastic devotee of the royal sport. His son, David Banks, Jr., the remaining member of the new co-partnership, has exhibited decided business ability, and will certainly make a valuable addition to the firm. The old house has not only withstood all the business depressions, financial shocks and commercial crises of well-nigh a century, but has, under wise and careful management, yearly increased its business and strengthened itself in the confidence and favor of the public. That it will continue to do so, with the recent addition of new blood and new energy, admits of no doubt.

The summary of the new Negotiable Instruments Law, which was printed in last week's issue of the ALBANY LAW JOURNAL, should have been credited to the Bankers' Magazine. Through inadvertence the proper credit was omitted.

A question of some importance is to be brought before the Ohio Supreme Court for adjudication. Judge Pugh, of the Franklin Common Pleas Court, not long ago decided, in the case of Burglar Jim Anderson, that the prisoner could not be tried on the charge of being an habitual criminal, because he was pardoned by Governor Bishop while serving his previous term in the penitentiary. Attorney-General Monnett desires to have the Supreme Court pass upon the question involved in this case, as the decision of Judge Pugh may operate to nullify absolutely the habitual criminal act. By one construction every convict who has served out his sentence is pardoned. On leaving the penitentiary the convict is handed a document, signed by the governor, which restores him to citizenship. If the restoration to citizenship is to be construed as a pardon, then, it is thought, no prisoner could be sentenced for life as an habitual criminal. It will thus

be seen that the point involved in the decision of Judge Pugh is one of considerable importance.

### Notes of Cases.

The assumption that the morphine habit may be an inducing cause of kleptomania evidently induced the Middlesex County Sessions to deal indulgently with Jane Green, "a lady of good position," who was recently charged before that tribunal with the larceny of "a box of Turkish delight." The defendant pleaded guilty, but her counsel assured the bench that she was in no want of money, but had sufficient means to enable her to live comfortably, and asked that she be treated leniently on the ground that the theft was due to the effects of the excessive use of morphine. It appeared that she had consumed as much as ninety-six grains of morphine in a single week. The magistrate suspended judgment, upon the defendant giving security in £50 to appear for sentence when required. The quantity of morphine taken by this lady was very large, but not equal to the enormous doses endured by habitual opium-eaters. De Quincey's daily consumption of laudanum was equivalent to 57½ grains of morphine, and there is a case on record where 120 grains were taken at once without producing death.

The Supreme Court of Ohio held, in the case of *Arnold v. Flanders*, reported in the Chicago Legal News, that the Ohio act of May 19, 1894, declaring it to be unlawful for any person or corporation to expose for sale within the State, without first obtaining from the secretary of state a license to sell, any convict-made goods, etc., imported from another State, is unconstitutional. The court said, in part: "It is not competent for a State legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the State by unfriendly legislation. Whatever congress, either by silence or statute, recognizes as articles of traffic and commerce, must be received and treated by the several States. There is no act of congress declaring that convict-made goods are not fit for traffic or commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one State to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the State where offered for sale is unconstitutional. \* \* The act in question is not a police regulation, but an attempt to prevent, or at least to discourage, the importation of convict-made goods from other States, and thereby protect our citizens, laborers and markets against such goods. But if we are in

a condition to require such protection, the appeal for relief must be made to congress, which body alone has the power to legally grant such relief."

A case recently decided by an appellate court of Illinois deserves attention. It appears that a conductor on the "Big Four" Railroad was discharged for what seemed to be sufficient cause to the company. Accusations of larceny were brought against him soon afterward, but they were not proved. The company, however, refused to give the conductor a "clearance card," or certificate relating to his time of service, capacity, etc. Without such a card no discharged employe can obtain employment on other railroads, and the conductor brought suit to recover \$2,000 in damages against the company for denying him the certificate and thus depriving him of the opportunity to gain employment. The lower court awarded the plaintiff damages, and the appellate court affirms the decision. It admits that there is no legal obligation on employers to give testimonials to discharged servants, but it holds that where an agreement exists among a certain class of employers making such testimonials a condition of employment, it is unjust to refuse a testimonial where there is no good cause for the refusal. In other words, while there is nothing in law or public policy to prevent employers from discharging workmen for any indefinite cause, or even for no cause whatever, there is such a thing as the "right to earn a living," of which no man can be deprived by any rule, regulation or practice of a combination of employers.

In *Hoyt v. Cleveland C. C. & St. Ry. Co.*, decided by the Supreme Court of Michigan (71 N. W. R. 172), which was an action against a railroad, under a statute of that State, to recover a penalty for failure to discharge a passenger at his destination, it appeared that plaintiff purchased a regular passenger ticket for a station on the road; that prior to the arrival at such station the train was so full that defendant ran through the station without stopping, there being so many persons waiting for the train that defendant determined it was unsafe to stop. It was held that no "legal or just excuse" within the statute was shown to excuse defendant from liability for the penalty. The court said: "The contention of the defendant is that it had taken reasonable precautions on the day before to ascertain from its agents at various points along its road their estimates of the number of passengers likely to present themselves for transportation, and that the unexpected number presenting themselves at Niles and taken on board furnished a legal excuse for not stopping at Eau Claire and letting the plaintiff off. The argument is that it was unsafe to stop there, where more passengers were waiting to get on, and that com-

mon prudence dictated the course taken by the conductor. We cannot concur in this contention. The defendant had furnished a train with a seating capacity of 210. It had taken on 462. This was a condition of affairs for which it alone was responsible. If it had refused to take on at Niles any more than it had reasonable accommodations for, and had refused to take the plaintiff for that reason, a different question would be presented, upon which we express no opinion. If the conductor had stated before leaving Niles that, on account of the excessive number, the train would not stop at other stations, and the plaintiff had chosen to get on board, possibly the defendant might have been excused. But the conductor knew that this was a regular train, and that passengers were liable to buy tickets for intermediate stations. Notwithstanding the crowded condition of the train at Niles, the conductor stopped at Berrien Center, a station between Niles and Eau Claire, and took on more passengers. The defendant having made a contract with plaintiff to carry him to Eau Claire, the crowded condition of the train, for which it alone was responsible, is not the 'legal or just excuse' named in the statute. The case of *Reed v. Railway Co.* (100 Mich. 507, 59 N. W. 144) has no application here, because the condition there was caused by a severe storm, which the company could not anticipate."

In the case of *Rena Jones v. The New York Life Insurance Company*, the Massachusetts Supreme Court has overruled the exceptions of the defendant company, and it must pay \$2,000 for a life policy on which it never received a premium. The application was made by William Jones, of Gardner, for insurance, and the policy was delivered to the assured without any payment, the agent stating that the assured should return the policy if he did not want it; if he did want it he was to send the money. The court says: "There was evidence from which the jury might have found that the agent waived an immediate payment of the premium in cash, and delivered the policy on the promise of the assured to pay in the future."

Harper's Drawer gives the following account of an Irish witness wrestling with the character and reputation question. He is asked by counsel, "Do you know Mr. O'Flaherty's character for morality?"

"Excuse me, yer anner, but would yer moind sayin' thot question over agin?"

"Is he a man of good moral character?"

"O' im not afther understandin' yer anner."

Then the court asks impatiently, "Is he a good man?"

"Good man, is it? Shure he is thot. Its mesilf has seen him thumping the faces aff two Orangemen to wanst."

# RIPARIAN OWNERS—RIGHTS IN LAND UNDER WATER.

THE question of the rights of riparian owners in and to lands adjacent, which lie below high-water mark, at times becomes one of importance. A recent work on mortgage foreclosures (1) gives two cases in which this question has recently arisen on the foreclosure of mortgages given by the owners of riparian lands. One of these cases is in New York and the other in New Jersey. Between these decisions there is an apparent conflict. The hope of being able to distinguish the cases one from the other is the excuse for the preparation of this article.

According to a recent work on real property (2), the fundamental principle of the English law, from which our idea of tenures is derived, is that the king is the lord paramount, or original proprietor of all the kingdom, and consequently the source of all land titles. This doctrine of the common law was brought to this country by our forefathers, and adopted by them, they holding title to all lands by royal charter or grants from the crown. Hence the fundamental doctrine in this country is that all valid titles to land are derived from the local State government, or from the Federal government, or from royal chartered governments which were chartered and in existence at the time of the declaration of independence (3).

The general rule in this country is that the title to lands under tide-water, which, before the Revolution, was vested in the king, upon the separation of the colonies from the mother country became vested in the States within which they are situated; and the State legislatures may exercise the same powers which, previous to the Revolution, could have been exercised by the king alone, or by him in conjunction with parliament, subject only to the restrictions imposed by the Constitution of the United States (4). In the course of his opinion in this case, Mr. Justice Andrews says: "The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. \* \* \* In the treatise *De Jure Maris* (5) Lord Hale says: 'The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use. And this conten-

tion is clearly borne out by numerous English cases (6). Hence public grants to individuals, under which rights are claimed in impairment of public interest, are always construed strictly against the grantee (7).

Keeping in mind these fundamental principles, and any local statutes that may have been passed in any particular State relating to and governing, we may possibly avoid apparent conflict of authorities.

The question of the rights of riparian land-holders or mortgagees to lands bordering thereon, but lying below high-tide, has come up recently in New York and New Jersey.

In the case of the Mutual Life Insurance Company v. Voorhis (8), an action was brought to have certain lands under the waters of the Hudson river, which had been granted by the people of the State of New York to Peter Voorhis, adjudged to be subject to the lien of a mortgage upon the adjacent uplands, made by said Voorhis and his wife to the plaintiff, and that the grant from the State be adjudged to inure to the benefit of the plaintiff. In passing upon the question thus raised the court holds that a mortgagee of upland does not, upon foreclosure of his mortgage, obtain a title to lands under water in front of the upland, granted to the mortgagor by the State after the execution of the mortgage, and not included in the description in the mortgage.

The facts in the case are as follows: Peter Voorhis owned a lot of land in Nyack, Rockland county, bounded on the east by the Hudson river. On the 25th of April, 1872, he executed a mortgage, in which his wife joined, to the plaintiff, to secure a loan of \$40,000. This mortgage was foreclosed, and on the 23rd of July, 1873, the land was sold under a decree in the foreclosure action. The plaintiff bought in the property for \$10,000, and duly entered a judgment for the deficiency, which was \$32,853.40, on the 9th of December, 1880. On the 30th day of November, 1872, Peter Voorhis applied to the commissioners of the land office for a grant of land under water adjacent to this mortgaged property, and also in front of two other pieces he owned, adjoining the same. The grant was made upon the petition of Voorhis that he was the owner of the upland, and in occupation of the same, and that the grant was needed for the beneficial enjoyment of the adjoining uplands for shipping stone quarried on the uplands, and that the

(1) See Kerr's Supplement to Wiltie on Mortgage Foreclosures, §§ 256 p. 577t.

(2) See 3 Kerr on Real Property, § 2255.

(3) See Jackson exd. Winthrop v. Ingraham, 4 John. [N. Y.] 163, 182.

(4) People v. New York & S. I. Ferry Co., 68 N. Y. 71.

(5) P. 22.

(6) See, among others, Williams v. Wilcox, 8 Ad. & E. 314; s. c. 35 Eng. C. L. Rep. 609; Blundell v. Cottrell, 5 B. & A. 268; Attorney-General v. Parmeter, 8 Price, 378.

(7) Rowndes v. Dickerson, 34 Barb. [N. Y.] 586; People v. New York & S. I. Ferry Co., 68 N. Y. 71, 77. See People v. Laimbier, 5 Den. [N. Y.] 15.

(8) 71 Hun, 117; s. c. 53 N. Y. St. Rep. 874; 24 N. Y. Supp. 529.

petitioner intended to build a dock for public steamboat uses and general purposes. Upon due publication of the notice of application, the people of the State of New York granted the lands under water "for the purpose of promoting the commerce of our said State, or for the beneficial enjoyment of the adjacent owner," on the 23rd of July, 1873. Peter Voorhis died in the next year. The defendants were the heirs-at-law of the deceased. The court, in the course of the opinion, say: "The question is what interest the facts gave the plaintiff in the lands under water in front of the mortgaged upland. A grant to any other person than the upland owner is void (9). The applicant, Voorhis, was the owner of the land up to the sale under foreclosure. Before that time the mortgage was simply a security. Plaintiff had no other interest in the land than to be paid out of it (10). The description in the mortgage did not include the lands under water. When it was given, Voorhis, the mortgagor, had no interest in it. The lands belonged to the State (11). The Court of Appeals, in *Gould v. Railroad Company* (12), held that the owner of the upland had no other right than all others in the lands under water, and, while this principle is questioned in *Rumsey v. Railroad Company* (13), no question is made as to the title being in the people as to lands between high-water mark and under water (14). The foreclosure sale did not, therefore, extend a title in lands not covered by it. The mortgaged lands were not extended by the mortgage being on tide-water, as the lands under water then belonged to the sovereign. The title Voorhis took was absolute and unconditional (15). The patentee, being the owner of the upland thereof, got a good title, and, if any right was obtained by the foreclosure sale, it was a right to sue for damages for an injury to the right of the upland to go to the river. This right was destroyed by the upland owner himself, and the mortgagee got the land covered by the mortgage."

The case of the *Mutual Life Insurance Company v. Voorhis* is distinguished by the same de-

(9) New York Session Laws, 1850, c. 283.

(10) *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; *Calkins v. Calkins*, 3 Barb. Ch. (N. Y.) 305; *Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Astor v. Miller*, 2 Paige Ch. (N. Y.) 608; *Morris v. Mowatt*, 2 Paige Ch. (N. Y.) 586; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

(11) *People v. Canal Appraisers*, 33 N. Y. 461; *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102.

(12) 6 N. Y. 522.

(13) 133 N. Y. 79; s. c. 30 N. E. Rep. 654.

(14) Citing: *Blakslee Manufacturing Co. v. Blakslee Sons Iron Works*, 129 N. Y. 155; s. c. 29 N. E. Rep. 2; *Rumsey v. Railroad Co.*, 114 N. Y. 423; s. c. 21 N. E. Rep. 1066; *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71.

(15) *Abbott v. Curran*, 98 N. Y. 665.

partment of the Supreme Court in which it was rendered (the Second) in the case of *Oakley v. Gardiner* (16); but this distinguishing is in no sense a criticism of the doctrine of the case on the point under discussion, and does not in any way weaken it as an authority in this State on the question of the rights of the holders of mortgages on riparian lands.

The New Jersey Court of Errors and Appeals passed on the question in the case of *Point Breeze Ferry and Improvement Company v. Bragaw* (17). One Robert T. Currie executed and delivered to the defendant a bond for \$10,000, secured by a mortgage on a tract of land in Jersey City, described by metes and bounds, except in the easterly (the fourth) line, designating the property as "running easterly to New York bay," and "including all land lying under water" in said bay in front of the upland embraced within the boundaries given, "together with all and singular the tenements, hereditaments and appurtenances," etc. Robert T. Currie subsequently made a contract with a dredging company to fill in the lands under water in front of the property mortgaged, in conjunction with other properties, and afterwards conveyed by warranty deed to the Point Breeze Ferry and Improvement Company the land in front of the property mortgaged, two feet in depth back from high-water mark. Subsequently to the transfer by Currie the riparian commissioners of the State of New Jersey conveyed to the Point Breeze Company "all the land lying under the water of the New York bay, between high-water mark on the shore of said bay and the exterior line, for piers, as established by the riparian commissioners," in front of the lands mortgaged by Currie. The company filled in beyond these lands, far out into the bay, expending over \$200,000 in reclaiming the land under water. Afterwards Currie sold to the Point Breeze Company a narrow strip across the upland retained by him, to be used as a roadway.

On foreclosure of the Currie mortgage it was ordered that sale be made as follows: First, the upland still retained by Currie; second, the strip sold to be used as a roadway; third, the two feet on the water front; and fourth, all right, title and interest Currie had in and to the land lying under water in the New York bay, in front of the upland described in the mortgage.

An appeal was taken from the third and fourth points of the decree. It was held that on the foreclosure of a mortgage given by a riparian owner, covering the shore, and including land lying under water in front of the upland, which was after-

(16) 78 Hun, 138, 140; s. c. 60 N. Y. St. Rep. 192; 28 N. Y. Supp. 972.

(17) 47 N. J. Eq. (2 Dick.) 298; s. c. 20 Atl. Rep. 967.

wards leased from the State and improved by filling below high-water mark, the rights of the mortgagee in the land which was submerged at the time the mortgage was given, and which has since been reclaimed, should be defined before the sale is ordered (18); otherwise an uncertain interest will be sold, which would be an injustice to all the parties. The purchaser at such a sale would buy an equitable estate and interest which could only be settled by a suit in equity. It would be contrary to equitable principles to thus invite further litigation, and make it necessary to bring the parties again before the court in other proceedings to determine rights which can be ascertained and defined before the sale is ordered, and for these reasons they should be first defined so as to do justice to all when the lands are sold for the payment of the mortgage debt (19). In the course of the opinion Judge Scudder, speaking for the court, says: "At the time the mortgage was given, the mortgagor was a riparian owner, and as such he had the right of pre-emption and reclamation to the lands under water in front of his land bordering thereon. These could not be taken from him by the State, through its agent, the board of riparian commissioners, until after six months' notice in writing he should have neglected to apply for the grant or license, and neglected to pay, or secure to be paid, the price the said commissioners fixed (20). He could apply to the commissioners for a lease, grant or conveyance, upon such a compensation therefor, to be paid to the State, as should be determined by the commissioners (21). These rights he conveyed to the mortgagee as security for his mortgage debt, who thereby became entitled to an equitable estate or interest therein. The defendant took the two-foot strip above high-water mark, or the *ripa*, subject to the mortgage, and the right of pre-emption and reclamation of the land under water, as also subject to the equitable interest of the mortgagee (22)."

It is thought that when the wording of the two mortgages and the respective laws of the States of New York and New Jersey are properly considered and analyzed, it will be found that there is not a conflict in the decisions of the courts of these respective States. In other words, it is thought that in the absence of any statute controlling, where a man mortgages lands definitely and fully described by metes and bounds, situated on the edge of and along navigable waters in which the tide ebbs and flows, but does not specifically convey any interest in and to the lands under the

water, the rights are materially different, and the case distinguishable from one in which all the rights, interest and title, and appurtenances in and to the land below high-water mark are specifically conveyed.

JAMES M. KERR.

NEW YORK.

#### METHODS OF LEGAL REMUNERATION.

AN extremely interesting and valuable report on "The Methods of Legal Remuneration in Contentious Matters" has just been prepared by Master Macdonell for the Society of Comparative Legislation (London). Master Macdonell set about his work in a thoroughly practical and businesslike way. A comprehensive set of queries was prepared and circulated in most European countries. Mr. Newton Crane, barrister-at-law, who has practised in the United States, undertook the task of procuring answers from that country, while Mr. W. F. Craies examined the legislation of several of the colonies. The responses to Master Macdonell's appeal were full, complete and satisfactory—a result which, the London Standard thinks, does something to relieve the judicial and legal profession from the reproach—so often leveled against them—of being too much engrossed in the petty, or, at any rate, practical details of every-day life to care anything about law in its scientific and comparative aspects.

The first group of questions related to the law of remuneration as between solicitor and client, including, in the former term, lawyers who combine the functions of solicitors and advocates. In regard to this matter, several distinct systems, it appears, prevail. In some countries—*e. g.*, Denmark and many of the American States—no scale of costs is recognized, but legal remuneration is left to be regulated by an express or implied contract between the parties, who have, in the event of a dispute, the same remedy as in the case of differences with respect to the proper remuneration of a builder or an accountant. In other countries—*e. g.*, England, most of the colonies, and (to some extent) Scotland, France, Holland and Italy—a scale of charges is fixed for each service rendered, and any disputes as to amount are determined by the court or its officers. In England and in the colonies, which have followed English procedure, a solicitor is bound to deliver to his client a bill of costs, or statement, showing in detail every payment made, and a separate charge for every step taken, attendance, or letter. In no other country, it seems, do clients enjoy the security against overcharges which is provided by the English bill of costs. Now that Master Macdonell's inquiry has brought this fact into prominence, however, the omission will stand a very fair chance of being promptly rectified. In the next place, we have legal systems which fix remunera-

(18) *Point Breeze Ferry & Imp. Co. v. Bragaw*, 47 N. J. Eq. (2 Dick.) 298; s. c. 20 Atl. Rep. 967.

(19) *Id.*

(20) N. J. Revision, p. 984, § 8 (Laws 1869).

(21) N. J. Revision, p. 985, § 1 (Laws 1871).

(22) *Boon v. Kent*, 42 N. J. Eq. 131; s. c. 7 Atl. Rep. 344.



tion according to the value of the subject-matter in dispute, the stage at which the proceedings terminate, or according as the action is or is not contested. In other countries — *e. g.*, France (in regard to which Mr. Thomas Barclay, of Paris, has prepared a most valuable return), and Italy — the value of the subject-matter in dispute is also taken into account in fixing the *honoraria* of advocates. The same consideration, it may be added, is not without weight in this country also. The last group of systems under this head are those which give no right to any remuneration in excess of what is allowed as against an opponent in the absence of agreement. This rule holds good in nearly every country in which the English system does not prevail; and German law contains the further safeguard against overcharge that any contract varying from the general rule must be in writing and signed by the client.

Master Macdonell next proceeds to deal with the question of remuneration — not between solicitor and client, but between the parties to an action. And here again several different systems are in vogue. In some countries — *e. g.*, Spain, Denmark — and (in substance, though not in form) the spirit of the Roman law, which tended to leave each party to pay his own expenses, survives. In others, of which Germany is a typical instance, costs as between party and party depend on the value of the subject-matter in dispute; while in a third class a fixed fee is given for each step or service. It is a striking fact that in almost none of the countries from which answers have been received are the costs allowed by the courts a complete indemnity. English legal reformers have been striving for some time — with strong judicial sympathy — to get a more equitable rule introduced in this country, under which a successful litigant would recover from his defeated opponent every penny of the legitimate outlay to which the litigation put him. There is need for a similar movement in other countries. In Belgium, for example, the successful party has to bear the expenses of the *honoraria* of his advocate, although (a practice which also prevails in some of the American States) the court may include in the damages a sum approximately equal to that which the successful litigant has been compelled to pay. In France only the court fees paid out of pocket, and, in the case of *avoués*, certain scale fees are recoverable against an unsuccessful party, but nothing in the way of profit charges or *honoraria*; while in Toronto, although the amount awarded by the taxing-master is theoretically a complete indemnity, practically it is nothing of the kind. For example, the costs of procuring evidence cannot be taxed against the other side.

Not the least interesting and valuable aspect of Master Macdonell's report is the incidental light that it throws on a variety of legal problems and phenomena which are either common among our-

selves or constantly attracting attention in this country. There is, for instance, the cost of litigation. If we take three hypothetical cases of very frequent occurrence in our courts — an action for personal negligence, an action for libel, and an action for breach of contract — the approximate results may be conveniently tabulated thus:

COUNTRY.	Action for Personal Negligence.	Action for Libel.	Action for Breach of Contract.
Scotland .....	£150 to £160	£230 to £250	£40 to £50
Germany .....	£50 to £60	About £60	.....
Holland .....	£60	£60	£35
Denmark .....	£35	£25	£20
Spain .....	£12 to £14	£20 to £26	£6 to £8
New York .....	£10.	£100	£30
New York .....	£50 to £100	£150	£50 to £100
Massachusetts .....	£80 to £160	£40 to £160	£40 to £50
Illinois .....	£60 to £100	£20 to £100	£10 to £50
Missouri .....	£60 to £100	.....	.....
California .....	£50	£100	.....
Ontario .....	\$250	\$350	\$150
Quebec .....	\$350	\$250	.....

Litigants who in England have had to "pay the piper" — to use Lord Justice A. L. Smith's language — in an unsuccessful litigation of any one of the three types which form the basis of this table, will not need to be told that English charges in such matters would be among the highest of the tabulated amounts. Another point of interest on which Master Macdonell and his associates and correspondents have shed a volume of light is the question of average professional incomes. We may take France and the United States as test cases. In regard to the former, Mr. Barclay gives it as his opinion that for small cases costs are less than in England, but for large and intricate cases they are heavier. The *honoraria* of French *avocats* and (in the tribunals of commerce) *agréés*, paid on the argument of a case, may be taken to be higher than counsel's fees would be for a similar case in England by about one-third. But, then, all is included in the lump-sum paid. There are no intervening fees for conferences, consultations or settlement of documents. A similar system prevails in the United States. Parents who are exercising themselves over the perennial problem, "What to do with our sons," may study the following statistics, in regard to New York, with advantage: "A young man who has been admitted from three to five or six years considers himself very well paid if he can average, say, fifteen dollars for each working day. From that he advances, and if he is getting fifty dollars a day after being admitted ten or fifteen years, he is doing very well. Many of (the) best men for the trial of cases are satisfied to act as barristers for one hundred dollars a day, although a few of the leaders, in large cases where a considerable amount is involved, would not hesitate to charge two hundred and fifty dollars a day." There are only two other matters which we need notice in this report. The one is the curious difference

which exists in different countries in regard to the functions of the two branches of the legal profession. France and Belgium furnish a very good instance of this. Belgian procedure is substantially the same as French, and the distinction between *avocat* and *avoué* exists in both countries. But in France the client generally goes to an *avoué*, who chooses an *avocat*; while in Belgium, on the contrary, he goes in the first instance to an *avocat*, who selects the *avoué*. The other point is that in German law the advocate is entitled to a considerable fee for any settlement of an action effected through his instrumentality. Master Macdonell suggests, with considerable pertinence, that some such provision might advantageously be adopted in this country. If the Society of Comparative Legislation continues to produce statements of this masterly character, it will deserve well not only of the legal profession, but of all sections of the community.

#### RECENT PROCEEDINGS INVOLVING PROFESSIONAL CONFIDENCE.

WE are indebted to the ALBANY LAW JOURNAL of June 19th, 1897, for notices of recent proceedings involving the obligations of professional confidence, one of them concerning a physician, and the other a lawyer. The account of the first of these is as follows:

"It appears, according to English exchanges, that the doctor, in the case in question, was insured under an accident policy covering, *inter alia*, blood-poisoning. In operating on a female patient afflicted with syphilis he scratched his finger, and blood-poisoning ensued. It was clear, according to the evidence, that the injury was within the policy, the doctor's *bona fides* being unimpeachable, but the insuring company demanded to know the name of the patient. This the doctor would not give, his collegiate oath pledging him not to do so, and the court, in consequence, dismissed his claim, on the ground that he had not furnished the evidence required; that is to say, the best evidence. Lord Young, who dissented, observed that 'however candid and credible a pursuer's statements may be, and however much they may be believed and supported by evidence, \* \* \* his claim must be rejected unless he is prepared to do what is confessedly dishonorable, that is, disclose the name of the patient from whom he received the infection.' The action of the company appears to have been based on a technicality, raised for the purpose of avoiding liability under the contract, in which they have been successful."

Certainly, if the doctor's *bona fides* were above suspicion, the company was guilty of an act of superlative meanness in not paying the loss upon his general statement or affidavit that he had contracted syphilitic blood-poisoning in the course of legitimate professional employment. It would,

however, in the absence of any information as to grounds of suspicion that the company may have had, be unfair to unreservedly condemn its action. As to the purely legal points involved there might be even greater difficulty in the physician's recovery under the law of New York than that of England. Section 824 of the Code absolutely prohibits a physician or surgeon from disclosing any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity. A strict and liberal interpretation of this section might prohibit a doctor from disclosing even that he had contracted syphilitic blood-poison from a patient. It would certainly, according to its spirit, prevent a doctor from disclosing any facts or circumstances by which his patient might be identified. And if an insurance company for any reason chose to stand on legal rights, and require proof of the physician's representation, we do not see how the law could help him out. If the policy entitled the company to proof, we do not see how some circumstantial showing of the accidental character of the injury could be dispensed with. And the fact that the doctor suffers a personal loss, through loyalty to his collegiate oath, or under the express statutory provision of a State like New York, would not affect the legal status of the matter. — New York Law Journal.

#### ODD CRIMINALS BEFORE THE COURT.

IN these days of sensational trials and extraordinary occurrences, it is strange to look back into the middle ages and note the peculiar developments of superstition and fancy in those remote times. Not only were the punishments given cruel and uncouth — the crimes themselves were often horrible beyond belief, and in most cases the witnesses had nearly as hard a time of it as the accused. But the horror and cruelty of the judgments of the middle ages were sometimes lightened by scenes which seem irresistibly comical to us now, though at the time they were enacted in perfect good faith. Strange criminals sometimes appeared at a mediæval bar, either in person or by proxy, to receive the punishment of their crimes. In France alone there were no fewer than ninety-two trials of animals recorded between the years 1120 and 1740 — the last sufferer being an unfortunate cow. The delinquents were not only those animals who had committed direct assaults upon humanity. There is a kind of justice in bringing a bull to trial for goring a man to death, or a dog for killing a little child. But the mediæval intellect went further, and saw malicious intent in any annoyance of men by beasts and insects. There was a regular course of procedure to be followed, and all things were done decently and in order.

For example, in cases where a district was over-

run by rats, mice, locusts, fleas or other pests, the ordinary course was to appoint an advocate to plead for the accused creatures, and then to summon them publicly three times to appear before the court. If they did not appear at the third summons the case was tried in their absence; and if their advocate could not make a good defense for them they were ordered to leave the country before a certain date, under penalty of exorcism. This penalty was generally enforced, although, astonishing to relate, the creatures often seemed to become even more abundant and destructive than ever after being exorcised. This was always put down to the power of Satan, and did not shake the faith of the people in the least. There is, however, an account of some leeches who were tried at Lausanne, in the year 1451, who behaved in a much more satisfactory manner. They had been found guilty of infesting the country and annoying the inhabitants, and a few of them were caught and brought into court to hear the sentence, which was the usual order to leave the place within three days under penalty of exorcism. Whether the leeches did not quite understand, or whether they were contumacious, does not transpire, but it is placed upon record that they failed to depart within the prescribed limit, were exorcised with all due ceremony and immediately commenced to die off day after day, so that in a little time the whole race was exterminated.

A very curious trial of rats is recorded to have taken place at Autun in the fifteenth century. M. Chassensee, an advocate of the place, was appointed to plead for them; and very well he did it, actually getting his clients off. They were accused of appearing in great numbers and annoying the townspeople, and were summoned to appear before the court. The first plea of M. Chassensee was that the rats were unable to attend upon the day named because all of them had been summoned to appear, and, as some of them were very young and others sick and infirm, they required a longer time to prepare for their journey. The court admitted the plea, and granted an extension of time. Still the rats did not appear, and their advocate brought forward another plea. He declared that his clients were ready and willing to come, and were only restrained by bodily fear. They considered the court was bound to protect them, as they came by its order, and therefore requested that before they appeared in the open streets the cats of the neighborhood should be bound over to keep the peace. The court acknowledged the justice of the request; but the townspeople, who were the plaintiffs in the action, refused to be responsible for their cats. The whole thing reads like some child's story, but the records of Autun bear witness to the truth of it. The cause was determined in favor of the rats, as they were willing to appear; and we can only suppose that they were allowed henceforth to pursue their

depredations unmolested. It is not mentioned what reward they gave to their advocate, who certainly deserved well of them.

In some cases we are told of creatures obeying the order to leave at once, and marching away in troops in the broad light of day! Some of them committed suicide and plunged by hundreds at a time into the sea, sooner than remain to face the exorcism of the church. It is almost a pity that the faith of the nineteenth century will not allow a trial of the ancient methods upon the rabbits in Australia. No advocate would be found to plead for them, the thunders of the church would be launched upon them, and, always supposing that they saw the thing in its true light, they would immediately commence dying, like the Lausanne leeches, or would march in a body to the coast and cast themselves, like the Gadarene swine, into the sea. Some very small culprits were brought up for trial at Sauvigny in 1457. An old sow and her three or four little ones were brought into court, accused of killing a little child and partly eating it. Such instances were not uncommon in the middle ages, when scavengers were unknown and vestries were not, and when pigs and dogs wandered about the narrow, dirty streets of the towns in search of food, and were often ferocious and savage creatures. The case was proved against the old sow, and her advocate had not a word to say on her behalf. But, he argued, it could not be just or right to punish the youthful pigs, who had merely followed their mother's bad example, and could not be expected to know any better. Besides there was no clear proof that they had assisted at the murder of the child, although it could not be denied that they had joined in the repast. The defense was accepted. The old sow was accordingly publicly hanged in the market-place, and the little pigs were pardoned and let loose on the world again. — Strand Magazine.

#### LAWYERS' CLERKS.

THEIR DUTIES, THEIR PAY, AND THEIR MANY DISCOURAGEMENTS.

**A** PROPOS of the subject of admissions to the bar and the chances of success therein, the following observations by a writer in the New York Evening Post will certainly prove of interest and value:

While glancing through the "wants" column of the New York Law Journal recently my attention was attracted by the following advertisement:

"Clerkship Wanted. — Managing or assistant; by a competent attorney. five years' experience; college and law school (Columbia) graduate; highest references; salary, \$10."

That a competent lawyer, possessing so many qualifications for success, should be anxious to

secure a mere clerkship at such a low rate of compensation would seem to indicate hard times in the legal profession. The main significance of the advertisement, however, is that there are men in the law, as in other pursuits, who lack the talent of working for themselves. Under the direction of others they are capable; but when it comes to independent action they are lost. Wanting in self-confidence, they stand hesitating, and allow others to step into the places that, by right of attainments and ability, should be theirs. A few of them, perhaps, are the "Sydney Cartons" to the "Stryvers" of the profession; brilliant men of misdirected energies, "incapable of their own help and happiness, sensible of the blight on them, and resigning themselves to let it eat them away."

Every intellectual employment has a powerful fascination to men of brains. The poet would rather starve in his garret than abandon poesy; the artist would prefer subsisting on bread and herring to laying aside his brush. Law, like literature and art, can become an infatuation; so much so that men of the first order of talent are often content to do the mere clerical work of the profession for wages that are barely sufficient to keep body and soul together. An ex-judge has said that one of the most learned men in the law he ever knew was a lawyer's clerk, who, after a long life of drudgery in a small office for a miserable weekly stipend, died in abject poverty. I was once acquainted with a clerk who was a graduate of Oxford, could speak six or seven languages, was profoundly versed in ancient and modern literature, and was possessed of such encyclopædic legal knowledge that he was invariably consulted by his employer whenever a knotty question had to be unravelled. Yet his salary was eight dollars a week, and he had never sought admission to the bar.

In fact, a majority of the clerks in the smaller law offices have never been admitted to practice. They have acquired their knowledge of law and its procedure by private study and by experience in office work. And right here it should be understood that I am not referring to the mere copyists, process-servers, and the host of fledglings who serve their time in offices to comply with the requirements of the law; but to the experienced clerks upon whom the real responsibilities of office work devolve. Such men—whether they have passed the required examination or not—are to all intents and purposes lawyers; for, in a majority of instances, they prepare for trial all the cases of their employers. They collect and sift evidence, examine witnesses, prepare the necessary papers, and hunt up precedents and authorities. They keep track of all court proceedings, and are familiar with every step that should be taken in the proper prosecution of a suit; for a lawyer with a growing practice has no time to attend personally to the minutæ of his business.

It would seem that work necessitating legal knowledge, experience and acumen would command a high price. On the contrary, lawyers' clerks are miserably paid. A managing clerk, in a large office, who is himself a competent and experienced attorney, and who has a large force of clerks under him, may receive as high as \$30 a week, and, in a few exceptional cases, even more; but the average salary paid to capable men is no higher than \$10 a week, while a large number are obliged to rest content with \$7 or \$8. This is partly because lawyers, as a rule, cannot afford to pay higher wages, and partly because the supply of experienced and capable men, who are willing to accept the low wages offered, is greater than the demand.

A large proportion of the young men who are graduated each year from the law schools, and pass the examination required by the State, find themselves stranded at the very outset of their career. They have exhausted their means in acquiring a profession, and are in no position to wait for clients to come to them. A few turn to journalism; but the vast majority seek positions in the offices of lawyers and corporations, where they will have some chance to exercise their legal knowledge, while hoping for an opportunity to "branch out" for themselves. In time many discover that they are lacking in certain faculties which are essential to success in their profession.

This discovery usually comes when it is too late for them to map out any other path in life. The only hope, therefore, that the future holds out to them is that, by hard study and experience in office practice, they may become, in time, sufficiently learned to set up as counselors. As year by year passes away, however, even this hope is gradually dissipated, and they accept their destiny as lawyers' clerks without a murmur. Add to these the young men who enter the offices of lawyers, with the intention of some day becoming professional men, but who never present themselves to pass the State examination—although many of them are qualified to do so—and it will be readily understood why the supply of talented law clerks is so greatly in excess of the demand.

What renders the lot of the lawyer's clerk particularly discouraging is that, although legal practice has undergone many radical changes in recent years, to the manifest advantage of his employer, his own position has not been correspondingly bettered. Law has been gradually becoming more of a business and less of a profession. Many of the greater law firms to-day are simply big commercial concerns. They act as agents for estates, loan money on mortgages, collect dividends and interest, organize corporations, and act as advisers for corporations already organized. Their offices are furnished with desks and counters; they employ a large corps of bookkeepers and stenographers, and conduct their affairs with as much

regard to routine and system as any banking house or trust company. One firm in this city act as agents for estates aggregating \$100,000,000, besides attending to the legal affairs of many large corporations, and conducting a general law practice. Their business is divided into several departments, each in charge of a clerk, whose duties are restricted to attending to the affairs of his own department. It is the duty of one man to attend to the collection of rentals, interest and dividends; of another to search titles, file mortgages and look after investments generally; a third has supervision over the interests of corporations, and so on.

Many firms that divide thousands of dollars in profits each year pay their clerks pitiful wages. In one of the biggest law concerns in New York there is a gray-haired clerk who has entire charge of the real estate department, which represents an interest of \$20,000,000 or \$30,000,000. He has been with the firm for thirty years, is an able attorney, expert in real estate law and values, and has the complete confidence of his employers. His position is not only one of great responsibility and trust, but requires special knowledge and sound judgment. If he were employed by a trust company, insurance company, or a big business house, he would undoubtedly receive a salary of \$5,000 or \$6,000 a year; but, because his employers are lawyers, he regards himself as fortunate in receiving \$25 a week.

The larger law offices afford few opportunities for young men to gain experience in office practice, for the work given them to do is almost entirely of a clerical nature, that could be done just as well by those who have never conned the pages of a law-book. One year's experience as clerk in the office of an attorney who has a variety of petty cases pending in the different courts is worth ten years of monotonous drudgery in the office of a big concern whose principal business consists in managing great estates and corporations.

There are so many circumstances operating against the success of young lawyers in the great cities that it would be far wiser for them to hang up their shingles in country towns than to begin as law clerks in a larger field. For, though they may suffer many discouragements before securing a client, they are certain, sooner or later, to be accorded a chance of showing their abilities.

The Supreme Court of Kansas, in *Farmers' National Bank v. Salina Paper Manuf. Co.*, decided that the maker of a promissory note, payable at a bank, has the entire day of maturity in which to make payment, and that an action begun thereon just after the close of banking hours of the day it falls due is prematurely brought. While there is some diversity of judicial opinion on this question, the weight of authority is undoubtedly with the Kansas decision.

#### LAW OF DISBARMENT.

SUSPENSION OF DISBARMENT PROCEEDINGS BY REASON OF INSTITUTION OF CRIMINAL PROCEEDINGS DENIED.

#### NEW YORK COURT OF APPEALS.

ROCHESTER BAR ASSOCIATION v. DORTHY.

1. After the commencement of disbarment proceedings against an attorney, if the charges of professional misconduct are such as to involve liability to a criminal prosecution, this fact will not entitle the respondent to a suspension of proceedings until he has had an opportunity of a jury trial upon such charges.
2. The court establishes the rule after an examination of American and English authorities.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Application by the Rochester Bar Association for the disbarment of John F. Dorthy, an attorney. From an order of the Appellate Division (41 N. Y. Supp. 1112) disbaring defendant, he appealed. Affirmed.

#### OPINION.

BARTLETT, J. — In June, 1895, the Rochester Bar Association preferred charges against the defendant, and presented them to the General Term. The defendant having interposed a general denial, an order was made appointing a referee to take evidence, and report the same, with his opinion thereon. The referee took a large amount of evidence, and reported the same to the court, without any opinion. The Appellate Division, after considering the referee's report, and hearing counsel for the complainant and the defendant, made an order disbarring the latter, and revoking his license to practice. From that order this appeal is taken, and we are asked to review the questions of law and fact presented by the record.

Eight distinct charges are made against the defendant, as an attorney of the Supreme Court of the State of New York. As to the first charge, the referee reported that, in his opinion, the evidence was insufficient to establish it. In view of the very grave character of this proceeding and the serious consequences involved, we have examined the record with the greatest care, in order to be satisfied that the defendant had a fair hearing and was convicted upon evidence that clearly justified such a result. After this investigation, we are of opinion that the court below could not properly have reached any other conclusion than it did. The Appellate Division adjudged the defendant guilty of the seven acts of deceit, malpractice and crime, in manner and form as the same are fully set forth in the referee's report. The learned counsel for the defendant is in error in supposing that this implies that all the charges have been practically treated as one. We have

taken, as the court below doubtless did, each of the seven charges upon which the conviction rests, and treated it as if standing alone, and have brought together from a voluminous and confused record the proofs bearing thereon, in order to decide if it had been duly and separately established. It would be impossible within the proper limits of an opinion to consider each of the seven charges in detail, and such a course would serve no good purpose under the circumstances. It suffices to say that we find that each of them was duly proved, and discloses a story of professional misconduct painful to contemplate. We have examined the exceptions, and find no prejudicial error, and will refer to but one of the legal questions argued by the defendant's counsel.

Prior to the argument before the Appellate Division, the defendant filed with that court a notice and affidavit to the effect that he claimed the right to be tried by a jury on those charges that involved a felony, before the court could take any action thereon by way of disbaring him. This point does not appear to have been taken before the referee at the opening of the reference, or at any time during the trial, but we shall treat it as seasonably made, although not referred to in the opinion of the Appellate Division or the printed brief of the complainant submitted on this appeal. The counsel for the defendant seems to lose sight of the distinction that runs through the English and American cases, that the court is at liberty to strike from the rolls the name of an attorney for professional misconduct, without regard to the fact of possible or pending indictment. If the charge involves a felony or a misdemeanor entirely distinct from the defendant's professional action, it has been repeatedly held that the court will stay its hand until the criminal trial had taken place. This may be very well illustrated in the supposed case of a member of the bar being accused of murder, or arson, or burglary, and resting under indictment. In such a condition of affairs the court would await the result of the criminal trial; and under the law of this State, if conviction followed, the defendant would *ipso facto* cease to be an attorney and counselor-at-law, or to be competent to practice. Code Civ. Proc., § 67. Section 67 of the Code of Civil Procedure regulates the proceedings now under consideration, and reads as follows:

"SEC. 67. An attorney and counselor, who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counselor of the courts of record of this State, may be suspended from practice, or removed from office, by the Appellate Division of the Supreme Court. Any person being an attorney and counselor at law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counselor at law, or to

be competent to practice law as such. Whenever any attorney and counselor at law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted, shall, by order of the court, be stricken from the roll of attorneys. Upon a reversal of such conviction, or pardon by the president of the United States or governor of this State, the Appellate Division shall have power to vacate or modify such order of disbarment."

The rule which we have adverted to is very well illustrated in England by the case of *Stephens v. Hill* (10 Mees. & W. 28), where Lord Abinger wrote the opinion. He says:

"I never understood that an attorney might not be struck off the roll for misconduct in a cause in which he was the attorney, merely because the offense imputed to him was of such a nature that he might have been indicted for it. So long as I have known Westminster Hall, I never heard of such a rule as that; but, in the case of applications calling upon an attorney to answer the matters of an affidavit, I have known Lord Kenyon, and also Lord Ellenborough, frequently to say: 'You cannot have a rule for that purpose, because the misconduct you impute to the man is indictable; but you may have one to strike him off the roll.' Now, an attorney who has been guilty of cheating his client, or the opposite party, in such a manner as to render himself indictable, is unfit to be allowed to remain on the roll, or to practice in any court; and I see no objection, on principle, to the court's removing him at once from it. If, indeed, he were called on to answer the matters of an affidavit, he would, by not complying, be guilty of a contempt for which he might be punished by attachment; and, if the offense imputed to him were of an indictable nature, it would be most unjust to compel him to do so, for which reason a rule to answer the matters of an affidavit is never granted in such a case, but only a rule to strike him off the roll, which gives him a full opportunity of clearing himself from the imputation, if he can, while, on the other hand, it does not compel him to criminate himself."

This quotation from the opinion of the learned chief baron makes perfectly clear the practice in the English cases. Where professional misconduct was involved, the rule upon affidavit was denied; but the rule to strike an attorney from the rolls, being a proceeding where he was not required to make any statement under oath himself, was always granted, without regard to the possibility that a criminal indictment might follow upon the same state of facts.

The English cases cited by the defendant's counsel do not conflict with this general rule. The Supreme Court of the United States, in *Ex parte Wall* (107 U. S. 265, 2 Sup. Ct. 569), made a most

exhaustive examination of the question we are now considering. In that case a member of the Florida bar, during a term of the United States Court, assisted a mob in taking from the jail a prisoner who was about to be tried, and hanging him to a tree in the court-house yard. Upon due complaint, the United States district judge ordered Wall to show cause why his name should not be stricken from the roll of attorneys. After a hearing in the proceeding, which included the taking of evidence, the name of Wall was stricken from the roll of attorneys. The point was taken for the defendant that he was not acting in his character as an attorney when he committed the act complained of. The court, however, held (Justice Field dissenting) that the character of the act was such as to denote a gross want of fealty to the law and repudiation of legal government. The court, in the prevailing opinion, says:

"No respect for the dignity of the government as represented by its judicial department, was even affected. The judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. \* \* \* We have no hesitation as to the character of the act being sufficient to authorize the action of the court."

Judge Field placed his dissenting opinion upon the ground that, "to disbar an attorney for an indictable offense not connected with his professional conduct, before trial and conviction, is also to inflict an additional wrong upon him. It is to give the moral weight of the court's judgment against him upon the trial on an indictment for that offense."

The learned dissenting judge was evidently of opinion that the act complained of did not concern the defendant in his professional relations to court or client, while his associates entertained the contrary view. The majority opinion distinctly recognized the rule that where an attorney commits an indictable offense in a transaction not involving his character as an attorney, and does not admit the charge, the court will not strike his name from the roll until he has been regularly indicted and convicted. It also restated principles that are very familiar, to the effect that the proceeding to disbar is not criminal, and is not intended for punishment, but to protect the court from the official ministrations of persons unfit to practice as attorneys therein; that such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, but that the proceeding itself, when instituted in proper cases, is due process of law. The general principle we are considering is recognized in *Percy's Case* (36 N. Y. 651), Judge Grover writing the opinion of the court. An order of disbarment had issued, and the defendant appealed. The charges against the appellant were that his general reputation was bad; that he had several times been indicted for

perjury, one or more of which indictments were still pending; that he was a common mover and maintainer of suits on slight and frivolous pretexts; and that his personal and professional reputation had been otherwise impeached in a trial at the circuit. The defendant, Percy, was convicted upon all the charges; and it was insisted, among other points in his behalf, that the court had no right to call upon an attorney to answer charges of this description, for the reason that it compels him to give evidence against himself. Judge Grover said:

"The answer to this is that the party is not compelled to be sworn at all, unless he chooses. He may introduce his other evidence, tending to show his innocence, and submit the matter to the court without having sworn."

We are of opinion that all of the charges upon which the defendant stands convicted involve professional misconduct, and if it be true that some of the acts complained of are felonies, and indictments may follow, it is no reason why this proceeding should be stayed. We discharge an unpleasant duty in affirming this order of disbarment, but our obligation to a learned and honorable profession to maintain its standard of conduct and character above reproach leaves us no alternative. The order appealed from should be affirmed.

All concur. Order affirmed.

John Van Voorhis for Appellant.

Edward Harris for Respondent.

### English Notes.

The oldest will extant, unearthed by Prof. Petrie at Kahum, Egypt, is at least 4,000 years old. In its phraseology, says the *London Law Times*, the will is singularly modern in form, so much so that it might be admitted to probate to-day.

The first international congress of barristers will be held at Brussels in the first days of August. The object of the congress is to study and discuss questions relating to the bar which are closely connected with the administration of justice and the progress of legal science.

At Blackburn County Court, on Monday, it transpired in a case of committal against "James" Howarth that his correct name was John. The authorities at Lancaster Castle consequently refused to admit him to gaol. An application to amend the name was then made to his honor Judge Coventry, who, in refusing, said the mistake was due to carelessness, and greater care in swearing affidavits ought to be exercised. — *London Law Journal*.

Lord Esher, British master of the rolls, still active at 82 years of age, has been giving some unconventional dicta from the bench of late. In an action for libel involving the professional sensibilities of two musicians, one of whom was Tito

Mattei, the composer, the judge stopped a lawyer who wished to quote authorities as to what may be libel, saying: "If you do, it will be a serious libel on us. We ought to know enough law to decide a wretched case of this size, where the damages were only £20, without counsel having to help us by referring to authorities. Do shut up your book."

The scene in the Appeal Court at Sydney when the judges and barristers discarded their wigs and gowns on account of the great heat, is not without an English parallel, says the London Law Journal. Twenty-nine years ago a similar scene was witnessed in the Probate and Divorce Court. The Times of July 24, 1868, contained this paragraph: "During the last two days the learned judge and the bar have been sitting without their wigs, and, in opening a case, Sir Robert Collier called attention to the innovation, and apologized for not appearing in full forensic costume. His lordship said he had set the example of leaving off the wig in consequence of the unprecedented heat of the weather, as he thought there were limits to human endurance."

### Legal Laughs.

It is related that a Montana legislator, when some corrections in spelling and grammar in his bill were called to his attention by the committee, said: "Why, you fellows have mutilated it!" It was the same statesman who said, in addressing a committee of which he was a member: "The muddy slough of politics was the boulder upon which the law was split in twain, and fell in a thousand pieces from the pedro of justice. Let us, then, gear up our lions, that we can go forth with a clear head."

It was when that eminent jurist, the late Judge Richard Clarke, was presiding in the Atlanta circuit of the Superior Court. One of the most remarkable murder trials was in progress. The evidence was conflicting, and the judge was called upon to charge the jury on some decidedly new and interesting legal points. The judge was a rapid talker. In this instance it was very important that every word he spoke should be correctly recorded, and he so cautioned the stenographer.

Then Judge Clarke began. As he warmed up to his charge he was speaking at the rate of 250 words a minute. Once he glanced toward the stenographer. That worthy official seemed to be half sleeping over his work, and apparently writing very slowly.

"Mr. —, are you getting my words down correctly?" asked the judge.

At this the stenographer seemed to wake up. With little concern, he replied:

"That's all right, judge; fire away. I am about fifteen words ahead of you now!"

### Notes of Recent American Decisions.

**Carrier—Duty to Warn Passenger of Danger.**—It was the duty of the conductor of an electric street car, when he saw a passenger in danger from having his arm partly outside the car window, to warn him of his peril, and contributory negligence of the passenger is not a legal excuse for non-performance of that duty. (*South Covington & Cincinnati Street Ry. Co. v. McCleave*, Ky. Law Rep., Vol. 18, No. 23.)

A messenger employed in the office of the district attorney and paid a fixed salary cannot recover against the city of New York for services rendered to the district attorney and his staff, without any request on their part or agreement to pay therefor, which consist of acting as notary public and taking their acknowledgments and affidavits in the course of the business of the office. In such case the messenger comes within the provisions of section 28 of article 3 of the Constitution of this State, which provides that "the legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." (*Henry Merzbach, Applt., v. The Mayor, Ald., Etc., of the City of New York*, Respondent, N. Y. Sup. Ct., App. Div., First Dept.)

Judgment for defendant, in an action by a husband against his wife for divorce for adultery, is not admissible in a prosecution of the husband for neglecting to support his wife, in which he sets up as an excuse, and offers evidence to show, the same acts of adultery alleged in the divorce suit. (*State v. Bradneck*, Sup. Ct. of Errors [Conn.], 37 Atl. R. 492.)

**Lands Sold for Taxes.**—A statute decreasing the rate of interest to be paid to redeem land sold on execution is inoperative on a sale made prior to the passage of the act. (*Thresher v. Atchison* [Sup. Ct. California], 48 Pac. Rep. 1020.)

**Eminent Domain—Taking of Water-Works.**—The condemnation of a water-supply system is within the unquestioned limits of the power of eminent domain. (*Long Island Water-Works Supply Co., Plaintiff in Error, v. City of Brooklyn*, U. S. Sup. Court, Apr., 1897.)

### Notes of Recent English Decisions.

**Contract — Breach — Application for Injunction to Restrain — Specific Performance of Contract to Let Rooms for a Single Day—Damages.**—The defendants agreed verbally with the plaintiff to allow him, for the sum of £15, the sole use of the first floor in a certain house, on the 22nd of June, 1897, for the purpose of viewing the queen's diamond jubilee procession on that date. Subse-



quently the defendants returned the money, and repudiated the agreement, on the ground that they were precluded by a covenant contained in the lease under which they held the premises from subletting the same or any part thereof without the consent of their landlord; that the landlord absolutely declined to give such consent; and that if they fulfilled their contract with the plaintiff they would render themselves liable to have the lease forfeited. Thereupon the plaintiff commenced an action, and then moved before North, J., for an interlocutory injunction to restrain the defendants from letting or otherwise dealing with the first floor in question so as to interfere with the plaintiff or his nominees in the use and occupation of the same for the purpose aforesaid. It was decided by North, J., that the plaintiff's proper remedy was by way of damages, for there was no evidence that suitable rooms could not be obtained elsewhere; and that, if the plaintiff did get them elsewhere, and had to pay more than £15 for them, he could claim the increase of price as damages for the breach of the agreement. The plaintiff appealed. In support of the appeal it was stated that the plaintiff had already let seats in the rooms in question to other persons, to whom he would be liable if he were prevented from carrying out his contracts with them; and it was submitted that an agreement for possession for a single day was not such an underletting as the court would take notice of; and that damages would not meet the case, as, if given, they would be of no avail. The case of *Mashiter v. Smith* (3 Times L. Rep., p. 673) was relied upon. *Held*, that specific performance of a lease for a single day could not be granted, and that the plaintiff's only remedy was by way of damages. *Held* also, that, apart from that, if this application were granted the defendants would be exposed to a serious risk of incurring the forfeiture of their lease. *Held*, therefore, that the appeal must be dismissed with costs. Decision of North, J., affirmed. (*Glasse v. Woolgar and Roberts*, Ct. of App. No. 2, Law Times Adv. Rep., June 19, '97.)

### The Magazines.

The beginning of a new volume of the Review of Reviews is signalized by an expansion of the name of that very successful and widely-read periodical. It has now become the American Monthly Review of Reviews, with particular emphasis on the first two words. It seems likely enough that the public will speedily fall into the way of calling this magazine the American Monthly, for short. It is announced, however, by the editor, that the full and formal title will retain the words Review of Reviews. The magazine is especially devoted to public affairs and topics of the time, and its presentation of all such matters is conspicuously from the American point of view.

Its reviews and condensations from American and foreign periodical literature form a very acceptable part of its monthly bill of fare; but inasmuch as this work of reviewing the periodicals occupies very much less than half of the space of the magazine, it is obvious that the title, Review of Reviews, comes far short of expressing the full scope of the periodical. The American Monthly Review of Reviews for July contains a variety of important contributed articles. Among these we note Edward Cary's able and interesting character sketch of President Seth Low, Dr. Gould's exposition of the plans of the City and Suburban Homes Company, of New York city, for a model suburban settlement; Baron de Coubertin's vivacious account of "The Revival of the French Universities," Gen. Greely's survey of "Higher Deaf-Mute Education in America," and Sylvester Baxter's sympathetic review of Edward Bellamy's new book.

Li Hung Chang's secretary has recently written to the Century Company expressing the pleasure the viceroy is taking in Gen. Horace Porter's articles, "Campaigning with Grant," now appearing in The Century. Mr. Pethick, the secretary, says: "His excellency has had read to him Gen. Porter's articles on Gen. Grant, and has been greatly interested in studying the character of his great friend during the greatest of his campaigns for the preservation of the Union. It is a rare privilege to read of such deeds related so eloquently by one who honorably participated in them."

The Living Age, for all its fifty-three years of life, was never fresher, more vigorous or more valuable than now. Timely and able articles on the leading questions of the day, papers of interest and value, biographical, historical and scientific, are always to be found within its pages.

Harper's Magazine for July is a notable issue. Gen. George A. Forsyth tells of Sheridan's ride, and Zogbaum illustrates it; "The Century's Progress in Physics" is treated by Henry Smith Williams, M. D.; T. P. O'Connor, M. P., continues his interesting article on the "Celebrities of the House of Commons." Other articles are: "The Modern American Mood," by W. D. Howells; "White Man's Africa," part nine, by Poultney Bigelow, and the "Military Academy as an Element in the System of National Defense," by Capt. James Parker, U. S. A. The number also contains the first instalment of "The Kentuckians," a romance, by John Fox, Jr., illustrated by W. T. Smedley, which deals with the broadly contrasted types of the mountains and the blue-grass; and the second instalment of Frank R. Stockton's latest novel, "The Great Stone of Sardis," a romance of twentieth-century invention, illustrated by Peter Newell. "The Martian," George du Maurier's last novel, reaches its final instalment.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JULY 10, 1897.

### Current Topics.

ONE of the most peculiar pieces of legislation ever enacted by any State of the Union has just gone into effect in Pennsylvania. It is an act regulating the employment of foreign-born, unnaturalized male persons, and is so unusual in its character as to deserve special attention. By its provisions all aliens in whatever capacity employed are taxed three cents a day. Their employers are held responsible for the collection and payment of the tax, the only way to avoid it being for each individual to become naturalized. According to the statements of those who ought to know, the aliens who will be most generally affected in the most populous portions of the State are Italian laborers, most of whom, it is said, do not come to this country with the intention of becoming citizens, and who, therefore, do not take out naturalization papers. The tax, of course, will come out of their wages. The agitation for and passage of the bill may be credited to the labor organizations of the State, whose representatives alleged that thousands of foreigners come over here and go to work for less wages than native-born or naturalized citizens would accept; that they save every cent possible, and when they have laid by a few hundred dollars, go back to the countries from which they came. Thus they take out of the country the money they earn here, instead of adding to its wealth and prosperity. All this may be freely conceded

without at all endorsing the method resorted to in this singular statute to regulate the evils complained of. While purporting to be an act to tax aliens, the act does not tax them. The tax is levied on "the persons, firms, associations or corporations employing one or more foreign-born, unnaturalized male persons over 21 years of age within the Commonwealth." It is made obligatory on all employers of labor to ascertain whether any of their employes are aliens, and keep record of their number and their names, and the number of days each of them has been employed. They must make a report covering these matters quarterly, and failure to do so subjects them to fine of not less than \$200, nor more than \$1,000, at the discretion of the court. It is thus the employers, not the aliens, whom the law deals with. It is also pointed out by the Philadelphia Press, which strongly denounces the measure as not in the true interest of labor, that the alien aimed at may never know that there is a tax levied on his employment. He may learn this, however, if employers, having paid the tax, choose to avail themselves of the option given them in the last clause of the law "to deduct the amount of the tax provided for in this act from the wages of any and all employes." No doubt the legislature meant the deduction should be made from the aliens whose employment gives rise to the tax. But this is not what it says. The employer who pays a tax on aliens is expressly authorized to reimburse himself by deducting sufficient to make up the sum "from the wages of any and all employes," whether native, naturalized or aliens. There is a quite commendable disposition on the part of employers to conform to the new law, but that it will stand the first test of constitutionality we do not for a moment believe. It is on a par with many foolish, useless or positively vicious legislative acts passed by various State bodies of law-makers.

The Pennsylvania legislature has also enacted a new and radical labor law, the object of which is to protect employes of corporations in their right to join or con-

tinue their membership in labor organizations. The law referred to prohibits corporations, their officers and agents from discharging workmen under them because of their membership in labor organizations, or from attempting to prevent them in any way from joining or remaining in such organizations. The passage of the law was successfully urged by the great labor organizations of the State, and was, in a sense, the outgrowth of a legal contest between the Reading Railroad and the Brotherhood of Railway Trainmen. In a case before him in the Federal Circuit Court, Judge Dallas held that an employer could discharge a workman for any reason he might name, and membership in a trades union might properly be advanced as a reason for discharge. In order to counteract the effects of this decision, the labor organizations procured the passage of the act under consideration. There are, however, some weighty objections to some of its provisions, and the workmen affected are by no means unanimous in the opinion that it will stand the test of constitutionality. The chief objection is that it divides labor into classes, and grants privileges to one class which it denies to another. Private employers and partnerships are not prohibited from discharging workmen for the specified cause, and the labor so employed is not afforded any protection, while, on the other hand, corporations may complain that they are discriminated against and forbidden to do that which other employers are permitted to do. Another objection is that the law interferes with the right of contract by preventing employers from stipulating in their agreements with workmen that the latter must not join certain organizations. There are so many vitally important questions involved in the passage of the law that the final interpretation of the courts is an absolute necessity.

In addition to these legislative acts, which cannot be wholly commended, the legislature of Pennsylvania, before its final adjournment, passed by a practically unanimous vote an altogether admirable libel law, which supersedes the antiquated and proscriptive

statute under which this great State has too long suffered. The bill, which Governor Hastings promptly signed, provides that in criminal prosecutions for libel, if the matter charged as libelous is, in the opinion of the court, proper for public information, the truth may be given in evidence. The second section of the bill precludes suits in more than one county. The third section is the crucial provision. It enacts that in any civil action for libel the plea of justification shall be accepted as adequate when it is pleaded that the publication is substantially true in every material respect and proper for public information, and if this plea shall be established there shall be no recovery. It further enacts that "in no civil action for libel shall damages be awarded beyond just restitution for injury actually sustained." Thus an end is put at once to all speculative libel suits. As the Philadelphia Press well observes, "it serves notice on the shysters who have been hunting around for the pretexts to be used for stimulating vexatious and blackmailing proceedings on shares that their vocation is gone. It stops the tide of essentially unfounded and unwarranted prosecutions which has been running in Philadelphia for the last two or three years under the infectious influence of two or three excessive and monstrous verdicts. It restores the law to what was the accepted practice before this later era of perversions. The public as a whole and the individual lose no right and no just protection; but, on the other hand, a bulwark is thrown around journalism against the harpies that seek to pluck it." New York State ought to have such a libel law on its statute-books, and with proper effort and agitation, which cannot be begun too soon, that desirable end can be accomplished at the next session of the legislature. According to the construction placed upon the law of this State by the highest courts, no matter whether the published allegation be true or not, accidental or not, retracted or not, the publisher is held to have had malicious intent — the presence of the libel presupposes malice on his part — and not a few cases have occurred recently in which great hardship and injustice have resulted. Al-

though heretofore published in these columns, the following admirable epitome of the whole subject, made by Judge Gordon, of Philadelphia, in a recent charge to a jury in a libel suit, is worthy of careful re-reading:

"It is of the very first importance to the community that a malicious publication, intended to injure, repeated, avowed, not retracted, should be punished, and punished with the utmost severity of the law. But if verdicts of that character are demanded under such a state of facts, it is equally true that for a libel not malicious, but accidental, for the publication of a false article which occurred in a manner almost natural and excusable, the verdict should not represent more as compensation than the facts proven justify. There should be in such cases no element of punishment, because, important as it is that the reckless and malicious press should be punished, it is equally important that a careful, reputable and honorable press should be defended in every right, because while one is an agency of oppression, the other is a safeguard to liberty, civilization and happiness."

Mrs. Clara Foltz, the well-known New York attorney, has again done a service to her sex and the public at large, in bringing to trial a test action which is of much importance to newspaper contributors. The question at issue related to the right of newspaper publishers to delay payment for articles accepted long after notification to the author of such acceptance. In the suit referred to, Mrs. Belle A. Whitney was the plaintiff, and the New York Herald the defendant. The latter had accepted Mrs. Whitney's contribution, but in response to numerous requests for a settlement, replied that payment was not made until after publication and receipt of clippings. Rather than watch every issue of the Herald, Mrs. Whitney decided to place the account in the hands of Mrs. Foltz for collection. The attorney, after some unsatisfactory correspondence and an equally unsatisfactory interview with the publishers, decided to bring suit, but when the day came for trial the defendant's attorney paid the amount de-

manded, with costs of court, and the suit was dismissed. Mrs. Foltz founded her case mainly upon the well-known principle of law that when one person accepts the labor or the product of the labor of another, either mental or manual, he is legally bound to pay for it. Commenting on the decision of the case, the Newspaper Maker says:

"This settlement of the case can be quoted as forming a precedent in a matter which has occupied the attention of newspaper writers for many years, and may inaugurate a more liberal policy on the part of publishers who are accustomed to delay the payment for articles long after they have been accepted. Much credit is due to Mrs. Foltz for her bold and vigorous enunciation of the law and its application in this important matter. Her efforts will not only receive the endorsement of every woman writer in the land who is forced to employ her pen as a means of support, but will receive the commendation of every fair-minded person engaged in literary pursuits."

The legislature of Ohio, in 1896, enacted a law, commonly known as the Ohio Lynch Law, providing that any person taken from the custody of an officer by a mob and receiving injury shall receive \$1,000 from the county in which the violence occurred. In a case tried in the Common Pleas Court, sitting in Cleveland, last week, the action being brought against the county by two persons for injuries received during a strike, the court held the statute to be unconstitutional, the principal objection being to its fixing a definite sum as damages, thus depriving a jury of its constitutional power to assess damages proportioned to the extent of the injury. The purpose of the statute, which was entirely commendable, is thus defeated by the carelessness, or worse, of legislators in a State which boasts of a large number of able lawyers, some of whom, no doubt, were included among the law-makers of the Commonwealth.

At the annual meeting of the Illinois State Bar Association, held last week, the president, John H. Hamline, Esq., in the course

of his address, briefly reviewed the work of the fortieth general assembly, which recently adjourned. The verdict upon that work was not complimentary; in fact, it was the exact reverse of that. The speaker found that there was but one conceivable explanation of the eagerness of legislators to put private and illegitimate demands above the interests of the people, viz., bribery. To use Mr. Hamline's own words: "Any bill could have been forced through that legislature provided there was money enough behind it." This, be it remembered, was not the irresponsible declaration of an ambitious politician at a mass-meeting, but the deliberate conclusion of the president of the Bar Association of the State, and one of the recognized exponents of the legal profession of the Commonwealth. Such a statement, made under the circumstances referred to, is well calculated to startle the honest citizen and arouse him to the imminent danger which threatens our much-vaunted institutions. It need not, however, lead to confirmed pessimism; rather should it cause a reawakening—a determination to uproot the evil and elect a different class of men to make the laws. There is more than a suspicion that Illinois is not peculiar in this respect, but that legislative bribery stalks abroad in most of the State capitals. Here is a large and fruitful field for the energies of those who would see legislation conducted on a different basis. They cannot act too quickly, or make their work too thorough.

It is a general rule, to which the courts make few exceptions, that a party is bound by the acts of his attorney, and that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, will constitute reason sufficient for setting aside a judgment or granting a new trial. This severity is generally justified by considerations of public policy, as well as by the plain demands of justice. In discussing this question, some time ago, we referred to one notable case which constitutes an exception, viz., that of *State v. Jones* (12 Mo. App. 93). The defendant, in this case, was convicted of murder in the first degree, and sentenced to

death. So far as the record discloses, no error was committed by the court in the conduct of the trial, and the only ground relied upon by the defendant for a new trial was the ignorance, imbecility and incompetency of his attorney, and his gross mismanagement of the case. Upon a motion being made for a new trial, on the ground that the defendant's attorney was incompetent and had been guilty of mismanagement, the attorney filed a counter affidavit, in which he sought to extenuate his conduct and show that the defendant had not been prejudiced thereby, and the court severely scored him for his seeming impropriety in volunteering an affidavit to prevent his convicted client from obtaining a new trial, and reversed the judgment, concluding its opinion with the following language: "Modern civilization stands aghast at the barbarity of the ancient law which denied to a prisoner the aid of counsel 'learned in the law,' when on trial for his life. The wisdom and humanity of the present age demand that the maxim, 'Every man is presumed to know the law,' shall be reversed, both in theory and in practice, when applied to the legal methods of conducting a defense against a charge of felony. \* \* \* It would be a most unworthy exercise of the judicial function to administer the shadow of the law, but not its substance. We consider that the prisoner here, in effect, went to his trial and his doom without counsel such as the law would secure to every person accused of crime."

We publish in this number of the ALBANY LAW JOURNAL an able and entertaining article from the pen of L. B. Proctor, on William Wirt's connection with the trial of Aaron Burr for high treason. It will be seen that the learned writer takes a different view of that celebrated trial from that which has generally been entertained, and that he sustains his view with force and vigor. He insists that, considering the failure of evidence to convict Burr, the trial was a legal travesty; that it was Wirt's brilliant and terrible denunciatory speech against Burr which was the real feature in the case calcu-

lated to render the trial memorable, and that even this great effort was a failure, so far as concerns the production of evidence on the trial to sustain it; that it was Wirt's exuberant imagination, dramatic power of description, and vivid fancy which rendered the trial memorable, and the name of Burr infamous. The writer's analytic review of Wirt's speech, his ingenuity and learning, and the graceful style in which the article is written will render it attractive to all classes of readers.

In *Kelly v. New York, N. H. & H. R. Co.*, decided by the Supreme Judicial Court of Massachusetts (46 N. E. R. 1036), it was held that an action by a husband for the loss of *consortium*, caused by injuries to his wife through the negligence of defendant, will lie, though the wife has already recovered in her own right for the injuries received. The court showed that by the common law it was clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of *consortium* with her, and the contention of the defendant must therefore rest entirely on the ground that the husband had lost this right of *consortium* by reason of the legislation of the Commonwealth of Massachusetts increasing the rights of married women. The court held, however, that there had been no substantial change in the statutes upon this subject since the decision in *Bigaouette v. Paulet*, and that notwithstanding the progress of legislation in giving married women the control of their time and actions, this right of the husband was not destroyed. While the unity and identity of interest which, by the common law, existed between husband and wife have been impaired, they have not been entirely done away with. The court continued:

"The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain different duties and obligations towards

each other, in sickness and health, which it cannot be supposed that the legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole separate account, as her husband may; nevertheless each owes certain duties to the other which are not annulled by the statutes (*Mewhirter v. Hatten*, 42 Iowa, 288). These duties are included in the word '*consortium*;' but the extent of these duties, or of the right of *consortium*, need not now be determined. The only question presented to us is whether the presiding justice was right in allowing the jury to consider at all the loss of *consortium*. It is argued by the defendant that if a husband has a right to recover for loss of *consortium* through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statute, in case of such an injury to her husband; and that this has never been held, or even contended for. She has no such right at common law, but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony."

#### WILLIAM WIRT AT THE TRIAL OF AARON BURR.

THE trial of Aaron Burr is almost unparalleled in interest, and in many respects in importance. Burr stood at the bar proudly pre-eminent among the great lawyers engaged in the case for and against him, accused of the highest and darkest crime in the Criminal Code, with the eyes of the nation upon him, and, in the opinion of many, already condemned, for he had the power, the prejudice, the influence and the unceasing activity of the government, from the president to the lowest official, against him. He was surrounded by spies, secret informers, arguèd political enemies, to magnify every minor incident into the enormity of treason. What single individual, without political power, without great wealth or influence, can successfully contend against all this fearful opposition? was a question that pervaded the public mind, resulting in the natural answer, "No one can."

The importance of this trial is increased by the great legal questions that arose and were discussed in it, and settled by the opinions of John Marshall, the chief justice of the United States, who presided at the trial, and by the un-

exampled eloquence, learning and skill of the counsel engaged in it.

But among them all William Wirt's speech against Burr made the strongest and most enduring impression on the public mind of any of the arguments delivered on this trial. Though it was not the most learned of these speeches, it is unequalled in power of sarcasm, in luxuriance of fancy, polished, rankling invective, picturesque elocution and fervid imagination. As Burke said of Sheridan's speech on the trial of Warren Hastings, "In vivacity of allusion, beauty and elegance of diction, copiousness of style, extent of conception and force of imagination, it stands unrivaled in the eloquence of antiquity or modern times." Where proof was wanting, and it was wanted on the whole trial on the part of the prosecution, Wirt supplied it with the creation of his fancy; for facts he interposed the fictions of his imagination; with Machiavellian's art, and perfect command over the most dazzling figures of speech, he drew a portrait of Aaron Burr's alleged enormous guilt, as terrible as the production of the great Italian painter, the contemplation of which drove the artist himself insane. Wirt drew a frightful picture, and endeavored to apply it to Col. Burr; but there is no resemblance.

For generations a part of this speech of Mr. Wirt has been declaimed by school-boy orators, mouthed by ambitious elocutionists, and quoted by the enemies of Aaron Burr as indubitable proof of his guilt as a traitor to his country, when, as we have said, there was not a particle of proof on which to hang these withering and brilliant denunciations. Those who heard these repeated declamations believed they were listening to the evidence adduced on the trial of Burr, and indignation against him and contempt for his memory were the result. Perhaps nothing in the whole career of that great and unfortunate man did so much to so cruelly blacken his memory as this speech of William Wirt. Let us examine a synopsis of the evidence given on the trial of Burr, and learn on what false foundation this speech was made.

With the exception of the great arguments to which we have referred, the trial was an ignoble failure, for the want of evidence against Burr rendered it almost a travesty. In his opening address, Mr. Hay, the attorney-general, informed the jury that he had abundant evidence to prove the overt acts of treason against Burr alleged in the indictment; that this evidence would show that he assembled a large body of armed men on Blennerhassett's Island, with whom it was his intention to wage war against the Spanish provinces and capture New Orleans; that he intended to detach the loyalty of the people of that country from this, and establish an independent government there, of which he was to be the head,

and thus dismember the Union; that for the purpose of accomplishing these treasonable designs he made two long visits to the western country, and finally, in the autumn of 1806, he visited New Orleans; that men were actually enlisted and drilled, armed boats built on the waters of the Ohio river, and provisions purchased to an immense amount; that heavy cannon, mortars, muskets, swords and every deadly instrument of war was provided for a powerful, well-disciplined army; that it was nearly ready to move on New Orleans, when the men were dispersed, their arms captured, the gunboats taken and the whole campaign interrupted by the troops of the government.

After lengthy arguments on preliminary questions, among which was a successful motion of Col. Burr for a *subpœna deuces tecum* to compel Thomas Jefferson, president of the United States, to appear before the court as a witness, and bring with him certain documents which were important for the defense, the attorney-general introduced the evidence on the part of the people. Fifteen witnesses were sworn, not one of whom established a single fact that amounted to an overt act of treason, or a single material allegation in the indictment. It was not even shown that Burr was present on Blennerhassett's Island, the scene of the alleged treason; but it was proved by the people's witnesses that he was two hundred miles away, in the State of Kentucky.

It appeared by the proof of the people's witnesses that the armed gunboats in which, as Mr. Hay alleged, the army and Mr. Burr were to descend the Mississippi and take New Orleans, the strongest fortified city in the nation, were fifteen in number, ten feet wide, forty feet long, and constructed exactly like the flatboats used on the Mohawk river. When the evidence describing this formidable (?) flotilla was given, it created a ripple of laughter throughout the court-room. It was shown that Mr. Hay's large and invincible army consisted of from twenty to twenty-five men, a few of whom had rifles, two or three shotguns, and one man a brace of pistols. The evidence showed there were no cannon, no drilling of troops or enrollment of men, and finally none of the "pomp and circumstance of treasonable war," upon which the attorney-general dilated with so much eloquence. It was proved that two men with shotguns were seen to go into the woods and to return, after a few hours' absence, with half a dozen squirrels they had killed. It was proved that the famous Comfort Tyler, who had charge of the boats, purchased about eight or nine hundred dollars worth of provisions, consisting of pork, flour, meal and stores. It was proved by nearly all the witnesses sworn that the men present with Mr. Tyler had engaged to emigrate with him to Nachitoches, on the Red

river, where Tyler, Burr, Governor Allston, of where Tyler, Burr, Governor Allston, of South Carolina, Col. Swartout, and several other wealthy gentlemen, had purchased an immense tract of land, which they were intending to colonize.

Commodore Truxton, who testified on the part of the people to several conversations with Burr concerning his intentions in the expedition down the river, stated he always understood that it was the design of Col. Burr and these gentlemen we have mentioned to colonize the tract of land which they had purchased, and that the men present on Blennerhassett's Island were emigrants to settle on the lands. Truxton further testified that he regarded Col. Burr as too good a soldier to attempt to capture New Orleans, strongly fortified as it was, with fifteen or twenty Mohawk flat-boats and thirty men, some of whom were armed with shotguns, rifles and a brace of pistols, without cannon or other munitions of war; that in his conversation with Mr. Burr respecting his military and naval subjects and the Mexican expedition, he always said they depended on the event of war with Spain, which he was confident would soon be declared; that in that event the Mexican expedition would aid the government in conducting it.

Gen. Eaton testified to frequent, rambling and contradictory conversations with Burr in regard to his plans touching his proposed descent down the Mississippi; that from these admissions Eaton was convinced Burr's designs were dangerous and treasonable, and yet, on his cross-examination, Eaton testified that he waited on the president several times and strongly urged Burr's appointment as minister to England.

Dudley Woodbridge, a witness for the prosecution, testified that Blennerhassett was totally unfit for any military duty; that he was very near-sighted, and could not distinguish a man from a horse ten steps away; that he was a man of moderate means, considerably embarrassed; that he was regarded as a man of talents and of literary taste; that among the people of the country he was considered a man having every kind of sense, except common-sense; in other words, that he had more of other than common-sense; that he cultivated, with some success, a taste for music, and gave a little attention to the study of chemistry. Mr. Woodbridge further testified that when the government troops in a hostile manner were approaching the home of Mrs. Blennerhassett, she left it, taking a part of her husband's library; that the remainder was taken by the troops, who broke into the house, destroyed the furniture, mutilated the rooms, helped themselves to Blennerhassett's wine, and desecrated the grounds. It was further testified by Woodbridge that the troops seized Mr. Burr's property, consisting of boats, provisions and

stores, to the amount of many thousand dollars, for which no recompense was ever made.

It also appeared in evidence that when Burr descended the Mississippi, *en route* for New Orleans, as Mr. Hay had stated in his opening, he did so in an elegant yacht, furnished by Major-General Wilkinson, of the United States army, in command of the department of the southwest. On his voyage down the Mississippi, Burr landed at many of the principal cities, where he was received with ovations and every public demonstration of respect and honor. On his arrival at New Orleans he was received by Governor Claiborne, the mayor of the city, all the other principal officials of the State and city, and tendered a banquet of



WILLIAM WIRT.

From an original painting in the Congressional Library at Washington.

unusual elegance and luxury; he reviewed the troops of the State, and was the city's honored guest for two weeks.

At the close of the evidence of the eight witnesses, Mr. Burr insisted that the counsel for the people should adduce, without further delay, all the testimony they had relating to an overt act of treason; that, notwithstanding two weeks had elapsed since the evidence in this case was opened, there had not been any overt act of war, tumult or insurrection, nor the semblance of any overt act, proven, and he, therefore, moved the court to direct the attorney-general to produce all his evidence of the overt acts charged in the indictment. The chief justice decided Mr. Burr's motion in order, but suggested that it be postponed. A long



discussion followed, at the conclusion of which the attorney-general said he would produce other witnesses, by whom he expected to prove overt acts of treason. Accordingly, two witnesses were sworn and examined by him, who totally failed to establish any fact that had the color of an overt act. The attorney-general made no offer to produce further evidence to prove an overt act of treason.

This brought the counsel for the defense to submit the following questions for the consideration of the court:

1. Whether there can be treason in levying war without the employment of force.

2. Whether, under the Constitution of the United States, a person who, it is admitted, would be an accessory in felony, can be considered as a principal in treason, in levying war.

3. Whether, under the form of this indictment, charging Col. Burr with having done the acts personally; any evidence of a derivative or accessorial agency can be admitted.

4. And if such evidence of derivative or accessorial treason were to be admitted under the indictment, whether the real principal ought to be first convicted.

5. Whether there can be any treason without the exercise of actual force or an overt act or acts.

6. Since, according to the proof, Burr was not present on the scene of the alleged rebellion, and Blennerhassett was, if there were an insurrection there, was not Blennerhassett the principal, and Burr an accessory, and must not a conviction of the principal be shown before the accessory can be convicted.

It was in reply to these interrogatories that William Wirt made the brilliant speech to which we have alluded. He discussed the principal leading questions with ability, keen sagacity and practical logic. He attempted to show that, although Burr was not present on Blennerhassett's Island, he was there constructively, and therefore the principal in the crime. His argument will always be read by the professional reader with interest and instruction; it was rendered memorable by the parallel he drew between Burr and Blennerhassett, in his ingenious attempt to demonstrate the stupendous guilt of the former, and by the terrible invectives he launched upon him.

We have seen all the evidence the United States government could bring against Burr on this trial: now let us see what use Wirt made of it in his speech, which must be regarded an offspring of genius, classical taste and fervid imagination, equal to the triumph of his pen in writing the "British Spy." Let us see if it is a triumph of forensic learning, strength and truth.

"Having shown, I think, on the grounds of law," he said, "that the prisoner cannot be considered as an accessory, let me press the inquiry whether, on the ground of reason, he be a princi-

pal or accessory; and remember that his project was to seize New Orleans, separate the Union and erect an independent empire in the west, of which he was to be the chief. This was the destination of the plot—the conclusion of the drama. Will any man say that Blennerhassett was the principal and Burr the accessory? Who will believe that Burr, the author and projector of the plot, who raised the forces, who enlisted the men, and who procured the funds for carrying it into execution, was a mere cat's paw? Will any man believe that Burr, who was a soldier, bold, ardent, restless and aspiring, the great actor whose brain conceived and whose hand brought the plot into operation, could sink down into an accessory, and that Blennerhassett could be elevated into a principal? He would startle at once at the thought. Aaron Burr, the contriver of the whole conspiracy, to everybody concerned in it was as the sun to the planets which surround it. Did he not bind them in their respective orbits and give them their light, their heart, their motion?"

Where was Mr. Wirt's proof of any or either of the charges thus made? On what authority did he say that Burr's plans were to seize New Orleans? What forces did he raise? What men did he enlist? What plot was proved of which he was the author? What men did he "bind in their respective orbits, and give them their light, their heart, their motion?" But he continues in a bolder and more inventive course:

"Let me put the case between Burr and Blennerhassett. Let us compare the two men and settle this precedent between them.

"Who Aaron Burr is we have seen already. I will add that, beginning his operations in New York, he associated with men whose wealth is to supply the necessary funds. Possessing the main-springs, his personal labor contrives all the machinery. Pervading the continent from New York to New Orleans, he draws into his plan, by every allurements he can contrive, men of all ranks and conditions. His recruiting officers are appointed: men are engaged throughout the continent. Civil life is indeed quiet upon the surface, but in its bosom the man has contrived to deposit the material which, with the slightest touch of his match, will produce an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806 he goes forth to apply the match."

Does it not appear to the reader that, with all this immense preparation of Burr, appointing his recruiting officers, engaging men throughout the continent, enlisting troops, "depositing material in the bosom of civil life which, with the slightest touch of his match, would produce an explosion that would shake the continent," only eight or ten witnesses could be found by the whole force and power of the United States government to testify against him, not one of whom could relate a single

fact showing even a distant attempt of Aaron Burr to perpetrate the great crimes thus charged against him; that not even the semblance of an overt act of treason could be proved? But he continues with the question:

"Who is Blennerhassett? A native of Ireland; a man of letters; he fled from the storms of his own country to find quiet in ours. On his arrival in America he retired even from the population of the Atlantic States, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste, science and wealth; and lo! the desert smiled! Possessing himself of a beautiful island in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery that Shenstone might have envied blooms around him. Music that might have charmed Calypso and her nymphs are his. An extensive library spreads its treasures before him. A philosophic apparatus offers to him all the secrets and mysteries of nature. Peace, tranquility and innocence shed their mingled delights around him. And, to crown the enchantments of the scene, a wife, who is said to have been lovely even beyond her sex, and graced with every accomplishment that can render it irresistible, had blessed him with her love and made him the father of several children. The evidence must convince you that this is but a faint picture of the real life."

"In the midst of this peace, this innocent simplicity and this tranquility, this feast of the mind, this pure banquet of the heart, the destroyer comes; he comes to change this paradise into hell. Yet the flowers do not wither at his approach. A stranger presents himself. Introduced to their civility by the high rank which he lately held in his country, he soon finds his way to their hearts by the dignity and elegance of his demeanor, the light, beauty and grace of his conversation, the seductive and fascinating power of his address. Such was the state of Eden when the serpent entered its bower. He breathed into the unfortunate Blennerhassett the fire of his own courage: a thirst for glory and great enterprises, for all the storm, bustle and hurricane of life. In a short time the whole man is changed, and in a short time his former delights are relinquished. Greater objects have taken possession of his soul. He has been taught to burn with restless emulation at the name of great conquerors. His enchanted island is destined soon to relax into a wilderness, and we soon find the beautiful and tender partner of his bosom shivering at midnight on the winter banks of the Ohio, and mingling her tears with the torrents that froze as they fell. Yet this unfortunate man, thus ruined and undone, and made to play a subordinate part in this grand drama of guilt and treason, is to be called the principal offender, while he by whom he was thus plunged in misery is a mere accessory! Is this reason?

Is this law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and so absurd, so revolting to reason!

"Upon the whole, sir, reason declares Aaron Burr the principal in the crime, and confirms herein the sentence of the law and the evidence. It is clear from the evidence that Burr did not derive his guilt from the men on the island, but imparted his own to them."

When the readers of this speech, or the listeners to it when declaimed by ambitious school-boys, are touched by tearful sympathy for the beautiful wife of Blennerhassett, "shivering at midnight on the winter banks of the Ohio, and mingling her tears with the torrents that froze as they fell," her home ruined, and then turn to the proof in the case, given by the witnesses for the prosecution, and find from it that this beautiful woman was driven from her home by the rough, licentious, brutal militia of Woods county, her home desecrated and ruined by them; that Blennerhassett was, before his acquaintance with Burr, on the eve of bankruptcy, nearly a physical wreck, and find no proof that Burr was guilty of any of these offenses charged against him in regard to Blennerhassett, they feel that the lawyer was lost in his fancy, or his imagination and poetic frenzy, they feel, indeed, that

"False eloquence, like the prismatic glass, Its gaudy colors read on every side."

This celebrated case was brought to a close in the afternoon of August 20, 1806, by the argument of Luther Martin, one of the counsel for Burr, the greatest lawyer of his time. His speech appealed powerfully to the intellect, the reason and good sense of his hearers. His object seemed to be, not to captivate by brilliant painting, picturesque image, or startling figure, but by earnest, close reasoning and matchless learning to enlighten the court as to the truth and justice of his defense.

He based his argument on the following points: "Under the Constitution," he said, "no person can be convicted of treason unless on the testimony of two witnesses; that the act must be war in itself, not an innocent act, rendered treasonable by evidence of confession or extrinsic circumstances. There must be some actual force or violence to constitute the crime of levying war; in other words, there must be an overt act proved by two witnesses; that testimony on this point must be notorious, actual and unequivocal; that to constitute levying war against the United States requires the assemblage of men ready to act, with intent to do some treasonable or warlike act, and armed in a warlike manner; that to render a person guilty of treason he must have been present and taken an active part in treasonable acts."

Martin concluded his great argument in the following eloquent peroration:

"We have been told, sir, by the attorney-gen-

eral, in his opening, that he had abundant proof of the existence of a great and formidable rebellion inaugurated by Aaron Burr, with his headquarters on Blennerhassett's Island, from whence he was about prepared to strike a powerful blow — a blow that would dismember the Union. He insisted that Burr was prepared to do this, with well-drilled troops, provided with heavy ordnance, munitions of war, gunboats and small arms of every kind; that the country is alarmed from Maine to New Orleans, arming to crush this dangerous rebellion. If this formidable array exists, how easy it would be for a powerful government to prove it, or some small part of it. Has this been done? Henry IV. fell a sacrifice to the machinations of the Jesuits — they predicted his fall, and he fell. The enemies of Aaron Burr have compassed his death on the scaffold as subtle and as powerful as those which hurled an English monarch from his throne. In the conflicts of political animosity justice may be forgotten, or sacrificed, to mistaken zeal and prejudice. We look up to the judiciary to guard us. Of one thing I am certain — that you will disregard consequences; that you will determine '*fiat justitia*,' let the result be what it may."

On Monday morning, August 31, 1806, Chief Justice Marshall pronounced an opinion, which placed him first among the great jurists of the world. It is as follows:

"This indictment charges Aaron Burr with levying war against the United States, alleging an overt act of levying war. That overt act must be proved, according to the Constitution and the act of congress, by two witnesses. It is not proved by a single witness. The presence of the accused is an essential component part of the overt act, and there is not only no witness of his actual legal presence, but the fact of his absence is not controverted. This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was secured by the accused. On that point the court withholds its opinion for the present, as it is understood, from the statements made by the prosecution, that such evidence exists; let it be offered, and the court will decide upon it. It is proper to say that no overt act of treason has yet been proved to have been committed by any person or persons on Blennerhassett's Island. The attorney-general informed the court that he had nothing to offer to the jury of evidence or argument, and that he must leave the case with the jury.

"The jury," said the chief justice, "have heard the opinion of the court on the law in this case. They will apply it to the facts, and find a verdict of guilty or not guilty, as their consciences may direct."

The jury retired, and in a short time returned a verdict that,

"We, the jury, find that Aaron Burr is not

proved to be guilty under the indictment. We, therefore, find him not guilty," whereupon the verdict of "not guilty" was entered in the minutes of the court.

Thus ended the first, and, in some respects, the greatest, trial for treason recorded in American legal history. Reading it forcibly reminds us of Lord Erskine's remarks on the defense of Lord George Gordon for an offense similar to that of Burr's, with a like failure of the prosecution's evidence.

"O fie! O fie! fie!" exclaimed his lordship to the jury when the evidence closed. "Is the intellectual seat of Justice to be thus impiously shaken? Are your benevolent propensities to be thus disappointed and abused? Does the prosecution wish you, while listening to this evidence, or this failure of evidence, to connect it with unforeseen consequences, in spite of reason and truth? Is it their object to hang a millstone of prejudice around the neck of an innocent man to sink him? If there be such men, may Heaven forgive them for their attempt, and inspire you with fortitude and wisdom to rise superior to prejudice, popular clamor, family hatred and jealous enemies: to do your duty with calm, steady and reflective minds. There is no evidence against the accused, and they ask you to send him to the scaffold on public opinion and the hatred of political enemies."

L. B. PROCTOR.

ALBANY, July, 1897.

### Notes of Cases.

In *Loudoun v. The Eighth Avenue Railroad Co.* (16 App. Div. 152), decided by the Appellate Division of the New York Supreme Court, First Department, a somewhat novel question was decided. The evidence showed that there had been a disclosure by one of the medical witnesses for the defense of facts, knowledge of which he had obtained as the physician of the plaintiff. Counsel thereupon made several observations reflecting upon the character of the witness, and read the sections of the Code prohibiting disclosures of such professional communications. This the Appellate Court held was proper, saying: "The counsel was justified in calling the attention of the jury to the fact of this violation of law, of this failure of appreciation of the duties of a professional man to his patient, and the flagrant abuse of the position which he occupied. It cannot be said that too severe language was used in criticising the conduct of a physician who would thus betray his patient. Counsel have a right to criticise the conduct of witnesses. If it is the subject of an inadvertence, they have a right to bring the attention of the jury to it, and it is not error in the court to permit counsel to exercise this right."

Judge Kirkpatrick, in the United States Circuit Court, at Trenton, N. J., has decided in favor of the government in its appeal against the Balbach Smelting and Refining Company, holding that lead bullion imported into this country for refining in bond must pay duty on the entire weight imported, and not upon the weight of lead after gold, silver, etc., and refuse have been extracted. Judge Kirkpatrick, in his decision, overrules the board of general appraisers, who ruled that "the merchandise, which was entered in bond for refining or smelting, is known in trade as base bullion or lead bullion, and that it is not, in fact, nor is it commercially, known as pig lead or lead in pigs. The bullion is in pigs or bars of about 100 pounds each, and contains about 97 per cent. of lead, the remaining three per cent. being gold, silver, copper and various impurities. "It is in evidence," the board continues, "that the value of pure lead is about two and three-tenths of a cent a pound in bond, while the value of the bullion in question is nearly ten cents a pound, thus showing that the lead is far from being the component material of chief value, and that, on account of its cost, if for no other reason, the article is unsuitable for use as lead. We are of the opinion that the merchandise is metal in a crude form, requiring refining or smelting; that it is covered by section 21, act of August, 1894, and that the refined metals produced from it are dutiable at the rates provided by law under regulations of the secretary of the treasury upon entry for domestic consumption, and not upon the gross weight of the bullion."

In *Weston v. Jordan*, decided by the Supreme Judicial Court of Massachusetts, in May, 1897 (47 N. E. Rep. 133), it was held that where a customer bought stock through a broker, and paid him part of the price as margin, and the broker undertook to carry the stock, but failed to keep it or any stock of the same kind, in his hands, and was unable and refused to deliver such shares on demand, and the customer subsequently paid to the broker the balance of the price, and received the number of shares bargained for, which were then worth more than the sum paid, having reasonable cause to know that the broker was not then solvent, and had procured the shares by purchase in the market, the transaction was a preference in violation of the insolvent laws, to the extent of the excess of the value of the shares delivered above the sum then paid, since, on the broker's refusal to deliver, a right of action accrued to the customer, which would be provable in insolvency against the broker as a "debt," under Mass. Pub. St., c. 157, § 26.

In *People v. Lewis*, decided by the Supreme Court of California, in May, 1897 (48 Pac. R. 1088), it was held that a person attacked in his

own house is not necessarily obliged to retreat in order to justify killing his assailant. The following is from the opinion reversing a judgment of conviction of the defendant of manslaughter: Upon the law of self-defense, the court instructed the jury as follows: "The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is, Would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this was defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger. *If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly, or, as the books have it, must retreat to the wall.* But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack may be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of slaying his assailant avoided. If the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no further."

The New York Court of Appeals recently rendered an important decision construing the Banking Law. The case was that of the Murray Hill Bank's application for a voluntary dissolution. The question was whether a bank had the right to institute proceedings for a voluntary dissolution after the superintendent had taken possession. The court held that after the superintendent of banks, acting under the provisions of the Banking Law, has taken possession of the assets of an insolvent bank, with the intention of having an action brought by the attorney-general to dissolve the corporation, it is then too late for the directors of the bank to institute proceedings for voluntary dissolution. Such an action by the attorney-general takes precedence of a proceeding under the Code by the directors for voluntary dissolution, notwithstanding the proceeding was commenced prior to the action, but subsequent to the time when the superintendent took possession of the bank. Both the action and the proceeding cannot be carried on together.

In *Taliaferro v. Travelers' Protective Ass'n of America*, decided by the U. S. Circuit Court of Appeals, Eighth Circuit (80 Fed. R. 368), it was held that a benefit certificate insuring against "death by accident" does not cover a case where the insured was shot in a quarrel in which he was

the aggressor, and violently attacked his adversary with a pistol, accompanying the act with the exclamation that he must have revenge, and warning his adversary "to put himself in shape." The court said, in part: "The case on which counsel for the plaintiff in error appears to place most reliance is *Lovelace v. Association* (126 Mo. 104, 114; 28 S. W. 877), but in that case, while it appeared that the deceased had engaged in a quarrel which he might very well have avoided, it did not appear that he had drawn a weapon of any sort, or that he knew, when he engaged in the quarrel, that his opponent was armed. So far as the case showed, the deceased had no reason to expect, when he engaged in the encounter, that it would result in any bodily harm to either party, and for that reason the court appears to have held that the unexpected result of the affray was an accident, so far as the deceased was concerned. The case in question, and the other cases to which our attention has been particularly invited, to wit, *Hutchcraft's Ex'r v. Travelers' Ins. Co.* (87 Ky. 300, 8 S. W. 570), *Phelan v. Insurance Co.* (38 Mo. App. 640), and *Supreme Council Order of Chosen Friends v. Garrigus* (104 Ind. 133, 140; 3 N. E. 818), are clearly distinguishable from the case at bar. According to the undisputed facts disclosed by the present record, the deceased voluntarily engaged in an encounter with deadly weapons, the result of which was not an unlikely result, but was such as any reasonable person might have foreseen."

### LIBEL.

#### REQUISITES OF PUBLICATION — PRIVILEGED MATTER.

#### COURT OF APPEALS.

June, 1897.

GEORGE W. YOUNMANS, as Administrator, &c., of William Youmans, Deceased, Respondent, v. SHERRILL E. SMITH et al., Appellants.

An action to recover damages for libel cannot be maintained upon proof simply that the libelous words were composed and were in existence as written or printed matter, without being known to any one except the author and the victim. Unless communicated to some third person no damage, either actual or presumed, can result.

Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows. He who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler.

When an attorney, before trial, prepares and circulates among his witnesses printed questions containing matter reflecting injuriously upon the character of the party against whom they are intended to be used, and the questions are such as the attorney might reasonably suppose would be material and pertinent upon the trial, they cannot be made the subject of an action for libel, either against the attorney or the party who printed them, but are treated in law as privileged matter.

Appeal from a judgment of the General Term of the Supreme Court in the Fourth Judicial Department, entered on the verdict of a jury.

This action was commenced in May, 1890, by William Youmans, a practicing attorney, residing in the village of Delhi, against the defendants, who published a newspaper and carried on a printing business at the same place, to recover damages for the publication of certain printed matter alleged to be a libel upon the plaintiff. The defendants, by their answer, admitted that they printed the matter in question, but denied that they published it, and alleged that whatever they did was privileged. On the trial it appeared that, in November, 1888, one Richard Whigham had presented a petition to the General Term of the Supreme Court, alleging that the said William Youmans had "for a long time been guilty of disreputable and unprofessional conduct, and corrupt and venal acts and practices," and asking that he be deprived of his right to practice law. Thirty-five specifications of assault and battery, perjury, defamation, malicious prosecution, dishonesty, oppression of clients and others, and the use of vile epithets towards neighbors, &c., &c., were set forth and supported by the affidavits of eighteen witnesses. Mr. Youmans filed a denial, supported by the affidavits of fifty-four witnesses, and the court sent the matter to a referee to take the proofs and report the same at a later term. In preparing for the hearing before the referee, Calvin H. Bell, the attorney for the petitioner, prepared a list of "questions to be asked" during the investigation, and taking it to the printing office of the defendants, in their absence, and without their knowledge, employed the foreman in charge to print fifty copies of the same, stating that "he wanted them printed for the purpose of handing a copy to each witness, to be used in the disbarment suit." The copies were printed accordingly and delivered to Mr. Bell, who paid for them, and neither of the defendants knew anything about the matter until afterwards. The questions which were not published either in the newspaper or otherwise, as herein stated, were as follows:

#### "QUESTIONS TO BE ASKED:

"From the speech of people, what is Mr. Youmans' general character in the community in which he lives? Good or bad?

"What is his general character for truth and veracity? Good or bad?"

"What is his general character in respect to bearing false witness? Good or bad?"

"What is his general character in respect to insulting, traducing and villifying people? Good or bad?"

"What is his general character in respect to the promotion of virtuous actions, good principles and good conduct? Good or bad?"

"What is his general character in respect to licentious, obscene and vulgar conversation? Good or bad?"

"What is his general character in respect to his attacking and doing bodily harm to people? Good or bad?"

"Whilst you have known him, what has his influence as a lawyer been on the people where he resides? Good or bad?"

Mr. Bell mailed a copy of the questions to various persons who were subpoenaed by him as witnesses in said proceeding, but, so far as appears, made no other use thereof. No evidence was given tending to show express malice on the part of the defendants or either of them. At the close of the evidence, the counsel for the defendants asked the court to direct a verdict in their favor, upon the ground that their action, through their foreman, was privileged; that they never published nor circulated any of the papers, and that the delivery of the copies to Mr. Bell, the attorney in the disbarment proceedings, for use therein, was a privileged delivery. The motion was denied, exception was taken and the case submitted to the jury, who found a verdict in favor of the plaintiff for the sum of \$1,000. Upon appeal to the General Term that court affirmed the judgment rendered at the Circuit, and the defendants now come here.

Edwin Countryman and W. H. Johnson for appellants; Geo. W. Youmans and Charles L. Andrus for respondent.

VANN, J. — The appellants do not deny that the jury could lawfully find the words in question to be libelous, but they contend that they were not published within the meaning of the law relating to the subject, and that even if published, they were privileged.

An action to recover damages for libel cannot be maintained upon proof simply that the libelous words were composed and were in existence as written or printed matter, without being known to any one except the author and the victim. Unless communicated to some third person, no damage, either actual or presumed, can result. As said by a learned author, "until the publication the act is not complete in its mischief; before it is dispersed abroad it can produce no present or actual injury, either to the public or the individual, and until then there is a *locus penitentiae* on the part

of those concerned in the composing and writing." (Holt's Law of Libel, 281.)

Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows. He who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication, and becomes the instrument of the libeler. (Trumbull v. Gibbons, 3 City Hall Rec. 97; Rex v. Burdett, 4 B. & Ald. 95, 143; Rex v. Clerk, 1 Barnard. 304; Baldwin v. Elphinstone, 2 W. Black. Rep. 1037; The King v. Paine, 5 Mod. 105, 107; Bishop's Criminal Law, § 927; Townsend on Slander and Libel, §§ 104, 115; Hall on Libel, 293; 2 Starkie on Slander, 225; Odgers on Libel and Slander, \*157; Flood on Libel and Slander, 46; Cooke on the Law of Defamation, 138.)

It is very clear from these authorities that as the defendants, through their agent, printed the libel and delivered the printed copies to the author, knowing that he intended to submit them to various persons to be read, they became liable as publishers from the moment that any third person read the libelous matter, provided the words were not privileged.

The question of privilege is not so easily disposed of, not because the law relating to the subject is unsettled, but because its application to a novel state of facts is somewhat difficult. The law governing the privilege of parties and their counsel, so far as applicable to the case in hand, was well stated by Judge Grover in March v. Ellsworth (50 N. Y. 300, 311), as follows: "A counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; \* \* \* within such limit the protection is complete, irrespective of the motive with which they are used, but such privilege does not extend to matter having no materiality or pertinency to such questions." (Gilbert v. People, 1 Denio, 41; Hastings v. Lusk, 22 Wend. 410; Ring v. Wheeler, 7 Cow. 725.) In applying this principle the courts are liberal, even to the extent of declaring that where matter is put forth by counsel in the course of a judicial proceeding that may possibly be pertinent, they will not so regard it as to deprive its author of his privilege, because the due administration of justice requires that the rights of clients should not be jeopardized by subjecting their legal advisers to the constant fear of suits for libel or slander. (Hastings v. Lusk, *supra*; Warner v. Paine, 2 Sandf. 195, 201; Brook v. Montague, Cro. Jac. 90; Hodson v. Scarlett, 1 B. & A. 232; Missouri Pacific R. Co., 4 L. R. A. 280, note;

Cooke's Law of Defamation, 63.) Any other rule would be an impediment to justice, because it would hamper the search for truth, and prevent making inquiries with that freedom and boldness which the welfare of society requires. If counsel, through an excess of zeal to serve their clients, or in order to gratify their own vindictive feelings, go beyond the bounds of reason, and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant the inference of express malice, they lose their privilege and must take the consequences. In other words, if the privilege is abused, protection is withdrawn.

Mr. Bell, the author of the words in question, was the attorney for the petitioner in a proceeding duly instituted in a court of competent jurisdiction for the disbarment of the plaintiff. The matter was pending and soon to be tried before a referee, who had power to compel the attendance of witnesses and to require them to answer under oath such questions as he should deem material. The issue was an unusual one, presenting a broad field of inquiry, and involving the personal and professional character of a member of the bar. It was the duty of Mr. Bell to make adequate preparation for the trial and to anticipate, as far as he could, what questions the referee might allow to be asked, both on direct and cross-examination, during an investigation, wide in its scope in any event, and which, through liberal rulings of the referee, or the failure to object by counsel, might embrace almost any question reflecting light upon private character. He could draft "questions to be asked" so as to adapt them to the changing phases of such a trial, and submit the list to witnesses for consideration and reflection before they went upon the stand. (*Delany v. Jones*, 4 Esp. N. P. R. 191; *Flood on Libel and Slander*, 156; *Holt*, 184.) While such a course may be open to criticism, there can be no question that he had a strict legal right to do so, provided the questions were confined to such subjects as were, or might become, material during the progress of a trial. As it was reasonable to believe that the attorney proceeded against would be a witness in his own behalf, the usual questions put to impeaching witnesses in relation to character for truth and veracity were clearly material. But Mr. Bell was not compelled to stop there in his preparation of a list of "questions to be asked." He had the right to anticipate that witnesses would be called to sustain the character of Mr. Youmans and to prepare for a thorough cross-examination, which, in a proceeding of this character, would be apt to take a wide range. (*Stape v. People*, 85 N. Y. 390.) As some of the specifications involved accusations of serious crime, which might be sustained by circumstantial evidence, or by the testimony of witnesses of doubtful credit, proof of the general good character of Mr. Youmans might

be received, the same as upon the trial of an indictment, in order to rebut the presumption of guilt arising from such evidence by creating a reasonable doubt. (*People v. Parlie*, 7 N. Y. Cr. Rep. 30, 2 *Rice on Evidence*, 1242.) If a sustaining witness should testify to good character generally, or to good reputation for truth and veracity, and that he would believe Mr. Youmans under oath, it would not be unreasonable to prepare questions for such a witness of the kind complained of in this action. Whether all of those questions would be strictly competent, even on cross-examination, if objected to, it is unnecessary to decide, for the attorney had the right to prepare for the contingency, which not unfrequently happens, of having the door of investigation as to character thrown wide open and the challenge broadly made to ask any question relating to the reputation of Mr. Youmans in respect to any subject. From the nature and extent of the charges, as well as the number of accusing and sustaining affidavits read before the General Term upon the presentation of the petition, it was probable that the deportment and reputation of Mr. Youmans in the community where he lived would be the subject of thorough investigation. In preparing for such a controversy and all its possible variations, we cannot say that any one of the questions under consideration might not become material. We are hence, of the opinion that Mr. Bell had the right to draft said question for use during the trial and in preparing therefor, and that they were privileged in his hands and in the hands of his agents, at least so long as they were used solely for those purposes. Whatever he could lawfully do himself in preparing for trial, he could employ others to do for him. As he needed more than one list, he could copy it himself, or employ a clerk to multiply copies with a pen, or a printer with a printing press. Whatever he had the right to do in conducting the matter for his client, according to the ordinary course of procedure, he was protected in doing by the broad shield of privilege, and could not be held liable in damages, even if what he wrote or said reflected injuriously upon the character of others. The privilege that protected him also protected his agents and employees in whatever they did at his request that he could have lawfully done himself. He had the right, by personal interviews, to ask the various persons, who were expected to be witnesses in favor of either side, upon the question of character, how they would answer the questions under consideration, or to send an agent to make the same inquiry, with a copy of the list as a memorandum. While we do not commend the practice, we cannot say that it is unlawful. The questions might have been prepared and printed for use in connection with a commission to examine absent witnesses, or to be used by counsel as a part of the trial brief. As they were not so manifestly imma-

terial that under no circumstances could they be asked upon the trial, we think that the drafting and the printing of the same was privileged and protected both the attorney and his employes against a prosecution for libel. Whatever he wrote, or they printed for him, that was material to the ordinary course of justice in the judicial proceeding pending at the time, was not libelous, because, upon grounds of public policy, the law made it privileged in order that counsel, having a duty to discharge, might write or "speak with that free and open mind which the administration of justice demands."

For these reasons we think that the judgment appealed from should be reversed, and, as the plaintiff has died pending the appeal, without awarding costs or a new trial.

All concur, except MARTIN, J., not sitting.

Judgment reversed.

#### MASSACHUSETTS LIBEL LAW.

THE following is the full text of the reform Libel Law, which, after a contest of two sessions, was passed in the Massachusetts legislature, and approved by the governor:

SECTION 1. In any action for libel the defendant, after notice in writing given to the plaintiff or to his attorney, at any time before the answer is required to be filed therein, of his intention to publish a retraction of such libel, accompanied by a copy of the retraction which he is prepared to publish, may give in evidence in mitigation of damages that he so published such retraction, or if upon such notice the plaintiff does not accept the offer so to publish such retraction, the defendant may give in evidence in mitigation of damages that he offered to publish such retraction, and that said offer was not accepted, and that the alleged libel was published in good faith and without actual malice; and unless the plaintiff prove actual malice or want of good faith, or a failure either to retract or offer to retract, as aforesaid, he shall recover only compensation for the actual injury sustained; and in no action of libel shall exemplary or punitive damages be allowed.

§ 2. In any civil action for libel the defendant may allege and prove, in mitigation of damages, that the plaintiff has already recovered damages for, or has received or has agreed to receive compensation in respect of substantially the same libel as that for which such action was brought.

§ 3. Whenever two or more civil actions are pending, whether in the same or different counties of this Commonwealth, brought by the same plaintiff for substantially the same libel, any justice of the court in which such actions are pending may in his discretion make an order that any or all of them be tried together. If they are so tried the court shall, if the actions are tried without a jury,

or the jury shall if the actions are tried by a jury, find a separate verdict in each action, and judgment shall be rendered in each as if the actions had been tried separately; and in the event of judgment in favor of the plaintiff in more than one action, the court shall make such order for the apportionment of costs between the defendants in such actions as may be just and reasonable.

§ 4. Chapter four hundred and forty-one of the acts of the year eighteen hundred and ninety-five is hereby repealed, but this repeal shall in no wise affect pending actions.

§ 5. This act shall take effect upon its passage.

#### THE REFERENDUM IN NEBRASKA.

THE principle of the referendum is unmistakably growing in popular favor, and special applications thereof have ceased to cause any surprise, says the Chicago Post. But the proposed Nebraska experiment in that direction is certainly of exceptional interest on account of the completeness and thoroughness which distinguish it from the generality of similar attempts. In that State a law has been passed which enables the voters of each city and town government to adopt not only the referendum, but the initiative, a feature generally regarded as a logical corollary of the former. Two-thirds of the voters must accept the plan to make it law, and Omaha is to be the first city to submit the question at a special election shortly to be held. Whether two-thirds of the legal voters of Omaha are sufficiently intelligent to appreciate the merits of the reform and to vote in its favor is, of course, doubtful. But the friends of the innovation are hopeful, and will make a very active canvass. If the vote is for the referendum law, the city will be governed under the following arrangement: Fifteen per cent. of the voters may propose ordinances by petition, and 20 per cent. of the voters may compel the city council and mayor to submit proposed ordinances to a popular vote. As for ordinances passed by the city council of its own initiative, they are not to go into effect for thirty days, and if, meantime, five per cent. of the voters petition for the submission of any ordinance so passed to the people, the same must be so submitted and must receive the approval of a majority of the voters to go into effect. A petition from ten per cent. of the voters obliges the city government to submit the proposed ordinance at a special election held within twenty days. Only ordinances relating to the immediate preservation of the public peace and health, and items of appropriations for current expenditures, are excepted from the provisions of the referendum law. The adoption of the law would be gratifying to thousands of intelligent Americans in other cities. The experiment would be watched with keen interest, and its success would lead to widespread imitation.



### Legal Notes.

In Michigan, under Senate Bill No. 68, which became a law, no policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, or by reason of such breach of condition.

The Kentucky Court of Appeals, sitting in Louisville, recently decided a suit against an accident insurance company, brought by a woman, for \$50,000, for the death of her husband, which resulted indirectly from a mosquito bite. The lower court held that the bite was not an accident in the meaning of the word as used by insurance companies, but upon appeal the plaintiff got peremptory instructions in her favor.

The courts in Michigan will shortly be called upon to decide whether the killing of a man by a burglar is an accident. A suit has been brought by the heirs of Lafayette Ladd, of Adrian, Mich., against the Continental Masonic Accident Association of Chicago, which contends that it is not.

In North Carolina it has been decided that a private citizen who personates an ordained minister, and, with the consent of the parties, solemnizes a marriage, is not guilty of any criminal offense either at common law or under the statutes. (*State v. Brown*, 119 N. Car. 825.) The court said: "So the case is that of a private citizen, unofficial, celebrating a marriage between a man and woman with their consent, and they are not complaining, and are presumably satisfied and enjoying their new relation. We are not aware of any statute or principle of the common law declaring the action of the defendant to be a criminal offense."

The American Bar Association will hold its next annual meeting at Cleveland, Ohio, on August 25, 26 and 27, 1897. Programmes or information in relation to the association may be had by addressing John Hinkley, secretary of the association, 215 Charles street, Baltimore.

Watches are accepted as security for fines by the Police Court of Knoxville, Tenn., and forty unredeemed ones, held for two years, are to be sold at auction by the city.

A man of 66 is "aged," according to the Supreme Court of Georgia, which reasons it out this way: "While the term 'aged,' as applied to human beings, is not for all purposes susceptible of precise definition, and while it is not practicable to arbitrarily fix a period of life at which the condition of being aged may be said to have certainly begun, it is safe to hold that a man 66 years old is entitled to exemption of his property from levy and sale under that clause of the Constitution (Civil Code, § 5912) allowing this right to 'every aged or infirm person.' This is true,

although the applicant may be 'a hale and hearty man.'"

By an oversight in drafting a law recently passed by the Colorado legislature, the Fourth of July, Thanksgiving, Christmas, New Year's, Washington's Birthday and Memorial Day have been abolished as legal holidays.

It is stated on good authority that during the last twenty years Canada has granted only 116 divorces.

The American Bar Association will hold its next annual meeting at Cleveland, Ohio, on August 25, 26 and 27, 1897. Programmes of information in relation to the association may be had by addressing John Hinkley, secretary, 215 Charles street, Baltimore.

The president of the United States, William McKinley, a member of the class of 1867, Albany Law School, has signified his intention to be present, if possible, at the next annual commencement of this institution, June 2, 1898, and address the graduates and members of the alumni. It is proposed to make this an occasion for a reunion of representatives of the various classes graduated from the school since its organization, in 1851.

The negligent and terrifying acts and exclamations of a brakeman on a train carrying both freight and passengers, when made in a car containing passengers, and which cause them to jump from the train, believing that a wreck is imminent, are held, in *Ephland v. Missouri P. R. R. Co.* ([Mo.], 35 L. R. A. 107), to render the carrier liable for the injuries received in jumping, although the brakeman had no express duty to perform in or about that car.

How a witness may kiss the Testament without incurring the dangers that lurk in the ceremony is a problem that has been ingeniously solved in the Northampton County Court, where a witness, at the instance of his honor, Judge Snagge, was sworn on a Testament wrapped in clean paper. If the intervention of paper between the book and the lips does not detract from the sanctity of the oath, the practice that prevails among certain witnesses of kissing their thumbs will not possess the effect which they now fondly believe it to have.—*Law Journal*.

### KIND WORDS OF CONTEMPORARIES.

THOUGH rather tardy in reference to the subject, we beg leave to congratulate our contemporary, the ALBANY LAW JOURNAL, upon the spring raiment with which it has recently adorned itself. Nor is its improvement confined to the "outside of the platter." Upon perusal, one finds its contents even more interesting and instructive than heretofore—which, by the way, is saying a good deal.—*Law Notes*.

### English Notes.

The Law Chronicle of Sydney, Australia, is responsible for the following: "A few years ago, in the country, a case of sheep-stealing came on for trial before a well-known ex-judge of the Supreme Court and the usual jury. Counsel for the prisoner thus concluded his address to the jury: 'Gentlemen, on the chalky cliffs of Dover stands a little cottage, in which dwell a poor old man and his wife—a fond old couple. For years they have day after day awaited the return of their only child, their son, the only prop to their old age; their son who had years ago gone away to this sunny land to earn an honest livelihood, and to be a blessing and a comfort to his aged parents. Gentlemen, this son was on the point of returning to the loved ones when this cruel prosecution was instituted. I entreat you, sirs, to think of the aching voids which you will cause in his parents' hearts should you convict my client of this charge. Do not, gentlemen, by a hasty and unconsidered decision, be the means of preventing this much-suffering man from receiving the loved embrace of his parents.' The jury returned a verdict of guilty. His honor, the presiding judge, in addressing the prisoner, said: 'Prisoner at the bar, you have been found guilty of the crime of sheep-stealing. The sentence of the court is, that you be imprisoned for the term of five years' penal servitude; but, as it is impossible for me to resist the touching appeal of your advocate 'not to keep you from your beloved and loving parents,' I now order that you serve the first three years in Berima gaol. There you will, no doubt, meet your father, who is serving a sentence for horse-stealing. The other two years you will serve in Maitland gaol, where your loving mother is serving a sentence for assaulting your father with intent to do grievous bodily harm.' 'Remove the prisoner.'"

### ORAL INSTRUCTIONS TO JURIES.

THE Chicago Bar Association, through its president and secretary, recently took a postal-card ballot upon the question of "Oral Instruction to Juries." A postal-card was mailed to each member of the association, requesting answers to the following questions:

1. Are you in favor of oral instructions to juries?
  - (a) On the law alone? or
  2. If so:
    - (b) On the law and the facts?

Of the 550 cards mailed there were 290 replies; 181 voted in favor of oral instruction to juries, and 109 voted against oral instructions. Of the 181 who voted in favor of oral instructions 42 were in favor of instructions on the law alone, 119 were in favor of instructions on the law and the facts, and 20 qualified in various ways.

### ONE WAY TO STOP LYNCHING.

THE Constitution of Ohio provides that no person who shall hereafter fight a duel, assist in the same as second, or send, accept or knowingly carry a challenge therefor, shall hold any office in that State. Similar provisions are found in the Constitutions and statutes of other States, particularly in the Southern States. The Constitution of Virginia provides that no person who has, since the adoption of the Constitution, fought a duel, etc., shall be allowed to vote or hold any office of honor, profit or trust; and the Code of Virginia provides that every person who enters upon the discharge of any function as an officer of that State shall take and subscribe an oath to the effect that he has not fought a duel or challenged any one to fight a duel, etc., and that he will not fight a duel or send or accept a challenge to fight a duel, etc., during his continuance in office. These constitutional and statutory provisions have been found to be very effective and have contributed in no small degree to the suppression of dueling; and attention is called thereto because it is believed that similar provisions should be adopted with reference to lynching. It is submitted that the governors of the several States should recommend to their respective legislatures amendments to the Constitutions and statutes which will prevent any one from voting or holding office who has participated in lynching persons suspected of having committed crimes. It was suggested to Governor Culberson of Texas that such provisions should be made, but we do not know whether he ever made any recommendations to the legislature. — Law Notes.

### Legal Laughs.

Lawyers have a ludicrous habit of identifying themselves with their clients by speaking in the plural number. "Gentlemen of the jury," said a prominent attorney of the Cleveland bar, recently, "at the moment the policeman says he saw us in the tap, I will prove that *we* were locked up in the station-house, in a state of intoxication." — Ohio Legal News.

The Scottish American tells a story of a cobbler who was sentenced by a Scottish magistrate to pay a fine of half a crown, or, in default, twenty-four hours' hard labor. If he chose the latter he would be taken to the jail at Perth. "Then I'll go to Perth," he said, "for I have some business there." An official conveyed him to Perth, but when the cobbler reached the jail he said he would pay the fine. The governor found he would have to take it. "And now," said the cobbler, "I want my fare home." The governor demurred, but discovered there was no alternative; the prisoner must be sent at the public expense to the place he had been brought from.

### Notes of Recent American Decisions.

**Board of Education — Removal of School-House — Abuse of Discretion.** — While a township board of education has exclusive control within its jurisdiction, in the selecting of a school-house site and of the size and character of the building to be erected thereon, yet where such board, without any valid reason or necessity therefor, is about to expend the public funds in taking down a suitable and satisfactory school-building on a central and improved lot, and re-erect it at another place in the district, a court of equity may properly enjoin the same, as an abuse of discretion and authority. (*Watkins v. Hall* [Ohio Circuit Ct., Fifth Circuit], Ohio L. J. Rep., Vol. xiii., 255.)

**Constitutional Law — Insurance in Unauthorized Company — Right of Citizen.** — The right of a citizen of a State to send a notification by mail to an insurance company in another State, which is not authorized to do business in the State where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the State might attach to the property specified in a shipment mentioned in the notice, although the property was then within the State, cannot be prohibited by a State statute, since that right is included in the "liberty" of the citizen which is protected against deprivation without due process of law. (*Allyeyer et al. v. State of Louisiana*, Adv. Sheets U. S. Sup. Court, Apr. 1, 1897, 489.)

**Fire Insurance.** — The policy by its terms was suspended in case of nonpayment of note when due, but the note could be collected by suit. The insured, when threatened by the agent with suit, claimed that his understanding was that the policy could be dropped. The agent told him he was liable on the note, and he requested postponement until the next premium came due, saying he would then pay "if he had it to pay." The agent agreed to submit his request to the company, telling him, however, that he would have to carry his own risk. The loss occurred pending the company's decision. *Held*, that the agreement of the insured to pay was only conditional upon his obligation to do so, which he doubted, and the suspension of liability on the policy was not waived. *Held*, that a promise by the agent to suspend suit pending submission to the company did not waive suspension of liability on the policy, where sufficient time had not elapsed before the loss for the company to decide. (*Home Ins. Co. of New York v. Karn* [Court of App. of Kentucky], Ins. L. J., Vol. xxvi., No. 7.)

It is not a violation of the Iowa law for one to own a drug store, even though he himself be not a registered pharmacist. An order for a month's rent given to a party to whom plaintiff had traded

the property does not show that the occupant was not the tenant of plaintiff, at least as to the insured furniture and fixtures. Neither of the above pleas by the insurance company are good. The policy must be paid. (*Erb v. German Ins. Co.* [Sup. Court Iowa], Ins. L. J., Vol. xxvi., No. 7.)

**Ordinance Prohibiting Speaking on Public Ground.** — An ordinance prohibiting any person from making any public address on any public grounds of a city, without a permit from the mayor, is within the police power, and does not violate the fourteenth amendment of the Constitution of the United States. (*Davis, Pl'ff in Error, v. Commonwealth of Massachusetts*, decided by U. S. Sup. Court, May 10, 1897.)

**Verdict by Less Than All the Jurors — Seventh Amendment.** — The decision of the Territorial Court sustaining a territorial statute providing for verdicts by less than the whole number of jurors, on the ground that the organic act of the territory gave the legislature unlimited legislative power, as against the contention that the act of congress as thus interpreted was in violation of the seventh amendment, is subject to review by this court as involving the validity of an act of congress. The seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases; and the act of congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so. (*Springville City, Plaintiff in Error, v. Thomas*, U. S. Sup. Court, Apr., 1897.)

**Verdict Signed by One Whose Name Did Not Appear as Juror.** — Where one of the nine names signed to the verdict of a jury did not appear in the list of the jury given in the record as having come to try the case, that fact did not render the judgment upon the verdict void, the right to object to the verdict upon that ground being waived by failure to make it at the proper time, no objection being made for more than six months. Moreover, the presumption of regularity must be applied in such a proceeding. (*Bickel, etc. v. Kraus* [Ky. Ct. of App.], Ky Law Rep., Vol. xviii., No. 24, p. 1054.)

### Notes of Recent English Decisions.

**Contract to Lend Money — Contract to Take Debentures of Company — Breach — Remedy — Damages — Measure of Damages.** — A contract to take debentures of a company is a contract to lend money. The only remedy for breach of such contract is an action for damages in respect of the loss which has been actually sustained by the breach, and if no actual loss is proved, nominal damages only can be recovered. (*South African Territories, Limited, v. Wallington*, Ct. of App. L. T. Rep., Vol. 86, 521.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JULY 17, 1897.

### Current Topics.

"AMERICAN Lawyers and Their Unmaking" is the title of an interesting paper which Percy L. Edwards, of Owasso, Mich., contributed to a recent number of the Michigan Law Journal. Mr. Edwards declares that the advent of the law school has furnished ample relief to the one-time aching necessity in this country for more lawyers, and quotes statistics to the effect that there are now in the United States not less than 90,000 practicing lawyers, good, bad and indifferent, a ratio of 1 to about 800 of the population — and more coming. According to a report made at the meeting of the American Bar Association, last year, there are 85 law schools in the United States, with an attendance approximating 10,000 students. A very rapid increase is shown, in additional statistics, to have occurred since the year 1870. In that year the schools reported 1,611 students; in 1886, 3,054; in 1891, 6,106; in 1894, over 7,600. It is not doubted that these schools are doing good work in better equipping men and women for the work of the profession, but the writer emphatically dissents from the belief, held by some, that this great preponderance of lawyers in our land is the result of the law of supply and demand. Again dropping into statistics, Mr. Edwards shows that France, with a population of about 40,000,000, has only 6,000 lawyers, and Germany, with a population of over 45,000,000, has but 7,000, these figures giving

VOL. 56 — No. 3.

ing a ratio of 1 to less than 5,000 in France, and 1 to about 6,500 in Germany. Mr. Edwards next proceeds to show that the sources of revenue to law offices, in this country, despite this marvelous increase in the number of lawyers, have been, one by one, cut off, until but little now remains except court work. This explains, to a great extent, why it is that so many lawyers in this country have been forced to go into other pursuits as an aid in helping out a meagre income from the legitimate practice of the law, or, as Mr. Bryce puts it, why so many American lawyers are "practically just as much business men as lawyers." Mr. Edwards thinks it is safe to say that, approximately, fifty per cent. of the ordinary revenues of the old-time law office have been cut off in recent years. Since banking institutions have engaged in the semi-professional occupation of collecting claims and rents, and loaning money, and taking securities, and since the business of conveyancing, which at one time was inseparable from a law office, is now no longer the necessary adjunct which it was, lawyers have found their income very greatly reduced. In this condition of affairs politics has proved an important vent in relieving the gorged condition of the profession, while many others, whose tastes are literary, turn to law-writing and compiling. This explains why the production of text-books, encyclopedic works, digests, works on practice, reports, etc., with the eternal revision, amplification and repetition, has increased at such a rate as to make the path of the practitioner of today as difficult to follow as was that of Bunyan's hero. This amazing, appalling flood of legal products causes Mr. Edwards to exclaim: "What a difference between the times of Marshall, Reeve and Gould and the present! Then less than a score of books were considered to well equip a lawyer for practice, where a thousand are now used." As England has been dubbed a nation of shopkeepers, so, Mr. Edwards thinks, may America become known as a nation of lawyers. He does not, however, offer any suggestions as to how the congested condition of the pro-

fession is to be relieved, probably for the reason that the problem is too difficult a one of solution.

The experiment of a midsummer session of the Appellate Division of the Supreme Court, which was tried with success last year in the First Department, will be repeated there next August. The sittings will begin on the first Monday of the month, and will continue until the calendar is exhausted. The court will be composed of Patterson, J., presiding, and Rumsey, Williams, O'Brien and, perhaps, Parker, JJ., as his associates. Under ordinary circumstances, Mr. Justice Barrett, as the senior associate, would preside, but he is just recovering from a very serious and dangerous illness, which for a time threatened to terminate the career of that distinguished and versatile judge. It is confidently expected that he will be able in the autumn to resume his labors on the bench, and continue the work he has for many years performed in such a graceful, yet masterful, manner. Judge Van Brunt, who, as presiding justice, sits continuously during nine weary and anxious months, is well entitled to the summer respite he ought to and does take. During Judge Barrett's illness his place has been filled by Judge Alton B. Parker, of Kingston. Judge Parker is no stranger to the bar of the metropolis. He was for several years a member of the General Term of the Supreme Court in the First Department, and he won an enviable reputation from the excellence of his work in that court. His designation by Governor Black as the temporary substitute for Judge Barrett was very gratifying to the court and to the counsel who practice in it. Judge Parker is prominently mentioned as a candidate for the chief judgeship of the Court of Appeals. As it is ordained that Chief Judge Andrews must leave the court at the close of the current year (and his retirement will cause universal regret), a worthy successor would be found in Judge Parker, whose experience as a member of the second division of the Court of Appeals, of the General Term and of the Appellate Division of the Supreme Court

peculiarly qualifies him for the high office his friends covet for him, and which he would fill with dignity and conspicuous ability.

"Hail poetry! Thou heaven-born maid,  
Thou gildest e'en the lawyers' trade.  
Hail glowing font of sentiment!  
All hail! all hail! divine emollient."

Thus, taking one little liberty with the verse, wrote Gilbert, in his opera, "The Pirates of Penzance." It is not every day that the power of poetry, especially of the home-made sort, is demonstrated in court proceedings, and a recent case in point is, therefore, worthy of notice. The "divine emollient" was invoked by Hon. Mirabeau L. Towns, in opposition to the application of the defendant in the suit of Charles E. and Rufus Tayntor against Thomas S. McFarland, to change the place of trial from Brooklyn to Buffalo. Plaintiffs alleged that they prepared the plans for a mausoleum to be erected in Forrest Lawn Cemetery, Buffalo, for Mr. McFarland and his family, and offered to build the tomb for \$5,000, getting from him a solemn promise that none should see the plans besides himself, except his wife and daughter. They allege that he returned the plans and employed another person to build the mausoleum, using their plans almost bodily, and paying nothing for them. They sued for \$1,000 damages. Mr. Towns, in opposition to the motion for a change of venue, made an able argument, which he wound up by dropping into verse as follows:

"From the land of cakes, of Burns, Carlyle and Scott,  
McFarland came with us to cast his lot,  
He challenged fortune; with his trusty thistle  
He stung the goddess, false and fair and fickle,  
Till she became his maiden meek and true,  
And loved him surely better than he knew.  
At any rate, she made his fortune rise,  
And he to follow mounts the starry skies;  
But e'er he went, this temple for his bones  
He built of granite, one of the hardest stones;  
And o'er the door he moved the sculptor's hand,  
To hew deep down the name of McFarland,  
In letters broad, in depth more than an inch,  
And yet the patient granite does not flinch,  
Though gaping wounds strike on our wondering  
eyes,

That here McFarland's dust eternal lies.  
Who planned this vault? His name, O friend, was  
Tayntor,

But here, alas! it is our praise grows fainter,  
For be it told, this tasteful architect  
Has never yet been able to collect  
His little bill. Mac still would not defray,  
And while he treads with saints the starry way  
We walk in court to get poor Tayntor's pay,  
And find it harder than his mausoleum  
To get from Scottish Mac his '*nervus rerum*.' "

Now, whether Judge Dickey, before whom, at Brooklyn, the application was made, was so enamored of Mr. Towns' verse that he found himself wholly unable to resist its seductive influence, or whether, steeling his heart against all poetic blandishments, he decided the matter on more practical grounds, may, perhaps, never be known; but certain it is that the application was denied, and the suit will have to be tried in Brooklyn, which, most fittingly, is surrounded by cemeteries. What further surprises this poet laureate of practice may have planned to spring upon court and jury, when the case comes to trial, we do not care to say, but it would be well for the defendant's attorneys to be prepared.

Another example of legislation that fails to legislate comes from New Jersey. The legislature of that State gravely considered and deliberately passed a bill which provided that any person sending a libelous communication to a newspaper, which communication is published, shall be equally guilty with the *newspaper*. The conclusion seems to be irresistible that the members of the legislature who voted for this act supposed that suits at law were brought against newspapers or magazines, whereas even school children are presumed to know that the publisher or editor, not the newspaper, must be proceeded against. Of course, Governor Griggs vetoed the bill, and in doing so took occasion to point out the manifest absurdity of its provisions. Such instances as this are calculated to remove what little confidence still remains in the public mind in the capacity of the average legislator to properly draft a bill, and, in addition, emphasize the need, in

every State legislature, of a commissioner, whose duty it shall be to see that proposed legislation is in proper form, before it gets into or through the legislative hopper.

The decision of the Appellate Division of the New York Supreme Court, First Department, in the matter of the appraisal of Jay Gould's estate, which was recently handed down, is of considerable importance, as settling a disputed question as to the rights of testators. The estate, it may be remembered, was appraised at \$78,000,000. The controller raised the question that the legacy of \$5,000,000 to George J. Gould, and the expenses of the administration, should not have been deducted in arriving at the value of the property for the purposes of taxation. The executors contended that there was an over-valuation of the property, objecting to the method of valuing securities, and that the amount allowed for the commissions of the executors was too small. The deduction of the \$5,000,000 legacy to George J. Gould was made on the ground that it was given in payment of an indebtedness owing to the estate, and was not, therefore, taxable under the statute. The controller's contention was that it was not given in payment of any legal debt, but was a gift or gratuity from decedent. The court, in an opinion by Justice Williams, which is concurred in by Presiding Justice Van Brunt and Justices Rumsey and Patterson, holds that the question was one of fact, which was properly determined by the appraiser. Upon all the evidence before the appraiser bearing upon the question, the court thinks the finding was properly made that this legacy was given in payment of a debt, and not as a gift or gratuity. The court adds:

"It was clearly a debt which could have been enforced against the estate, if its payment had been resisted. It was competent for the father and son, in 1880 or 1881, to make the agreement for the performance of the services, although the son was then under age. The agreement was made and was acted upon, not only during the minority of the son, but for six or seven years after he

came of age. No rate of compensation was originally agreed upon, but in 1892, before the decedent's death, such an agreement was clearly made, and both parties assented to it in the clearest terms. \* \* \* We see no reason to doubt that the intention of the decedent was to make the provisions purely as compensation for the services rendered, and that being so, the indebtedness was fully established, not only as against the estate of the decedent, but also for the purpose of the valuation of the property of the decedent for taxation under the statute."

The court holds that the surrogate rightly decided in deducting the expenses of administration and for commissions of the executors, and that the proper rule was applied in ascertaining the value of the securities of the decedent.

Justice Ingraham gives a dissenting opinion in reference to the legacy to George J. Gould. "The whole intention, as expressed," Justice Ingraham says, "seems to me to point clearly to the idea that what the testator did was intended as a voluntary gratuity to the son in recognition of the devotion that the son had shown to his father. It was rather a bequest to the son in addition to that given to his other children as a recognition of the devotion that the son had shown to his father than the distinct recognition and payment of an existing legal obligation." Justice Ingraham holds also that the appraisement of the securities belonging to the estate at the amount fixed by the appraiser was clearly excessive.

According to letters of correspondents, published recently in the London Times, while theoretically imprisonment for debt in England is a thing of the past, practically it is still a matter of everyday occurrence. An examination of the last volume of Judicial Statistics shows that the warrants of commitment in county courts in 1894 amounted to over 85,000, and the number of debtors imprisoned was 7,684. It is argued that, inasmuch as section five, sub-section two, of the act of 1869 requires that jurisdiction to commit to prison shall only be exercised

where it is proved that the debtor either has, or has had since the date of the judgment, the means to pay, and has refused or neglected to do so, the actual imprisonment seems to argue contumacy upon the part of the debtor for which he may not improperly be punished. It is said to be the custom for debt collectors — companies as well as individuals — to buy up bad debts, and then to enforce them by threats of imprisonment, thus making the body of the debtor a security for the debt in favor of an assignee who is willing to rely on such a security, rather than the mere punishment of contumacy in paying a debt which the debtor has the means of paying. Judge Harington, in a letter to the Times on the subject, strongly advocates the abolition of imprisonment as a remedy for the enforcement of judgments for civil obligations, subject to certain exceptions, where, for instance, it has been obtained by misrepresentation, or in actions for wages. The facts and statistics here briefly given constitute sufficient evidence that radical reforms are needed, and while the present agitation of the subject is not likely to lead to an immediate change in the statutes respecting imprisonment for debt, reform is bound to come, sooner or later.

Dr. Talmage, in the course of a recent sermon on lawyers and the temptations to which they are subject, paid a high and deserved compliment to the legal profession. "I have yet to find," said he, "a class of men more genial or more straightforward. There are in that occupation, as in all our occupations, men utterly obnoxious to God and man; but if I were on trial for my integrity or my life, and I wanted even-handed justice administered to me, I would rather have my case submitted to a jury of twelve lawyers than to a jury of twelve clergymen. The legal profession, I believe, have less violence of prejudice than is to be found in the sacred calling." This is a clear and straightforward expression of a well-known truth, but there are not many clergymen who would so frankly acknowledge it as Rev. Dr. Talmage has done.

**Notes of Cases.**

The estimation in which Dakota divorces are held by the courts of this State may be gathered from a decree of the Appellate Division of the New York Supreme Court, First Department, in the suit of Henry P. McGown, for divorce from his wife, Mary E. McGown. In September last Mrs. McGown secured a divorce from her husband in North Dakota, and then married again in that State. Because of her relations with her second husband the decree was granted in the present action. In his opinion Justice Patterson said, in part: "It is unnecessary to discuss the question of defendant's second marriage, as between the parties to it, and under the law of North Dakota. Under the law of this State, the marriage between the plaintiff and defendant was not dissolved by the decree of the Dakota court. The defendant still remained the wife of the plaintiff, and while so remaining she cohabited with another man and lived with him matrimonially. The status of the defendant in the courts of this State as to the plaintiff is to be fixed and defined by the law of this State, and not by that of the State of North Dakota. The plaintiff was entitled to sue here for a divorce, and his action must necessarily proceed upon the basis that his marriage with the defendant was, in this State, still intact and undissolved. He was her husband, she was his wife, and while that relation existed she had relations with another man. What contract she voluntarily made with that other man is of no consequence as affecting this plaintiff. It is her act that constitutes the offense, and no matter under what claimed sanction she may have performed it, she cannot excuse it as to him, or keep him bound to that marriage by claiming immunity through a decree of a foreign tribunal in no wise binding upon him in this jurisdiction, and which cannot here take away or impair his right in any respect." The custody of the child of the marriage was awarded to the father.

In the case of *Boatwright v. Chester & Media Electric Ry. Co.* (4 Pa. Sup. Ct. 279), the defendant company had sent out an excursion train of three cars, in charge of a motorman and two conductors, with about 225 passengers. As the cars neared the plaintiff, who was riding in a buggy with a friend, the passengers became uproarious, blew horns, waved flags, etc., and frightened the horse so that he ran away, upsetting the buggy and injuring the plaintiff. The trial judge refused to charge that the verdict of the jury must be for the defendant. The Superior Court held this to be error, and reversed the judgment, which was for the plaintiff, on the sole ground that the company was not responsible for the noise made by the passengers. The reasons for this holding were as

follows: "If the company deliberately loaded its cars with excursionists equipped with horns and flags, knowing they intended to wave flags and blow horns along the route, and thereby frighten horses lawfully upon the highway, for such conduct it might be held liable. Or, if it knowingly permitted such demonstrations from time to time as a part of its business upon the road, so as to become a nuisance and constant menace to persons driving vehicles upon the highway, they undoubtedly would be liable for such nuisance and menace. But there are no such circumstances in this case. \* \* \* There was no evidence that the company, its conductors or employes, anticipated any unusual noise on the part of the passengers. \* \* \* The company was under no obligation to provide a police force in anticipation of riots. \* \* \* The sudden outburst of passengers in a noisy demonstration was not an occurrence that the appellant was bound to anticipate or guard against."

An interesting decision as to the duties of national bank directors was rendered by the United States Circuit Court for the western district of Michigan in the case of *Gibbons v. Anderson* (80 Fed. Rep. 345). It was held that the directors of a national bank do not discharge their duty by merely selecting officers of good reputation, and then leaving the bank's affairs in their hands, but are bound to maintain a supervision of its business, and to know, at least, on what security its large lines of credit are given. A receiver of a national bank may sue the directors for malfeasance of officers where the directors were so negligent as to make practically no examination of its affairs, and to hold meetings only at rare intervals, and at such meetings to limit their business to the election of directors and the declaration of dividends.

In arbitration *Wright and City of Toronto*, the question was as to the liability of municipality under section 483 of Municipal Act of Ontario for damages done by closing and deviation of a highway (York street) to the business of claimant, a tenant of hotel property abutting on the highway closed. The official arbitrator, James A. Proctor, held that the municipality was liable to compensate claimant, although by-law authorizing work was not passed; that damage to business was recoverable though no land was taken, and that claimant was entitled to compensation for future damage caused by deviation of highway. The report of the arbitrator embodies a full discussion of all the important questions involved. It was contended on behalf of the city that they had the right to close up York street, below Esplanade street, having acquired from the crown the right to the water lots in front of York street, and that



in thus using their property they were not legally bound to give any compensation to claimant, even though the destruction of the thoroughfare down York street to the water front did cause the claimant damage. The arbitrator is unable to give effect to this contention. It was established to his satisfaction that there was a public thoroughfare down York street, passing the hotel in question (Walker House), to the water. That right was established by user for many years (if not by actual grant), and could not be destroyed by the corporation of the city without compensation to those specially injured. "The contention cannot be well founded that the municipality could, by acquiring the land or water lot at the foot of York street, or any other street, fill it and thus stop up the approach to the water which the public may have for years enjoyed, without compensation to those specially injured beyond the effect on the general public. It is true that the municipality is the owner of the streets as trustee for the people, but it is equally well established that the corporation cannot alter or change the streets or use them for another purpose without compensation to any person specially injured. So that any one holding or occupying property upon any such street so altered or changed or stopped up may claim compensation if his injury is of a special character. This doctrine is laid down in the American and English Encyclopedia of Law, volume 6, page 557." The arbitrator also found that the substituted roadway did not afford the Walker House an equally good and available thoroughfare to the water front as formerly, or as York street extended on the surface would do. No one passing over this new way would pass so near the Walker House as when formerly passing down York street. The arbitrator, after much consideration, also arrived at the conclusion that the claimant, Wright, as the occupier of the premises known as the Walker House, was entitled to compensation for the injurious affecting of his interests; in other words, that "owner or occupier" meant tenant as well as owner.

#### THE NEUTRALIZATION OF SUB-MARINE TELEGRAPHIC CABLES.

THE recent interruption and consequent inconvenience resulting from a refusal to receive cable messages destined for the territory of one or the other contending parties during the late war between Greece and Turkey, again invites attention to a matter of great interest in respect to the international status of submarine cables. When the transatlantic cable was finally successfully laid and its operation assured, in 1858, the scientific and mechanical experts who contributed to its permanent establishment, and a limited number having special knowledge, who appreciated the

full significance of the achievement, realized its momentous possibilities, and understood that a new force had been introduced into the economic and political system of the world and placed at the service of man. But to the general public it was still something of a mystery and an agency of unappreciated potentiality. The success of this cable was due to the undaunted energy, intrepidity and mechanical skill of American citizens, aided by a few Scotch and English scientists and capitalists, the record of whose services is fortunately preserved in the story of the Atlantic cable. The ultimate relation of submarine cables that were destined to circle the habitable globe to the political as well as to the economic system was early recognized in the United States; and the policy of safeguarding them internationally was suggested by President Buchanan in the first official communication transmitted from the United States to London, August 5, 1858. The message of Queen Victoria expressed the fervent hope that the electric cable would prove an additional link between the common nations, whose friendship is founded upon their common interest and reciprocal esteem. The admirable reply of President Buchanan contained the following aspiration: "May the Atlantic telegraph, under the blessing of heaven, prove to be a bond of perpetual peace and friendship between the kindred nations, and an instrument destined by Divine Providence to diffuse religion, civilization, liberty and law throughout the world. In this view will not all nations of Christendom spontaneously unite in the declaration that it shall be forever neutral, and that its communications shall be held sacred in passing to their places of destination even in the midst of hostilities?"

Replying to an invitation to attend a celebration commemorative of its achievement, Prof. Henry, who had recently resigned a chair at Princeton University to accept the secretaryship of the Smithsonian Institution, wrote: "This is a celebration such as the world has never before witnessed. It is not alone to commemorate achievements of individuals, or even of nations, but to mark an epoch in the advancement of our common humanity."

The public service which the sub-marine cable was to perform was the argument which prevailed and secured an appropriation of public funds, under the provisions of which the secretary of state was authorized to enter into a contract with the promoters of this private enterprise. The title of the act was "An act to expedite telegraphic communication for the uses of the government and its foreign intercourse." (U. S. Stats L., Vol. xi, pp. 187, 188.) The act also provided for the aid of the United States, by furnishing ships in laying the cable.

It would seem that public interest, as well as a wise policy, would recommend unhesitatingly in

respect to submarine cables what was suggested by the president in the matter of their neutralization. And such has been to some extent the case, as will be seen hereafter. As a result of acquiescence in such a policy, conferences of the nations were held at Paris, upon invitation of the government of France, in the year 1882, and in succeeding years as late as 1887, at which recommendations were made for the safeguard and protection of submarine cables, which resulted in appropriate legislation by nearly all the States interested. This legislation has been understood to contemplate and have reference to time of peace. But so far as complete neutralization is concerned, the desired and essential end has not yet been reached. And this brings us to the consideration of what is intended by "neutralization," in the sense in which it is here employed. Before entering upon this, it will be instructive to review what has been said generally in respect of the meaning and scope of the term as usually employed by writers on international law. Neutralization is one of those terms which, although in its origin having a somewhat technical meaning, has, as the result of customary employment, received a wide application. As used at different times and in differing relations, it has a natural, a restrictive and an extensive signification. The root term, "neutral," and its adjective, "neutrality," have been long in common use to denote the attitude and character of a noncombatant nation or community; and "neutrality," in this situation, is the antithesis of "belligerency." "The term," says Holland, "has in recent times received a larger application. A condition of neutrality, or one resembling it, has been created, as it were, artificially, and the process has been called 'neutralization.'" When persons, things and places, though in fact belonging to a belligerent State, are invested with immunities to which, as so belonging, they would not be entitled, they are said to be "neutralized." The same author insists that the phrase, "to neutralize," should mean "to bestow by convention a neutral character upon States, persons and things which would or might otherwise bear a belligerent character." But this seems to the writer a too limited definition. And as if sensible of such criticism, the author adds: "The term as thus defined may well be employed to describe what has been done with reference to Belgium and Switzerland, or with reference to hospitals and surgeons. It is indescriptive of such limitations upon the sovereign rights of States as were imposed by the Treaty of Paris." And his conclusions are thus expressed: "Treaties are too valuable, and at the same time too fragile of texture, to be exposed to unnecessary strain; and treaties of neutralization, unless under very favorable circumstances, are especially likely to become, as Frederick the Great said of treaties of guarantee, 'a network of filigree, rather pleasing

to the eye than practically useful.'" The language above quoted is from an article entitled "The International Position of the Suez Canal," and its scope and relevance must of course be considered with reference to the time, circumstance and the subject-matter under discussion, as well as the standpoint from which it was discussed. There is obviously some difference between the neutralization of the Suez canal and the neutralization of international submarine cables under the point of view here considered; but the differences are not far to seek. And if the term "neutralization," as presently understood, is not sufficient to describe the status of an international cable that is properly and permanently safeguarded in the midst of hostilities, it will not be difficult to find or to invent an appropriate term.

A different view from that expressed by Holland is entertained by Amos, who considers treaties of neutralization as the most beneficial of all treaties. And when referring to artificial communications between the territories of different States, or through the territory of one State, but connecting public international highways, the latter says of ties. And when referring to artificial communication a course and method of neutralization which have already been fruitful in results, and are still likely to be still more so in times to come." It is suggestive, and should be instructive, to recall here the fact that, on more than one point, this much discussed convention of 1850 between Great Britain and the United States furnished a model for the draft of the neutralization by the seven powers of the Suez canal.

The reasoning and arguments founded on common interest and a wise policy, which were advanced to promote a convention for the neutralization of the Suez canal, will apply with greater force to secure appropriate action by the powers that shall at all times ensure the safeguard of submarine cables.

What President Buchanan intended when replying to the friendly message of Queen Victoria is plain as language can make it: "In this view will not all nations of Christendom spontaneously unite in the declaration that it (the Atlantic cable) shall be forever neutral, and that its communications shall be held sacred in passing to their places of destination even in the midst of hostilities." Not less distinct or positive was the expression of Prof. Henry: "It is not alone to commemorate achievements of individuals, or even of nations, but to mark an epoch in the advancement of our common humanity," that we celebrate the success of the Atlantic cable.

Submarine cables derive their claim to international safeguard partly to the fact that they traverse the high seas, and partly to the circumstance that by means of the most subtle, expensive, delicate and artificial instrument of communication they connect the territories of different States.

The international character of a submarine cable is accordingly determined not so much by the national character of its proprietors — whether State, corporate or individual — as by the circumstance that its termini unite the territory of two or more independent States. And a distinction is recognized by some authorities between an international submarine cable and a national submarine cable, as follows: An international cable is one which connects the territory of different independent States; a national submarine cable is one which unites the territory or the colonial possessions of a single independent State. The character of the charter or ownership of a submarine cable determines whether it is to be deemed foreign or national in respect to a particular State. In the absence of any treaty protection, the destruction or mutilation of a submarine cable should be among those extreme acts of war which only a stern necessity will justify. The atrocities committed by the armies of Louis XIV. in the Palatinate inspired an anonymous writer, in 1690, to protest against the excesses and wanton ravages of war; and he resolutely denounced the carrying off of monuments and objects of art of cities, churches and palaces, and considered the useless destruction of these objects as a crime against posterity. What has been said as to the above objects applies with force to submarine telegraphic cables belonging to the enemy or to subjects of the enemy. "Their destruction," says a contemporary writer, "will often be useful, hence permissible. But a belligerent has no right (*droit*) over a cable uniting two neutral territories, or connecting the territory of his adversary with a neutral territory, except in case of blockade, and no doubt also in case of necessity, as the result of war."

Notwithstanding the continued recognition of certain extreme rights of belligerents, some progress has been made, under the influence of a wholesome public sentiment, towards an extension of the rights of neutrals, particularly in the direction of safeguarding submarine cables. It is gratifying to recall the fact that the United States, as early as 1869, suggested a conference at Washington to deliberate upon the best means for their protection. The Franco-Prussian war prevented the proposed conference at Washington. Various conferences have been held at Rome, Brussels and Paris with this view; and in 1884, at Paris, an international agreement demanded by the United States was realized. Twenty-six States signed a convention concerning the protection of submarine cables, article one of which is in these terms: "The present convention applies, outside of territorial waters, to all submarine cables established and which land on the territories, colonies or possessions of one or the other contracting parties." Article 2: "The breaking or injury of a submarine cable, committed voluntarily or by culpable negligence, the result

of which is to interrupt or impede, in whole or in part, telegraphic communications, is punishable as a criminal offense, without prejudice to civil action for damages and interest. This provision does not apply to ruptures or injuries of which the authors had only in view the protection of their life or the safety of their boats, after having taken all necessary precautions to avoid these ruptures and injuries." Article 8: "The competent tribunals to judge violations of the present convention are those of the country to which the boat on board of which the infraction was committed." Article 12: "The high contracting parties engage to take or to propose to their legislatures measures necessary to ensure the execution of the present convention." The parties to this convention have generally enacted appropriate legislation. The act passed by the United States is entitled "An act to carry into effect the international convention of the fourteenth of March, eighteen hundred and eighty-four, for the protection of submarine cables." (Stats. L. 25, p. 41.)

In its resolutions on the subject of the protection of submarine cables having international importance, the Institute of International Law, at the session of 1879, declared:

I. "It would be very advantageous for the several States to unite in a declaration that the destruction or paralyzation of submarine cables in the high seas is an offense against the law of nations, and to determine in a precise manner the criminal character of the acts and the punishments applicable; on the last point a degree of uniformity may be attained that is compatible with the diversity of criminal legislations.

"The right to seize the guilty individuals, or those presumed to be such, may be given to the public vessels of all the nations, under conditions regulated by treaties, but the right to adjudicate should be reserved to the national tribunals of the captured vessel."

II. "That it is desirable that when telegraphic communications must cease, as the result of a state of war, it must be limited to measures strictly necessary to prevent the use of the cable, and that an end should be put to these measures, and that the consequences should be repaired as soon as the cessation of hostilities permit.

III. "That a submarine telegraph cable which unites two neutral territories is inviolable."

The United States diplomatic circular of 1869 contained in its draft for a convention between the States a provision assimilating the wanton destruction or impairment of a submarine cable to piracy; but the committee of the Institute of International Law, in 1879, refused to adopt this provision on grounds stated. There is much force in the suggestion of the United States. Why should not the State, corporation or individual that wantonly de-

stroys or paralyzes this now essential instrument of communication be considered and punished as *hostis humani generis*? It is shocking to contemplate a situation that permits the well-being of inoffensive States and communities, and the orderly conduct of public and private affairs, to be imperilled at the caprice of every fussy prince or potentate or half-civilized tyrant who puts the rack and torch in motion and calls it "war." A public sentiment is aroused to minimize armed conflicts and attendant excesses, and to maintain peace whenever practicable; and looking to this end, the civilization of the age demands consideration and freedom of action for neutrals even though "rights" of belligerents shall be curtailed. The public voice calls loudly for reform in this direction; and the question presses, Shall the orderly conduct of the affairs of the world be controlled by neutrals, or be surrendered to belligerents? Shall a single nation, however great or powerful, or an unholy combination of States, make the law and dictate terms to the great majority of dominant States?

At an international conference for the protection of submarine cables, held at Paris in 1882, it was proposed to neutralize submarine cables, and a draft convention to this effect was prepared, but has not yet been adopted by the powers. The first article was in these terms: "The present convention applies, outside of territorial waters, to all submarine cables legally established between the territories of the high contracting parties." The convention only applies outside of territorial waters, because it is here a question of regulating the common use of the high seas; and it includes all cables legally established, for the reason that the commission desired to indicate that no distinction was to be made between cables belonging to a State or to private companies.

Article 15 of the convention of the 14th of March, 1884, is thus conceived: "It is well understood that the stipulations of the present convention do not restrain the liberty of action of belligerents." At the moment of subscribing, Lord Lyons, in the name of the government of Great Britain, declared: "The government of her majesty understands article 15 in this sense, that in time of war a belligerent signatory of the convention shall be free to act, in regard to submarine cables, as if the convention did not exist." A declaration in an analogous sense was made by M. Leopold Orban, the Belgian plenipotentiary.

Thirteen submarine cables traverse the North Atlantic between 60 and 40 degrees latitude. Eleven of these connect the Canadian provinces and the United States with the territory of Great Britain: two (one American, the other Anglo-American) land in France. Of these seven are largely owned, operated or controlled by American capital, while all the others are

under English control and management. There is but one direct submarine cable connecting the territory of the United States with the continent of Europe, and that is the cable owned and operated by the Compagnie Française Cables Telegraphiques, whose termini are Brest, France, and Cape Cod, on the coast of Massachusetts. All these cables between 60 and 40 degrees latitude, which unite the United States with Europe, except the French cable, are under American or English control, and have their termini in the territory of Great Britain or the United States. In the event of war between these countries, unless restrained by conventional act, all these cables might be cut, or subjected to exclusive censorship on the part of each of the belligerent States. Across the South Atlantic there are three cables, one American and two English, whose termini are Pernambuco, Brazil, and St. Louis, Africa, and Lisbon, Portugal, with connecting English lines to England, one directly traversing the high seas between Lisbon and English territory, and one touching at Vigo, Spain, at which point a German cable company has recently made a connection. The multiplication under English control of submarine cables has been the consistent policy of Great Britain: and to-day her cable communications connect the home government with all her colonies and with every strategic point, thus giving her exceptional advantages for commercial as well as for political purposes. The schedule blanks of rates of the English companies contain the following provisions: "The despatches of the imperial government shall have priority when demanded. The cable must not, at any station, employ foreigners; and the lines must not pass through any office, or be subject to the control of any foreign government. In the event of war, the government (of Great Britain) may occupy all the stations on English territory or under the protection of Great Britain, and it may use the cable by means of its own employees."

It is not a pleasing reflection that in the actual situation the United States is at a great and embarrassing disadvantage. Meanwhile it would seem to be the policy of the United States to overcome this disadvantage by the multiplication of submarine cables under American or other competing foreign ownership and control.

Although somewhat indeterminate, the policy of the United States in respect to the landing of foreign submarine cables, so far, at least, as the executive branch of the government is concerned, appears to be based chiefly upon considerations that shall guard against consolidation or amalgamation with other cable lines, while insisting upon reciprocal accommodations for American corporations and companies in foreign territory. The authority of the executive branch of the government to grant permission is exercised only in the

absence of legislation by congress regulating the subject, and concessions of the privileges heretofore have been subject to such further action by congress in the matter as it may at any time take. Several bills are now pending in congress relating to the landing of foreign submarine telegraph cables within the United States, and regulating the establishment of submarine telegraphic cable lines or systems in the United States. As this article is going to press, it is reported that the president has refused permission to a foreign cable company to land a new cable within the territory of the United States, and that the question raised as to the power of the Federal government to deny admission to the cable will be referred to the attorney-general for an opinion. Meanwhile the executive branch of the government holds to the doctrine that such landing can only be by express authorization of congress. The question of the landing of foreign cables received some consideration from the late attorney-general, in connection with an injunction suit brought by the United States against certain corporations engaged in placing on the coast of New York a cable having foreign connection. And he suggested for the consideration of congress whether it would not be wise to give authority to some executive officer to grant or to withhold consent to the entry of such foreign enterprises into this country on such terms and conditions as may be fixed by law.

The principal and most important submarine cables traversing or connecting the great oceans are owned and operated by private corporations or companies. They are in number 310, and their length in nautical miles is 139,754. The length of cables owned or operated by State governments is in nautical miles 18,132.

The policies of States, the movements of fleets and armies, and the regulation of the markets of the commercial world, depend upon advices, communications and orders that are habitually transmitted through the agency of submarine cables. In this view, the first aim is to safeguard from wanton destruction the delicate and expensive mechanism of these cables; the second is to restrain within the narrowest limits practicable interruptions in the operation of cables, even in the midst of hostilities; and the third is to encourage the establishment and extension of submarine cables owned and operated by American capital. All these ends may be advanced by the agreement of the powers to neutralize absolutely the submarine cable systems of the world. To do this will be a step in the direction of extending international jurisdiction, which is to be a controlling feature of the new periodical about to be established at Berlin, and to be printed in German, French and English, under the name of "Kosmodike."

ALEXANDER PORTER MORSE.

WASHINGTON, D. C., July, 1897.

## O'CONNELL AS A LEGAL RACONTEUR. —

WE feel that we are not wearying the patience of our readers, but, on the contrary, placing before them matters of great interest in professional circles, by reproducing some further anecdotes of Mr. O'Connell's experiences at the bar, which, after the lapse of half a century, have been forgotten in Ireland, and are quite fresh to English lawyers.

"In my journal," writes Mr. O'Neill Daunt, "of the 5th Nov., 1840, I find, among other memoranda, some interesting forensic recollections of O'Connell. Hedges Eyre, an Orange leader, had invariably engaged O'Connell as his counsel. On one occasion, a brother Orangeman severely censured Hedges Eyre for employing the Catholic leader. 'You've got seven counsel without him, and why should you give your money to that Papist rascal?' Hedges did not make any immediate reply, but they both remained in court watching the progress of the trial. The counsel on the opposite side pressed a point for nonsuit, and carried the judge along with him. O'Connell remonstrated against the nonsuit, protesting against so great an injustice. The judge seemed obdurate. 'Well, *hear* me, at all events,' said O'Connell. 'No, I won't,' replied the judge; 'I've already heard the leading counsel.' 'But I am conducting counsel, my lord,' rejoined O'Connell, 'and more intimately aware of the details of the case than my brethren; I entreat, therefore, you will hear me.' The judge ungraciously consented, and in five minutes O'Connell had argued him out of the nonsuit. 'Now,' said Hedges Eyre in triumph to his Orange *confrère*, 'now do you see why I gave my money to that Papist rascal?'"

O'Connell related this story of a physician who had been detained for many days at the Limerick Assizes, to which he had been subpoenaed as a witness. He pressed the judge to order him his expenses. "On what plea do you claim your expenses?" demanded the judge. "On the plea of my having suffered personal loss and inconvenience, my lord," replied the simple applicant; "I have been kept away from my patients these five days — and if I am kept here much longer, how do I know but they'll get well."

Here is a reminiscence of the method in which the harshness of the Penal Law system in its decline was mitigated by the action of the judicial bench:

"My poor old confessor, Father Grady," said O'Connell, "who resided with my uncle when I was a boy, was tried in Tralee on the charge of being a Popish priest, but the judge defeated Grady's prosecutors by distorting the law in his favor. There was a flippant scoundrel who came forward to depose to Father Grady's having said mass.

" 'Pray, sir,' said the judge, 'how do you know he said mass?'

" 'Because I heard him say it, my lord.'

" 'Did he say it in Latin?' asked the judge.

" 'Yes, my lord.'

" 'Then you understand Latin?'

" 'A little.'

" 'What words did you hear him say?'

" 'Ave Maria.'

" 'That is the Lord's Prayer, is it not?' asked the judge.

" 'Yes, my lord,' was the fellow's answer.

" 'Here is a pretty witness to convict the prisoner,' cried the judge. 'He swears Ave Maria is Latin for the Lord's Prayer.'

" The judge charged the jury for the prisoner, so my poor old friend, Father Grady, was acquitted."

In O'Connell's early days the judicial bench was disgraced by a Judge Boyd, "who was," said O'Connell, "so fond of brandy that he always kept a supply of it in court upon the desk before him in an inkstand of peculiar make. His lordship used to lean his arm upon the desk, bob down his head, and steal a hurried sip from time to time through a quill which lay among the pens, which manœuvre, he flattered himself, escaped observation. One day it was sought by counsel to convict a witness of having been intoxicated at the period to which his evidence referred. Mr. Henry Deane Grady labored hard, on the other hand, to show that the man had been sober. 'Come now, my good man,' said Judge Boyd, 'it is a very important consideration; tell the court truly, were you drunk or were you sober that occasion.'

" 'Oh, quite sober, my lord,' broke in Grady, with a significant look at the inkstand, 'as sober—as a judge.'

" The seemingly gravity of the bench was in the hands of a queer keeper when committed to the care of Lord Norbury (the lord chief justice of the Irish Court of Common Pleas, 1800-1827). All who remember him as he presided in court can bear witness that nothing appeared to delight him so much as the uproar created by his volleys of puns.

" 'What is your calling and occupation, my honest man?' he once asked a witness.

" 'Please, your lordship, I keep a racket court.'

" 'So do I,' rejoined Lord Norbury, in gratified allusion to the *racket* which his witticisms constantly excited in court.

" It is told of Lord Norbury that when passing sentence of death on a man convicted of stealing a watch, he said to the culprit: 'My good fellow, you made a grasp at *Time*, but, egad, you caught *Eternity*.'

O'Connell used to relate the following pathetic story of a Mr. Tim Driscoll, for many years a leading member of the Munster Circuit:

" I remember," he said, "an occasion when Tim behaved nobly. His brother, who was a blacksmith, was to be tried for his life for the part he had taken in the rebellion of 1798; and Tim's unfriends among the barristers predicted that Tim would shirk his brother and contrive to be engaged in the other court when the trial should come on, in order to avoid the public recognition of so humble a connection as the blacksmith. Bets were offered upon the course Tim would take. He nobly disappointed the predictions of his enemies. He waited till his brother was brought into the dock—sprang into the dock and embraced him—remained at his side during the whole trial, cross-examined the witnesses for the prosecution from the dock, invariably styling the prisoner 'my brother.' He carried the sympathies of the jury entirely with him, got a verdict for his brother, and earned glory for himself."

When O'Connell was lord mayor of Dublin, on the first day's sitting his weekly court was, of course, extremely crowded. The tipstiffs tried to clear it. "Let all persons leave the court that haven't business," shouted one of these functionaries. "In Cork," said O'Connell, "I remember the crier trying to disperse the crowd by exclaiming, 'All ye blackguards that isn't lawyers, quit the court!'"

Here is a story related by O'Connell of doing a judge out of a bribe. "Denis O'Brien had a record at Nenagh—the judge talked of purchasing a pair of carriage horses, and Denis accordingly sent him a magnificent pair, hoping they would answer his lordship, etc. The judge graciously accepted the horses, and praised their points extravagantly, and, what was more important for Denis, he charged the jury in his favor, and obtained a verdict for him. The instant Denis gained his point he sent in a bill to the judge for the full value of the horses. His lordship called Denis aside to expostulate privately with him. 'Oh, Mr. O'Brien,' said he, 'I did not think you meant to charge me for those horses. Come, now, my dear friend, why should I pay you for them?' 'Upon my word, that's curious talk,' retorted Denis, in a tone of defiance: 'I'd like to know why your lordship should not pay me for them?' To this inquiry, of course, a reply was impossible; all the judge had for it was to hold his peace and pay the money."

O'Connell thought that the Irish bar had no such wit as Curran, but that other members of the bar participated in a large degree in the laughter-stirring quality. "As for myself, to the last hour of my practice at the bar I kept the court alternately in tears and in roars of laughter. Plunket had great wit. He was a creature of exquisite genius. Nothing could be happier than his hit in reply to Lord Redesdale about *kites*. In a speech before Redesdale (then lord chancellor of Ireland) Plunket had occasion to use the word 'kites' very

frequently as designating fraudulent bills and promissory notes. Lord Redesdale, to whom the phrase was quite new, at length interrupted him, saying, 'I don't quite understand your meaning, Mr. Plunket. In England kites are paper playthings used by boys; in Ireland they seem to mean some species of monetary transaction.' 'There is another difference, my lord,' said Plunket; 'in England the wind raises the kites; in Ireland the kites raise the wind.' Curran was once defending an attorney's bill of costs before Lord Clare. 'Here now,' said Clare, 'is a flagitious imposition: how can you defend this item, Mr. Curran?' 'To writing innumerable letters, £100.' 'Why, my lord,' said Curran, 'nothing can be more reasonable. It is not a penny a letter.' And Curran's reply to Judge Robinson is exquisite in its way. 'I'll commit you, sir,' said the judge. 'I hope you'll never commit a worse thing, my lord,' retorted Curran. Wilson Croker, too, had humor. When the crier wanted to expel the dwarf, O'Leary, who was about two feet four inches high, from the jury-box in Tralee, Croker said, 'Let him stay where he is; *De minimis non curat lex*.' And when Tom Goolde got retainers from both sides, 'Keep them both,' said Croker; 'you may conscientiously do so. You can be counsel for one side, and of use to the other.'

"I remember," said O'Connell, "being counsel at a special commission in Kerry against a Mr. S.: and, having occasion to press him somewhat hard in my speech, he jumped up in the court and called me 'a purse-proud blockhead.' I said to him, 'In the first place, I have got no purse to be proud of; and, secondly, if I be a blockhead, it is the better for you as the counsel against you. However, just to save you the trouble of saying so again, I'll administer a slight rebuke.' Whereupon I whacked him soundly on the back with the president's cane. Next day he sent me a challenge, but very shortly after he wrote to me to state that, since he had challenged me, he had discovered that my life was inserted in a valuable lease of his. 'Under these circumstances,' he continued, 'I cannot afford to shoot you unless as a precautionary measure you first insure your life for my benefit. If you do, then heigh for powder and ball—I'm your man.' Now this seems so ludicrously absurd that it is almost incredible, yet it is literally true."—Law Times (London).

#### CONFIDENTIAL COMMUNICATIONS TO JOURNALISTS.

REFERRING to the point of professional privilege raised in the trial in the Criminal Court of the District of Columbia of John S. Shriver, for alleged contempt in refusing to answer a question put to him as a witness during the senate's Sugar Trust investigation of 1894, the New York Law

Journal is unable to find any theoretical analogy between the position of a lawyer, or a doctor, or a clergyman, and that of a newspaper man, and feels convinced that the true interests of public policy would not be promoted by importing the feature of confidential privilege into the legal status of journalists. In this respect it disagrees with the great majority of the daily press, and for this reason the arguments advanced are reproduced herewith:

"The imposition of silence upon professional men is essentially for the benefit and protection of the individual making disclosures. It is deemed necessary for the good of his life, liberty and estate, of his bodily health and of his soul, that he be privileged, without danger of betrayal, to tell the whole truth to his counsel, his physician or his spiritual adviser. The argument for journalistic confidential privilege certainly is not founded upon private right; we suppose that it amounts to a claim that the interests of the great public will be subserved by allowing newspaper men to gather all possible information, and that to this end it is necessary to authorize them to guarantee that the identity of their informants shall not be disclosed. A somewhat paradoxical result is readily imaginable. Of course the obligation to secrecy would have to be absolute and not merely discretionary. And if a journalist had received in confidence a very plausible story, which, after being printed, turned out to be exaggerated or distorted, the person who made the original communication would be shielded from all consequences. We are inclined to think that the extension of rights and obligations of professional secrecy to journalists would as frequently work disastrously as advantageously from their own standpoint.

"From the standpoint of public policy, it should be observed that the proposed change in the law would afford still more available opportunities than now exist for misleading the public through the newspapers. The crying journalistic abuses, as everybody knows, are sensationalism and rashness and mendacity. Only last winter a determined agitation was begun for journalistic reform. It would seem to be contrary to the central idea of such reform to take away from the responsibility, moral and legal, of all persons contributing to the insertion of matter in a newspaper. What most needs cultivation is the spirit of responsibility in all directions. A man who, to gratify a grudge or grind an ax, hoodwinks a journalist into publishing an exaggerated or distorted story, should certainly be liable to exposure and answerable in damages. And as to the exceedingly vague argument of general public interest, we believe the journalists of the present day may well be trusted, under the law as it stands, to promptly inform the public of everything that is worth knowing and a great deal more besides."

## DISPOSITION OF PUNITIVE DAMAGES.

A PARAGRAPH from a recent number of the Law Journal (London) calls attention to the English rule allowing damages to be recovered from the co-respondent in a divorce case, and also a rather peculiar exercise of discretion in the disposition of such damages:

"When a co-respondent in a divorce suit has to pay damages, are such damages the aggrieved husband's or not? We are inclined to exclaim off-hand: 'Why, yes. Whose should they be but the person's who has sustained the injury?' But we should be wrong. The damages are meant to serve two purposes — to punish the co-respondent and to repair the domestic ruin which his misconduct has wrought. The husband does not always have them paid out to him, or assign them, or present a bankruptcy petition against the co-respondent in respect of them. The question turned up in a rather novel form before Mr. Justice Williams — the bankruptcy forum — where the trustee in bankruptcy of the husband appeared to set aside a settlement of the damages made by him (the husband) as a fraud on his creditors. The settlement was made with the sanction of the Divorce Court, and was for the benefit of the erring wife and of the children as well of the husband, and Mr. Justice Williams had no difficulty in finding that it was not within the mischief of 13 Eli., c. 5, or the principle of *Higginbottom v. Holme* (19 Ves. 88). The court has in such a case the dominion of the fund, and might settle the whole of it if it liked on the wife and children."

Such a settlement of the damages would probably be repugnant to American sentiment and the analogies of American law. A criticism of considerable force would be that the erring wife was to an extent suffered to profit by her own wrong. On the other hand, it may be said that the erring wife must live, and it is not immoral that the author of her ruin should make some provision to prevent her becoming a public charge, or worse; and that as far as the children are concerned, the disposition of the matter evinced much shrewd British sense. In pursuance of the combined theory of punishment and reparation, the wrongdoer was mulcted in pocket and the husband was indemnified in whole or in part for increased or different expense in the support of his children. entailed by the breaking up of his former family life. We are disposed to approve of any logically defensible efforts on the part of courts or legislatures looking towards making punitive damages as practically compensatory as possible.

The theoretical anomaly of the doctrine of punitive damages in civil actions is generally recognized. Such doctrine has been not inaptly characterized as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine"

(*Haines v. Schultz*, 50 N. J. L. 481). In some States the right to recover exemplary damages is not recognized at all. One incidental objection to the system of exemplary damages we do not remember to have seen discussed — their possibly demoralizing effect on their recipient. If we can imagine the case of a husband, say without the incumbrance of children, who repudiates his adulterous wife and recovers heavy damages from her wealthy paramour, the breaking up of his home might be really a pecuniary advantage to him. There is, of course, a theoretical distinction between exemplary damages, pure and simple, and compensation for mental suffering. But whether a verdict amounting to a small fortune in a crim. con. case were nominally based on one ground, or the other, the result would be substantially the same; and it certainly would not be a nice thing or a self-respectful thing for a man to succeed to a life of luxury on the proceeds of his marital wrong. In the case of a libel, which is taken up and repeated by many newspapers, the aggrieved person may, by suing each of them in turn, gather in not merely a small, but quite a large, fortune, out of all possible proportion to any damage originally sustained, his reputation being additionally vindicated by each verdict in his favor. Indeed, this method of growing rich would be so comparatively easy that we have been surprised that attempts of adventurers or adventuresses to embrace it, by colluding in starting sensational libels in circulation, have not been definitely exposed.

We are not arguing against the retention of the doctrine of exemplary damages. We believe the arguments in its favor overbalance those against it, and fully subscribe to the following language from Sedgwick on the Measure of Damages (8th ed., vol. i., pp. 516, 517):

"Upon the whole, the doctrine is to be supported (except in those few jurisdictions which have repudiated it) mainly upon the grounds of authority and convenience. The historical facts already referred to show that it has its roots in that jealousy of the exercise of arbitrary and malicious power, to which the jury in our system of law has always been so keenly alive; and if it is an anomalous survival of a part of the old rule that the jury were judges of the damages, it must be inferred that it has survived because of its inherent usefulness. Many anomalies which have far less authority behind them must be supported on this ground, and no anomaly supported by both authority and convenience can be eradicated simply by showing it to be illogical."

Everybody knows how difficult it is to procure the enforcement of criminal laws against smaller offenses, especially in large cities, because of the volume of more important matters pressing upon the attention of public prosecutors. For this reason we favor the policy, wherever practicable, of punishing petty acts of misdemeanor by the im-



position of pecuniary penalties, suable for by persons aggrieved, either in whole or in part for their own benefit. It is very important that rights of substantial recovery should exist in the cases of torts, where often the actual indignity is atrocious but the pecuniary damage inconsiderable or nominal. The doctrine of exemplary damages supplies an important adjunct to the criminal law as a deterrent from acts of moral turpitude and a preventive of retributive violence.

At the same time, there are cases in which it would be more conducive to right and justice in general if punitive damages did not go in their entirety as a purely personal perquisite to the individual aggrieved, and the suggestive incident of the English case above cited seemed worth calling attention to. — New York Law Journal.

#### A QUESTION OF MILLINERY.

IN Illinois the question whether or not the judges of the Supreme Court of that State shall wear judicial gowns, while upon the bench, is being agitated.

The Chicago Legal News has worked itself up into a dreadfully agitated state of mind over the proposed innovation, and shouts that "kingly crowns and gowns should find no place upon the American bench." As nobody has proposed that the judges of the Illinois Supreme Court shall wear "kingly crowns," or any other kind of crowns, on the bench, and as the adjective "kingly" has no application whatever to judicial gowns, gowns of the kind worn by the judges of the United States Supreme Court, since the court's origin, without any obvious damage or danger to republican institutions, we don't quite see the logical bearing of the Chicago paper's outburst of pseudo-patriotism.

Whether American judges wear judicial gowns on the bench or "sit" in their shirt-sleeves is a matter of no great importance, so far as we can see. Personally we would rather see a Supreme Court judge wearing a gown in a dignified manner than see, as we have seen, a Supreme Court judge wearing a black velveteen sack coat and a red necktie, sitting with his feet on the desk before him, busily engaged in manicuring himself, during the progress of an argument. Still we can conceive of no point of view from which this question of man-millinery might possibly seem worth serious consideration.

But isn't it about time that this nation had outgrown that youthful lack of confidence in its own ability to regard with indifference the lures of monarchical pomp, which lack led it, during the Jefferson Brick stage of its development, to lose no possible occasion for loudly protesting its utter contempt for crowns and other such baubles of royalty, and made it as desperately afraid of doing anything, no matter how trivial and harmless, that

is generally done in monarchies, as a reformed drunkard is of the first glass, and for the same reason? If, after a hundred years, our republicanism must still be kept under a glass case to shield it from monarchical microbes, if it is in danger of being started on the downward road to royalty by indulgence in a judicial robe, it must be so weak and sickly a growth as to be hardly worth preserving. "Republican simplicity," in so far as it "comes natural," is excellent and respectable, but straining after "republican simplicity" is no more respectable than any other affectation, and we confess that we have no patience with the kind of talk of which the Chicago paper's cheap, insincere, demagogic swash about "kingly crowns and gowns on the American bench" is a typical specimen. — Rochester Democrat and Chronicle.

#### EVARTS' JOKE ON DEPEW.

PLEASANT ANECDOTES ABOUT PRESIDENT HAYES' FAMOUS SECRETARY OF STATE.

"I SAID I was going to tell you about the political situation in Texas," said Eli Perkins to a reporter for the Chicago Inter-Ocean, "but that ain't what the public wants. The public wants something light and short. That's where I made my reputation — knowing where to stop.

"Speaking of politics — New York would have been proud and glad to have had Chauncey Depew represent us at the English court. He is an all-around American. He came up from the people like Alger, and Blaine, and Garfield. John Hay is loved through our literature, he is from the farm, too; but he never hoed corn and split wood, like Depew and Alger.

"Evarts — William M. Evarts," continued Eli, "secretary of state under Hayes — is another all-around American. He was born on an old New England farm, up in Windsor, Vt."

"What is the great constitutional lawyer who defended President Johnson at his impeachment trial doing now?"

"The old man is blind," said Eli, sadly; "but he is still as bright as a boy. He has given up practice, and now spends most of his time on the old farm at Windsor. He raises Alderney cows and Berkshire pigs. 'My Alderneys,' he said, one day, 'have maroon ribbons on their necks and gilded buttons on their horns, and my pigs have bells on their ears and tails.'

"By the way," said Eli, in a reminiscent mood, "I rode up to Windsor with Mr. Evarts the other day. He was accompanied by a boy, who was reading the morning papers. As soon as he recognized my voice, he said: 'Come over here, Eli. You know what I want. Give me the digest of all the news, and all the funny stories. Oh, I do miss the stories so! What has Depew said lately?'

"A moment afterward we were talking about riding on the Wagner, and I said: 'Now, Mr. Evarts, you have ridden a good deal on the sleeper, and how had a man better lie to sleep well? Head to the engine, or feet toward the engine?'"

"'Oh, you shouldn't come to a lawyer with such a question as that, Eli. That isn't a law question; that is an engineering question. You should go to some railroad president with such a question. Go and ask Depew.'"

"'But Depew is a lawyer, isn't he?' I said.

"'Well, y-e-s! Depew is a lawyer;' then, continuing slowly and thoughtfully, 'but all the law Depew knows wouldn't bias him in answering any question.'"

"When I told this story at the Lotos Club a week afterward, Depew happened to be there. He laughed with the rest, but just before he left he leaned forward, with his hand over his mouth, and whispered to me:

"'The story is all right, Eli; but if you won't tell it any more in New York, I'll give you an annual on the road.'"

"Mr. Evarts for years sent a half-barrel of pork every year to Bancroft, the historian, with a characteristic note. No one ever read these notes but Bancroft. When the historian died they found these two notes from Evarts, tied up with red tape by the hand of the dead author:

"'DEAR BANCROFT: If your history of America ever becomes as successful as "Carlyle's History of the French Revolution," it will be largely attributable to my pen. EVARTS.'

"'DEAR BANCROFT: I send you two products of my pen to-day—my usual half-barrel of pig pork and my eulogy on Chief Justice Chase.

"'EVARTS.'"

### Legal Laughs.

The nervous, wiry little lawyer ran his bony fingers through his shock of bright red hair, squared his shoulders, and turned towards the jury. His frame quivered with suppressed excitement. His small, yellow eyes were full of baleful glitter. It was apparent he was about to deliver a telling blow upon the opposition.

His immediate victim was the witness in hand, who had been called to the city to testify in a damage suit for personal injuries, on trial in the Superior Court. The doctor was a pacific-looking man, tall, awkward, smooth-shaven, and of heavy features, denoting a phlegmatic disposition. The jury had discovered he possessed a vein of humor that expressed itself in occasional dry witticisms and drolleries.

The doctor had happened to be the first person on the scene when the lawyer's client, a twelve-year-old boy living on the West Side, had been

run over by a cable car. The attorney was trying to shake his testimony, which was to the effect the boy said, just after the accident, he was trying to steal a ride by catching on the side of the car, when he slipped and fell under the wheels.

"Doctor," said the attorney, "wasn't the boy under the influence of opiates when he made that statement?"

"No. He said that first thing, before the operation."

"Well, you can't be sure after two years just when he said it. Isn't it true you gave the boy opiates before you dressed the leg?"

"No; didn't give him opiates at all."

"What? Do you mean you operated on that boy's leg without giving him any opiate to keep him from suffering?"

"Yes. I didn't give him any opiates."

Here was the lawyer's opportunity. His manner was tragic as he cast a hateful glance at the street car company's witness and turned to the jury.

"Gentlemen of the jury," he cried, "this great corporation comes into court to fight the claim of this boy, a cripple for life, and asks you to believe the testimony of this man, who confesses himself an inhuman wretch. Think of the agonies that boy suffered while the operation was in progress, and still this human fiend gave him no opiates to relieve his suffering. See him smile as he sits there on the witness stand. He is gloating yet over the memory of this poor child's pain."

The doctor kept on grimly smiling until the lawyer paused to let his words strike in on the minds and consciences of the jurors; then with a slow turn of the head towards the jury-box, with a half apologetic drawl, the doctor said:

"We don't use opiates in surgical operations; use anæsthetics."

If the court had ordered the bailiff to remove from the room all who laughed, the little red-haired lawyer would have been left alone with his thoughts. — Chicago Journal.

They have a good one just at present on a well-known Bangor lawyer, who is noted for his absent-mindedness. He went up his own stairs the other day, and seeing a notice on his door, "Back at 2 o'clock," sat down to wait for himself. — Ohio Legal News.

### COMPANY LAW AND THE QUEEN'S REIGN.

MANY and marvelous have been the achievements of the queen's long reign; but, to contemplation's sober eye, has there been anything more memorable, more marvelous, in the dual demesne of commerce and law than the evolution of the joint-stock company? When her majesty ascended the throne that expression was a by-word, a synonym for reckless speculation and

ruin -- for scenes like those of the Glasgow bank failure. To-day there are probably thirty thousand sound and successful companies carrying on business in every quarter of the habitable globe, busily engaged in all sorts of useful and profitable industrial undertakings. What has made the difference? An era of unexampled national prosperity has had something to do with it, creating a vast reservoir of capital ever seeking profitable investment; but if we ask why this capital has poured itself into the channels of trading companies we must find the real reason in the wisdom of the law which has regulated the formation and the operations of these great trading corporations. It was the genius of Lord Bramwell which first invented the magic word "limited." "Write it on my tombstone," he said facetiously, and he might well be proud of the invention. That little key it is which has unlocked the golden stream, yet it is but one instance of the beneficent adaptation of the law. The Companies Act was a mere framework. Its policy and its principles had to be worked out in detail by the judges, and we may well wonder at and admire the vast body of judge-made law which has transformed the Companies Acts into an admirable code of company law. Think of the volume of law on such subjects as the formation of companies; of *ultra vires* and *intra vires*; of promoters and their fiduciary relationship; of directors, their powers and their liabilities; of the agreement to take shares; of payment for them, of their transfer; of preference shares, and founders' shares, and bonus shares, and underwriting contracts; of debentures, with all their special law; of the network of rights and liabilities connoted by "winding-up." All these things our judges have had to think out -- *sum cuique tradere* -- seconded by the arguments of counsel and the commercial experience of solicitors and other business men; and if we have to-day in full and successful working this vast system of industrial co-operative enterprise, it is in no small measure due to lawyers of all ranks who have helped to develop this branch of our commercial law in the spirit of Lord Holt and Lord Mansfield. Some will ask with Burke, "Are not our laws written on the sands of time and effaced by the winds of popular opinion?" But how misleading is a metaphor! That very change is their glory, not their reproach. It means that the judges are constantly adapting them to the changing exigencies of the social environment. — Law Journal (London).

### English Notes.

Lord Justice Lopes, who has been created a life peer, belongs to a well-known family in the west of England. He is the third son of Sir Ralph Lopes, the second baronet, of Maristow, Devon,

and first saw the light in 1838. Becoming a barrister, he went the Western Circuit, and, with Mr. Justice Charles, divided much of the practice left by Coleridge and Karslake on their promotion. A staunch Conservative, he sat in the house of commons for Launceston and Frome. On the death of Mr. Justice Archibald, in 1876, Mr. Lopes was chosen a judge of the now defunct Court of Common Pleas, and, after serving nine years, was appointed lord justice of appeal. By his marriage his lordship became connected with the old Cornish families of Molesworth and Trelawny.

The death of Sir John Simon removes still one more link binding the present with the past. The deceased knight was one of the few living sergeants-at-law who practised in the old Court of Common Pleas. We believe that now but one remains. There are, however, several of the judges who became sergeants in accordance with the old practice which made this necessary. It is impossible to avoid a feeling of regret at the gradual disappearance of an ancient and honored class. — London Law Journal.

A curious proposal, says the London Law Journal, has been put forward by a well-known member of the American bar in regard to the defence of prisoners. It is that counsel for the crown should prosecute and defend at the same criminal trial. The advantage that is claimed for this appearance of State counsel in a dual capacity is that it would remove the notion that their chief object is to obtain a conviction, and enable them to find out in a spirit of judicial inquiry all the facts of the case. In other words, the public prosecutor, also a public defender, would sit in judgment upon the prisoner before his case came before the jury, and would withhold from the twelve good men and true all the theories of innocence with which the prisoner's case might be strengthened, but in which he himself, with the information in his possession as prosecuting counsel, saw no reason to believe. One trial conducted on such a system of advocacy would, we imagine, be amply sufficient to prove that not even counsel for the crown can serve two masters.

Lord Justice Lopes will, it is understood, assume the title of Baron Heywood.

A Canadian law library has been established in London. Statutes, reports and gazettes have been received by the librarian, Mr. S. V. Blake, from the Dominion and most of the provinces, and a valuable collection of French law works has been lent the library. It is intended to raise, by subscription, sufficient funds to fill important gaps.

The race of special pleaders in England will soon be extinct. The Law List for the present year shows that only seven remain; forty years ago there were 109.

The paramount right in navigable waters is the

right of navigation which belongs to the subjects of the realm, and it has been held that every grant by the crown of the soil is subject to this public right, which includes the right to anchor, says the London Law Journal. The defeat of any attempt to interfere with the fullest exercise of this right is welcome. The Court of Appeal has, in the *Attorney-General v. Wright*, emphatically affirmed the existence of a general right to anchor a boat in navigable waters, not merely by dropping an anchor, but also by putting down moorings, which the owner of the boat can leave behind and return to at will. Claims have sometimes been successfully made by the owners of the soil under navigable waters to charge dues for the right to anchor. In the present case, however, the lessee of an ancient fishery asserted a right to cut boats adrift and seize as his property the moorings which had been affixed to his land.

### Legal Notes.

A new statute in Connecticut makes it unlawful for officers of public records, State, municipal or court, to use any ink in making public records not approved by the secretary of state. This is based upon the fact that in using poor ink in past years some important records are now nearly illegible.

A sanitary Bible for the use of court-rooms has been put on the market. It is bound with white celluloid instead of leather, and it can, therefore, be washed and disinfected from time to time. One of these Bibles is already in use in the mercantile department of the board of health of New York.

Prosecutions are expected to begin soon under a new Massachusetts law which forbids the wearing of the body or feathers of any undomesticated bird. Every offender will be fined \$10, and the prosecuting witness will be paid a reward of \$5.

C. W. Walton, justice of the Supreme Court of Maine, will soon retire after a service of forty years.

The Oklahoma legislature is considering a law to abolish the sharp-pointed shoe. The newspaper wits are, of course, getting in their work on the V-toe question.

Applying the doctrine that a loss or injury is due to the act of God where it is occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight, it is held, in *Wald v. Pittsburg, C. C. & St. L. R. Co.* ([Ill.], 35 L. R. A. 356), that an unprecedented flood, by reason of which the baggage of a passenger is swept away, is an act of God; but that where unnecessary delay of a carrier made the loss of the property by such flood possible, the carrier is liable.

McGill University, Canada's most famous institution of learning, will have a notable addition to its faculty, in September next, in the person of Mr.

F. P. Walton, B. A., LL.B. In connection with the faculty of law, it has hitherto not been found possible to arrange a satisfactory scheme of work, owing to the professors attached to that faculty being engaged in the active duties of their profession and unable to devote the necessary time to the work which the departure demanded. Ever since the resignation of Dean Trenholme, the governing body of the university have had in mind the appointment of a permanent dean, whose entire time would be devoted to the interests of the faculty, and who would be attached also to the faculty of arts, delivering, in connection with the chair of history in that faculty, lectures on constitutional law and history, Roman law, and cognate subjects. The desire of the authorities has been to establish as far as possible, in addition to the ordinary law lectures, a scientific and advanced school of law, in which the course of study shall afford a scientific training for future lawyers and judges, and a fitting preparation for the legislature and public life. In pursuance of this plan, Mr. Walton was appointed by the board of governors. He is a member of the Scotch bar, and has been for several years past specially identified with the teaching of law in the universities of Edinburgh and Glasgow. He is an accomplished linguist, and is at present examiner of modern languages in the University at Edinburgh. He has resided a good deal in France, and studied the civil law of that country, whose language he speaks fluently. It will thus be seen that Mr. Walton is peculiarly well fitted for the duties which he will undertake at the head of the law faculty of McGill University.

A jury summoned by direction of the court from the country districts of a county to the exclusion of residents of a city is held, in *Zanone v. State* ([Tenn.], 35 L. R. A. 556), to be illegal under a constitutional guaranty of an impartial jury of the county.

A gift over in the event of the death of any of testator's children "without living heirs of their body" is held, in *Glover v. Condell* ([Ill.], 35 L. R. A. 360), to import a definite failure of issue, and not to contravene the rule against perpetuities—especially where the gift is of personalty and the share of any child dying without living heirs is to be divided among the remaining children of the testator.

Some important questions as to the cross-examination of a defendant in a criminal case who takes the witness-stand in his own behalf are decided in *State v. Pancoast* ([N. D.], 35 L. R. A. 518), and it is held that he is subject to the same rules of cross-examination that govern other witnesses, and may be required to answer any relevant and proper question that will tend to convict him of the crime for which he is being tried, even though it may also tend to convict him of some collateral crime.

**Notes of Recent American Decisions.**

**Joint Verdict — Judgment Against Only One of Several Defendants.** — In an action against several defendants to recover damages for injuries inflicted upon plaintiff by a wild and vicious bull, which, it was alleged, had been turned loose by defendants upon the streets of the city, a verdict having been returned "for the plaintiff," and assessing the damages, one of the defendants against whom alone judgment was rendered upon that verdict can not complain that judgment was not rendered against the other defendants also, as it was agreed in writing that she alone was the owner of the business for which the bull was purchased, and she was the one who, in law and justice, ought to pay, and would have to pay the judgment; and, besides, counsel for defendants had asked, after the testimony was heard, that the jury be instructed to find for the other defendants. (*Pfaffinger v. Gilman* [Ky. Sup. Court], Ky. Law Rep., June 15, 1897.)

**Principal and Agent — Parties to Actions.** — Where an agent, in selling goods subject to the approval of his principals, agreed with the buyer to take from him a horse at a certain price, to be credited on the last of three notes executed for the purchase-price of the goods, that agreement is not binding on the principals, no reference being made to it in an order for the goods, signed by the buyer, to be forwarded to them, and the agent is not a necessary or proper party to an action upon the note upon which the price of the horse was to be credited. (*Russell & Co. v. Cox* [Ky. Sup. Court], Ky. Law Rep., June 15, 1897.)

**Torrens Land Title Act in Ohio Unconstitutional.** — The following is the syllabus of the opinion of the Supreme Court of Ohio in the case involving the constitutionality of the Torrens Land Title Act of that State: 1. The remedy by due course of law, guaranteed by section 16 of the Bill of Rights, extends to all the adversary rights of persons in property and requires that before there is a judicial determination affecting such rights process to obtain jurisdiction of the person claiming it shall be issued and served, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable. The act of April 27, 1896, entitled "An act to provide for the registration of land titles in Ohio," etc. (92 O. L. 220), is repugnant to this section of the Constitution. 2. Said act is repugnant to section 19 of the Bill of Rights, because it attempts to authorize the taking of private property for uses that are not public and without compensation. 3. Said act is repugnant to section 1 of article 4 of the Constitution, because it attempts to confer judicial power upon the county recorder.

**Notes of Recent English Decisions.**

**Injunction — Corporation — Misapplication of Funds — "Ultra Vires" Libel — Tort — Master's Right to Defend Servant.** — Appeal from an order of North, J., restraining the association until the trial of the action from expending their funds in defending a libel action which had been brought against their agent. The association was incorporated by royal charter for the purpose of founding and maintaining schemes for the benefit of nurses, supplying information to nurses, promoting conferences and meetings, and doing anything incidental or conducive to carrying into effect these objects. The association published quarterly a newspaper, called the *Nurses' Journal*; the *Journal of the Royal British Nurses' Association*, for the information of members of the association, and a copy was sent to each member. This journal was carried on under a honorary editor, whose duties were merely secretarial, and a journal and library sub-committee. The sub-committee sent to the editor, who published it in the journal for August, 1896, a report of proceedings at a general meeting of the association, with comments. A Dr. Bedford Fenwick alleged that these comments were a libel on him, and brought an action against the editor for damages. He refused to make the association defendants. The executive committee of the association passed a resolution that inasmuch as the action ought to have been brought against them, a sub-committee should be appointed to defend the action on behalf of the editor, and that the treasurer should be authorized to pay the costs. This resolution was approved at a meeting of the general council of the association. An action was then commenced by Miss Breay, an ordinary member of the association, against the association to restrain them from expending their funds in this way. North, J., granted an injunction until the trial; and the association appealed. Their lordships allowed the appeal. They said that the association had ample power to publish, and did themselves publish, the journal. The editor was no doubt liable for publishing the libel, but the association would also be liable for the very same thing, and could spend their money in defending themselves. Dr. Fenwick might have brought one action against them and the editor; they need not have severed in their defense; and as between themselves and the editor they were the persons to blame. Their position could not depend on whether Dr. Fenwick did or did not make them parties. The editor was their servant, and there would be nothing wrong in a master undertaking the defense of his servant in these circumstances. To say that they could not spend their money in this way, as an ordinary master could, would be to say that a corporation could not transact ordinary business. (*Breay v. Royal British Nurses' Asso.*, Ct. of App. Law Journal [London], June 26, 1897.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JULY 24, 1897.

### Current Topics.

THE so-called anti-trust law enacted by the New York Legislature at its last session, may be described, in sporting parlance, as "somewhat disfigured though still in the ring." The proceedings against the coal combination, which were recently instituted under its provisions, have come to a sudden termination. Judge Alden Chester's decision vacating the order appointing a referee to examine witnesses and take testimony on the subject of alleged combinations in restraint of trade appears to be based upon two principal points: First, that the law of 1897 attempts to impose upon justices of the Supreme Court functions which are non-judicial, and hence in violation of the Constitution. Second, that the law violates the constitutional rights of witnesses in those features of it which were relied upon to force the coal road presidents to testify against themselves, and then convict them of conspiracy upon their own evidence. These objections seem to be conclusive, and, although appeal will undoubtedly be taken to the tribunal of last resort, it does not seem probable that the courts will sustain the new law. The fact is pointed out that the decision of Judge Chester is in entire accord with that of the Supreme Court of the United States in the Counselman case. In that case Counselman declined to answer questions required by the Inter-state Commerce Commission,

VOL. 56 — No. 4.

on the ground that his replies would tend to incriminate him. He was declared to be in contempt, and, upon *habeas corpus* proceedings, the Supreme Court granted the writ on the ground that the most perfect and complete immunity from direct or indirect prosecution must be secured to a witness before he can be compelled to answer a question whose answer might tend to incriminate him. Congress was therefore compelled to pass a special statute declaring that no testimony given by any witness in inter-state commerce proceedings should ever be used directly or indirectly against him in any way. Notwithstanding this decision and the fact that Senator Lexow's attention and that of the legislature were called to it, it was ignored in the preparation of the statute. Jacob Sharpe escaped State prison because certain testimony he had given before a legislative committee was afterward used in his prosecution for bribery in the Broadway Street Railway proceedings. That case, too, was brought to the notice of Lexow and his committee, and yet, in spite of it, this statute was framed in such a manner as compelled the production of incriminating testimony without sufficient guarantee that it would never be used against the witness. Perhaps it would be unjust or at least premature to declare that the legislature never intended to frame a law that would stand the test of constitutionality, although stranger things than that have happened among legislators controlled by bosses or demagogues, or both. It would possibly be more just to say of the legislature of 1897 that "it meant well but didn't know;" but it does seem passing strange that, with all the legal talent embraced in its membership, the law-makers were not able to draft a law which would be constitutional and enforceable for the specific purpose intended.

San Francisco — which is nothing if not spectacular — continues to coddle Theodore Durrant, the convicted murderer of two innocent school-girls, and to parade him before the world as deserving of sympathy and aid in his desperate efforts to escape the

gallows upon which he should long ago have expiated his diabolical crimes. In order to replenish the impoverished exchequer of his family, who have probably expended all the money they had or could raise in thus far prolonging the prisoner's life, Durrant is said to have capered the other day for several hours before the camera of a veriscope, with the object of later reproducing the pictures of himself all over the country, in theatres and music halls. We are of the opinion that this scheme of raising money will fail, as it ought to fail. The public has been surfeited with pictures of this young monster; what they would like to see, however, is a veriscope picture of his execution, and possibly his relatives might, in this way, realize sufficient money to give the remains a decent burial. The whole history of this remarkable case as well as of many others, shows that there is something radically wrong in our system of administering justice in criminal cases. It is now several years since the discovery of the awful crimes in the little Baptist church in San Francisco shocked the civilized world, and more than two years since Durrant was convicted, after a long and eminently fair trial, of the murder of Blanche Lamont, and sentenced to death by the rope. Beaten in every effort he has made to have the conviction set aside, and having been refused executive clemency, the condemned man's friends, when the hangman seemed at last to have him within his grasp, succeeded in getting a United States Circuit judge to grant an appeal to the highest federal court, giving the prisoner another half-year's lease of life. Thus the travesty on justice continues. This is probably, however, the last card the prisoner or his friends will be able to play, and, if the decision of the United States Supreme Court is against him, the hemp is certain to end a life already too long spared, unless, in the laxity of prison discipline and regulations, he should be permitted to resort to suicide. It is such monstrous perversions of justice as are embodied in the Durrant case that foster and lead to lynchings, so prevalent in many communities. The Eng-

lish system relating to appeals in criminal cases may be too harsh, but ours goes to the other extreme. This is generally conceded, but little effort at reform seems to be made.

We have received the *American Lawyer* for July, 1897, accompanied by a supplement containing, what the publishers term a galaxy of over eighty of the leading lawyers practicing at the bar of Greater New York, with biographies of each. These eighty or more "photogravures" ought to be very satisfactory to these eighty lawyers, for they are apparently exceedingly well executed, and through their biographies present the originals as no common lights in the realms of jurisprudence. Looking over this array of four-score lawyers thus congregated in the ample pages of the *American Lawyer* we are reminded of a remark made by Lord Bacon when he was made a peer of the realm. He had sought that honor long and patiently during the reign of Elizabeth without success, but soon after James I ascended the throne that monarch conferred upon Bacon the star and belt of knighthood and he became a peer of England with about sixty others. Sir Francis went through the ceremony in rather a sullen mood. When his friends approached him with congratulations he received them without any semblance of pleasure. "Sir Francis," said one of his friends, "you are now Lord Bacon, but you do not seem elated over it. Why is this?" "I know I am a peer now, but the peerage is too gregarious. *I do not aspire to honors that come in flocks.*" We have always believed that lawyers are not gregarious, but since looking at the galaxy containing over eighty of them in the *American Lawyer*, we have changed our views on that subject.

The twenty-first annual meeting of the Illinois State Bar Association, which was recently held at the Chicago Beach hotel, proved one of the most interesting and valuable in its history. John H. Hamline, the president of the association for the past two years, presided. The committee on admissions reported favorably on eighty appli-

cants for membership and they were duly elected. The association devoted much time to the discussion of the changes in the procedure of the Supreme Court of Illinois, necessary to adapt the practice of that court to the recent act locating it at Springfield. After being migratory for about half a century, the Supreme Court of Illinois has at last found a permanent home at the State capital, a reform to which the association had devoted much time and effort, and the association followed this by considering the changes advisable in the practice to get the best results from the location of the court. After discussing the matter in its various phases a resolution was passed favoring the adoption of the practice of the Supreme Court of the United States with regard to the consideration and hearing and decision of cases. Hon. George W. Miller of Chicago delivered an address on the Bar and the Legislature. Mr. Miller was a member of the last general assembly and introduced into the house of representatives the bill locating the Supreme Court, and the success of the matter is largely due to his ability and influence. Hon. R. E. Hamill, of Springfield, delivered an address on the End of the Law. The association next considered the question as to whether any cause ought to be heard in more than one court of review. At present most cases in Illinois are taken to an intermediate appellate court and many of them are appealed then to the Supreme Court. The discussion was opened by Judge Simeon P. Shope, late of the Supreme Court of Illinois, and Judge Henry M. Sheperd, late of the Appellate Court for the Chicago district. Prof. Henry Wade Rogers, President of the Northwestern University at Evanston, delivered an address on Legal Education, which was followed by an address by Jesse Holdom, of the Chicago bar, on the Progress of the Law in the Victorian Era. The election of officers resulted in the choice of Gen. Alfred Orendorff, of Springfield, as President. Hon. Adolph Moses, of Chicago, Judge Charles Blanchard, of Ottawa, Col. Benson Wood, of Effingham, as Vice-Presidents, and James H. Matbeny as Secretary. The Association

next took up the subject of instructions to juries in the question "Should the present system be continued? If not, what changes are advisable?" Mr. Clarence S. Darrow, Joseph B. Mann and Adolph Moses discussed the matter.

Judge James B. Bradwell, of Chicago, read the report of the Necrologist and Judge Elliott Anthony, of Chicago, submitted the report of the committee on Legal History and Biography. In the evening of July second the annual banquet was held at the Chicago Beach Hotel and was a brilliant and successful occasion.

It is pleasant to note that the Illinois Bar Association is in a flourishing condition, doing valuable work for the profession and the administration of justice, and with a future fully as bright as its past.

In the issue of the Central Law Journal for July 16 (Vol. 45, No. 3), we find a very interesting discussion of the question "Is what a jury sees evidence when ordered out by a court to make a view of premises?" In other words, must a jury rely and decide upon the testimony, and not what they may see when "making a view." The author very properly, at the outset, distinguishes the cases, separating the different kinds of juries and viewers. Fence viewers, road viewers, etc., frequently have no other than ocular evidence before them, and their functions must not be confounded with those of a regular *nisi prius* jury.

The writer goes into the modern history of the doctrine, citing the leading cases, and holds that the criminal phase has no more sense in it than the civil phase. He asks what sense there is in a prisoner going out with a jury to make a view; his attorney could not cross-examine the landscape, nor explain anything, and if the prisoner should go the judge ought to go too. In his recapitulation the writer asserts: 1st. What the jury sees on a view is not evidence. 2d. The judge need not accompany the jury on a view. 3d. A prisoner on trial need not accompany the jury. 4th. What the jury sees need not go into a bill of exceptions. 5th. A view is always a matter of discretion



with the trial court. Views should not be permitted, except in cases where maps and plats are not sufficient to explain, and where the evidence is difficult to understand or to apply. And then the judge should caution the jury in advance. At the end of the trial the judge should instruct the jury, whether asked to or not, that what they see is not evidence, and that the view is to be disregarded by them, except so far as it enables them to better understand the evidence.

This seems to be a correct exposition of the doctrine, a clear understanding of which is likely to avoid unnecessary complications in the adjudication of cases, both civil and criminal.

An interesting decision as to the prerogatives of a State executive was rendered recently by Judge Simpson, of the District Bench, Minneapolis. It was held that while it was the duty of the Governor of Minnesota to respond to the grand jury's subpoena and to produce such papers as it required, he could not be compelled to do so by the judiciary branch of the State government, which, though co-ordinate with, is not superior to the executive. It was held that the governor is exempt from judicial process while in the discharge of his duties, and that he alone is judge of when such process would interfere with his official duties. He is amenable only to the legislature, which may impeach him for violation of duty. In his decision Judge Simpson points out that the power to summon witnesses is at the root of the judicial function, and that the governor is not justified in declining to respond, but he also concludes that for the judiciary branch to compel him to do so would be to bring the two branches of the government into conflict, and that this would be against public policy.

The courts are called upon to answer all sorts of peculiar questions. For example, the Superior Court of Pennsylvania recently had to decide what constitutes skimmed milk. Now this does not appear at first blush to be a very difficult question to answer. One would be likely to say, of

course, that skimmed milk is milk from which the cream has been removed, in whole or in part; but this definition would hardly suffice. In the opinion of the Pennsylvania bench, or a majority of them, it all depends upon how the cream is removed, for the court found this the rock—to slightly mix the metaphor—upon which they split. In the case in point, that of *Commonwealth v. Hufnal*, which came up on appeal from the judgment of the quarter sessions of Philadelphia county, the defendant, Elizabeth Hufnal, had been indicted under the Act of June 26, 1895, P. L. 317, charged with unlawfully selling milk from which a certain valuable and necessary constituent had been wholly abstracted. It appeared from the evidence that the milk which the defendant sold, instead of being skimmed in the usual way with a spoon or ladle, had been treated by the separator process, which, subjecting the fluid to a centrifugal force, operates on every particle, driving off all the lighter portion so that what remains is not worth considering. Milk so treated, the majority of the court held, is not skimmed milk, within the ordinary meaning of the term, so that it could be properly sold as such by a vendor, and the defendant was not acting honestly in selling it as such. The residuary product of this process has its distinctive name—separator skimmed milk—to indicate just what has been accomplished. The court found that by the means used in this case a fraud had been practiced on the public, in delivering to the purchaser a cheaper as well as an entirely different article, and on the honest dealer who must be driven from the market by such deceit. The court added: "Usage and custom have not only given this product a name, but qualities and attributes which are associated with the name. As such, it is purchased and used for special purposes. The demand for the different grades of milk has been met by new devices which furnish new results, and each should be given a distinctive name to truthfully represent the strength, purity and health merit of the product. The sale of these is not prohibited by the Act of 1895, if they are

honestly made as articles, or ingredients of articles, of food; and each and every package, sold or offered for sale, be distinctly labeled as mixtures or compounds, and are not injurious to health."

Judges Reeder and Wickham were unable to unite with the majority of the court in their interpretation of the law as applied to the facts in this case. Judge Reeder, who wrote the dissenting opinion, in which Judge Wickham concurred, said: "First. I believe that the proper definition of skimmed milk is milk from which the cream has been wholly or partially removed no matter by what process. The only method known for removing cream from milk was by skimming it from the top with a spoon or some similar utensil until recent years when other methods were invented. The purpose of both the old and the new method was to remove as much cream as possible from the milk. The method used by the old process gave the residuum the name of skimmed milk — the new process only differing in its effect upon the milk by the removal of more cream, the residuum by the latter process only differing from that in the former in this, that the cream is more successfully removed, in my opinion it is still proper to designate and sell it as 'skimmed milk.' Indeed, many, if not most of the lexicographers define 'skimmed milk' as 'milk from which the cream has been removed.'

"Second. The sales made to the baker Kolb, the only ones proved by the Commonwealth when their case closed, was made with his full knowledge that the milk he was buying was milk from which the cream had been removed by the centrifugal process. In fact, he said the defendant herself told him so when he bought the milk. The act does not prohibit the sale of 'separator milk' when sold as such, so long as it retains all the constituents it has when it came from the separator."

The New York Court of Appeals, in its recent decision affirming judgment convicting Giuseppe Costantino of murder in the first degree in killing Jeitro Galiotti at

Utica, held, among other things, that the fact that during the trial the jury, in charge of officers, attended church, where the sermon was upon the prevalence of crime, was insufficient to justify a new trial, when it was shown that the officers, as soon as they discovered that anything might be said which could prejudice the jury, at once left the church with them, and that the trial judge thereupon stated to the jury, and at the close of the trial charged them, that no opinion uttered by the preacher should have the slightest weight upon their minds in forming their verdict.

Anent the recent decision that an attorney may properly weep while addressing the jury in his client's behalf, Mr. James M. Kerr, the scholarly author of several well-known law books, says: "I never see an attorney weep while addressing a jury but I recall the words that grand old dramatist, Philip Massinger, puts into the mouth of the brave Romont —

—, heavens! you weep:

And I could do so, too, but that I know  
There's more expected from the son and friend  
Of him whose fatal loss now shakes our natures,  
Than sighs and tears, in which a village nurse,  
Or cunning strumpet, when her knave is hang'd,  
May overcome us.

The Fatal Dowry, Act I, Scene 1.

### Notes of Cases.

The Supreme Court of Iowa, following its former decision in *Opel v. Shoup* (69 N. W. Rep. 560), has lately held that a treaty of the United States with a foreign country, providing that aliens may inherit lands, is controlling, and confers that right upon them, though the laws of the State may provide otherwise. (*Doehrel v. Hillner*, 71 N. W. Rep. 204.)

According to a recent decision of the Circuit Court for the Southern District of California, a suit in a State court cannot be pleaded in abatement of a suit as to the same matter in a Federal court; but when a State court has first taken cognizance of a cause of which that court and the Federal court have concurrent jurisdiction, the Federal court, on motion, will dismiss a suit brought in it as to the same matter, or will sus-

pend proceedings therein until the final action of the State court. (*Gamble v. City of San Diego*, 79 Fed. Rep. 487.)

A contract declared upon in a case recently decided by the Supreme Court of Georgia was to the effect that if the plaintiff would erect upon a lot a permanent and first-class hotel for the accommodation of the traveling public, maintain the same in a first-class manner, and accommodate therein employes of the company at one-half the rates charged other customers, the company, by the patronage of its road, would maintain and support the hotel. The plaintiff was the owner of a lot of land adjoining the company's right of way at one of its stations. The declaration set forth also various facts, such as building a hotel, maintaining the same as agreed, etc. The complaint was dismissed on demurrer, the court holding (*Hart v. Georgia Railroad Company*) that the contract was too vague and indefinite to afford any safe, satisfactory or proper basis for computing damages arising from its non-performance by either of the parties.

The question whether a married woman living in one State can hold bank stock in another State was decided in the affirmative by the Maryland Court of Appeals in the case of *Kerr, Receiver, v. Urie*. The court, in rendering judgment, said: "The question presented is whether a married woman residing in this State is capable of holding stock in a national bank located and doing business in the State of Texas, and if so, whether she is liable as such stockholder under the personal liability provisions of section 5152 of the Revised Statutes of the United States. Whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case than from any other cause, for it can hardly be supposed that, at this day, when, by the law of most all the States, a married woman may contract as a *feme sole* in respect to her separate estate, she is without power to subscribe for or become the transferrer of the stock of a national bank."

Helen J. Hoffman sued the president, etc., of the Delaware and Hudson Canal Company to recover for personal injuries which she received through the sudden derailment of a train on defendant's road, while moving at about the rate of forty-five miles an hour. While the train ran some distance on the ties after leaving the track, the oil can of a metal lamp, which was adjusted to the ceiling of the car, and directly over the seat occupied by the plaintiff, became in some manner detached and dropped upon her, producing serious and permanent injuries. A judgment in favor of Miss Hoffman has been affirmed by the Fourth

Appellate Division. The vital issue in the case was whether the cause of the derailment was the negligence of the company in not properly caring for its tracks and roadbed, an inevitable accident, or the criminal intervention of some third party. The defendant contended, on appeal, that the company's chief engineer, who had made a careful examination of the situation, should have been allowed to testify whether the condition of the ties at the point of the accident had any effect upon the cause of the derailment, or could in his opinion, have contributed to it; and to give his opinion, judging from his examination of the scene of the accident, as to the cause of the derailment. The court holds that the proposed testimony was properly excluded; that expert evidence is not made competent simply by the fact that the witness may know more of the subject of the inquiry and may comprehend and appreciate it better than the jury.

A holographic will was recently construed by the New York Court of Appeals, and the decision is of more than ordinary interest. It appeared that Lizzie H. Perkins, who died in Paris, in September, 1891, had drawn her own will about nineteen months previously, without legal aid or advice. The fourth clause of the instrument contained this provision: "I appoint Ellen C. Woodbury as my legatee, and give her all not before specified in this, and request her to give as I may direct or sell from what remains." By the fifth clause she appointed Levi P. Morton, with two others, as her executors, and directed that they "shall sell bonds, stocks and other property, and give the money thus collected to hospitals and homes for women in Washington and New York." The only heirs-at-law and next of kin of the testatrix was her father, Thomas Harward, who, at the time of her death, was 103 years old. In the action brought by ex-Governor Morton, as sole surviving executor, for the construction of the will, the Court of Appeals has affirmed the judgment of the late General Term of the First Department, holding, by Judge Martin—Judges O'Brien and Vann dissenting—that the fourth clause was a good general residuary clause, and that the bequest in the fifth clause, being void for uncertainty, lapsed, fell into the residuum, and passed to the person named in the fourth clause as general residuary legatee, and not to the next of kin by intestacy. The appeal was made by the executors of Thomas Harward, who died shortly after the testatrix. The court says no particular mode of expression is necessary to constitute a residuary legatee; it is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated.

After charges of unprofessional conduct had been made some years ago to the General Term of the New York Supreme Court against William Youmans, a practicing attorney of the village of Delhi, supported by affidavits of eighteen witnesses, and a denial had been filed, supported by affidavits of fifty-four witnesses, a reference was ordered by the court to take proofs. A list of "questions to be asked" during the investigation was taken to the printing office of Sherrill E. Smith and others, in their absence, where copies were printed and delivered. In an action against the printers for damages for libel, Youmans recovered judgment on the trial, and that judgment was affirmed by the late General Term of the Fourth Department. Pending the appeal to the Court of Appeals, the plaintiff died, and his administrators were substituted as respondents. That tribunal has now directed a reversal, holding, by Justice Vann, that the defendants, in delivering twenty copies containing libelous matter to the author, knowing that he intended to submit them to various persons to be read, became liable as publishers from the moment that any third person read the matter, provided it was not privileged. Counsel conducting judicial proceedings were held to be privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words or writings were material and pertinent to the questions involved, and if the questions which were to be submitted to persons expected to be called as witnesses, although libelous, were not so manifestly immaterial that under no circumstances could they be asked upon the trial, the drafting and printing of these questions were privileged, and protected both the attorney and his employees against a prosecution for libel.

The Court of Appeals of New York, in the recent case of *Clason v. Baldwin* (16 N. Y. Law Journal, 1767), held that where each party, at the close of the evidence, moves the court to direct a verdict in his favor, they thereby waive the right to have any questions of fact submitted to the jury; and all questions of fact will be presumed to have been found by the court in favor of the party in whose favor a verdict is directed. The court said, in part: "At the trial, upon the close of all the proofs, counsel for each party moved that a verdict be directed in his favor. The court refused to direct a verdict for the defendant, and directed a verdict for the plaintiff, to which direction and refusal the defendant excepted. By these requests both parties waived their right to have any questions of fact submitted to the jury, and virtually submitted to the judgment of the court all questions of fact and law. Had the defendant requested to have the case submitted to the jury, even after the motions for a direction, she would

have been entitled to have the jury pass upon certain material facts in the case that rested entirely upon the interested testimony of the plaintiff herself and were not clearly established. The material facts, so far as they depended upon evidence not conclusive or upon inferences to be drawn from circumstances, must now be deemed to have been found in favor of the plaintiff by the court. This point is a sufficient answer to all that is said upon the brief of the learned counsel for the defendant, in which he contends that certain elements of the case should have been submitted to the jury." In the same case it was held that when parties or their attorneys enter into a written stipulation with respect to the facts in a case for the purpose of evidence, and it is not expressly limited as to time, but is general, it stands in the case for all purposes until the litigation is ended, unless the court expressly relieves them from its operation. The court said: "Much of the evidence on the part of the plaintiff was given through written stipulations as to the facts, signed by the respective attorneys. On the present trial they were received under the defendant's objection and exception. The objection was that they were entered into for the purpose of a former trial, and that the situation had since changed. The trial court held that they were binding on both parties until the court, upon some equitable ground, relieved them from their operation. The ruling was correct. When parties or their attorneys enter into a stipulation with respect to the facts in a case for the purpose of evidence, and it is not expressly limited in respect of time or confined in terms to some particular purpose or occasion, but is general, it stands in the case for all purposes until the litigation is ended, unless the court, upon application, should relieve either parties from its operation. (*Hine v. N. Y. El. R. R.*, 149 N. Y. 154.)"

#### CONTEMPT BY PUBLICATION.\*

A CONTEMPT is any act which is done in wilful disregard of the authority or order of a superior court, "whether committed in or out of its presence, or which tends to embarrass, impede or obstruct the court in the discharge of its judicial duties." (1)

From this definition we deduce two classes of contempts, viz., "direct" (criminal), which openly insult or resist the powers of the courts, and "consequential" (constructive), which, without gross insolence or direct opposition, plainly tend to create a general disregard of authority, or

\* Prize thesis by Arthur C. Mayer, College of Law, Grand Island, Nebraska.

(1) In re Shortridge, 21 L. R. A. 755 (Cal.); Anderson's Law Dict. 284.

which tend to embarrass the administration of justice (2). It is within the second class that this treatise falls.

Any publication relating to a pending cause, which tends to prejudice the public as to its merits, or corrupts or embarrasses the administration of justice, including aspersions on the court or its proceedings, or on parties, witnesses, or counsel, may be punished as a contempt (3).

Even this definition is somewhat narrow, for if it is calculated to obstruct the administration of justice, this would be sufficient to make it a contempt (4).

The object is to keep the administration of justice intact, and where the pending cause is not likely to be prejudiced proceedings of contempt are to be discouraged (5). Hence, the Supreme Court of Illinois has held that a publication, however libelous, but not calculated to hinder, obstruct or delay the court in the exercise of its proper functions, cannot be punished summarily as a contempt (6).

Before the passage of the statute which regulates contempt of federal courts, the Supreme Court of the United States held that any publication of matter concerning a trial not closed, and so near the court as to tend to embarrass the court or influence its decision in the controversy, is a contempt punishable by attachment (7).

And where an editor published an article in the same city where the court was sitting, and while a trial was pending, entitled "A Joke on a Judge," making certain proceedings in which a witness was fined for non-appearance in court appear ridiculous, and charging the judge with losing his temper, and averring that they were unjust and illegal, it was held to embarrass the administration of justice (8).

A publication which charged executors under a will with being affidavit-men, the names of the executors being indicated by the use of their initials, while suit over the will was pending in court, is a contempt of court. Lord Chancellor Hardwicke said: "It is a contempt of court to prejudice mankind against persons before a cause is heard, and that there is not anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters" (9).

The Constitution of Mississippi contains the

customary clause, viz., "The freedom of speech and of the press shall be held sacred." In *Ex parte Hickey*, Judge Thatcher said that as the Constitution guaranteed these rights, he would hold the following words, published while an indictment for murder was pending, not a contempt of court, but a mere libel on the functionary, and subject only to be punished as such an offense: "Having disregarded his oath of office and failed to execute the laws, Judge Coalter deserves to be hurled from the seat he desecrates and brought as a criminal abettor of murder to the bar to answer for his crimes. \* \* \* Immediate steps should be taken to impeach him."

"The power to punish for consequential contempts such as a newspaper publication reflecting upon the courts is at war with the Constitution of this State" (10). This view of the law was materially modified by members of that court who followed the learned judge.

**Matter.** — As to what is contempt more specifically, first, the publication must refer to a matter pending in court. However libelous it may be, if it refers to a matter already adjudicated, no contempt will lie (11). Thus, when a grand jury had completed its investigations, a libel on certain members of it was published concerning acts done in their official capacity, and which had no tendency directly to obstruct the grand jury in the discharge of any of its duties remaining to be performed after the publication was made, it was held not contempt of court (12).

What is meant by "having a tendency directly to obstruct the grand jury in the discharge of any of its duties" seems to have been a matter for the trial judge, for in *Fishback v. State*, we find the court stating the rule to be: "The publisher of an article reflecting on the grand jury at any time during its session, tending to bring its members into disrepute and embarrass the investigation as to a commission of crime, is liable for contempt, even though such investigation had been suspended with no intention at the time to pursue it further" (13).

As to what constitutes an "obstruction of the administration of justice," we find the courts not in harmony. Thus the following article, appearing in a local paper while its editor was being tried under an indictment, was held, by the Ohio court, a contempt: "The grand jury which found the indictment was called by the judge of said court then presiding for a special partisan purpose, and was never honestly drawn from the box: the presiding judge, co-operating with the clerk

(2) *State v. Henthorne*, 46 Kans. 614.

(3) *Cheadle v. State*, 110 Ind. 310.

(4) 3 City Hall Rec., 64 A. D. 1818 (N. Y.); 5 Id. 109, A. D. 1820.

(5) *Ex parte Taylor*, 31 S. W. Rep. 641 (Tex.).

(6) *Storey v. People*, 79 Ill. 50.

(7) *Hollingsworth v. Duane*, Wall. 77.

(8) *Cheadle v. State*, 110 Ind. 310.

(9) *Atkyn's Rep.* II, p. 469.

(10) *Ex parte Hickey*, 4 S. & M. 741.

(11) *Cheadle v. State*, 110 Ind. 310.

(12) *Storey v. People*, 79 Ill. 50.

(13) *Fishback v. State*, 30 N. E. Rep. 1088 (Ind.).

and prosecutor. had packed the grand jury, and the writer has in this manner been indicted by rascally and infamous methods" (14). While in Illinois the same state of facts existed, and the court held: "The publication of a libel on a grand jury or any member thereof in relation to an act already done by them, in their official capacity, but which has no tendency *directly* to impede the jury in the discharge of its duties remaining to be performed after publication, cannot be summarily punished as contempt of court" (15).

A few years after the Civil War the judges of the Supreme Court of North Carolina went on a stump-speech tour over the State, and the following publication was made: "From the unerring lessons of the past we are assured that the judge who openly and publicly displays his political party zeal renders himself unfit to hold the balance of justice, and whenever an occasion may offer to serve his fellow-partisans he will yield to the temptation and the 'wavering balance' will shake."

This was held a contempt of the court, because it reflected upon its character, and an ingenious explanation is made: "If you hurt the head, arm, leg, limb, or any part of the body, you hurt the man, and the idea of an intention to injure the character of the justices who compose the Supreme Court singly or *en masse*, without an intention to injure the court, is simply ridiculous" (16). But the true rule now seems to be as enunciated in Oregon, that unless the article has a *direct* tendency to impede the court in the discharge of its duties, it is no contempt (17).

*Time.* — It is not necessary that the particular matter commented upon be under consideration: if the case is being heard or about to be heard, the press must defer its criticisms until the court has had an opportunity to try the matter. Thus, in New Hampshire, a quantity of liquor had been seized, on the premises of one Angell, for being kept contrary to law. Angell could not be found, and notice was given by publication in a newspaper. Shortly after this, and before the day set for trial, an article appeared, entitled "Prosecutions Under the Liquor Law," the offending clause of which was the part which asked whether "certain outrageous proceedings lately instituted at Sunapee were to be tolerated and sustained." This was considered a contempt, because it would naturally be brought to "the notice of jurors and others who are in attendance on the court." Although the matter was not under consideration of the court, yet defendant knew that it would be as

soon as court met, and he should not have interfered (18).

This holding is based on Wells on Jurisdiction, page 191 (also approved in *State v. Phelps*, 45 La. Ann. 1263), and who says: "Where a publication being read by jurors and attendants on the courts would have a tendency to interfere with the proper administration of the law in pending cases, it may be adjudged a contempt and so punished." The occasion of the Louisiana court approving this passage was where a case had been commenced and plaintiff's witnesses heard, when court adjourned for a week. Two days before the resumption of the case an article appeared in the city where the trial was being conducted, which commented unfairly upon the evidence presented, and contained statements in many respects untrue, and not justified by any evidence received. As it was very probable that jurors would read the criticisms, and be influenced by them, the court punished the publisher.

*Place.* — The place of publication will also be considered in determining whether a contempt has been committed. An act committed where the process of the court runs will be considered a contempt. This is the reasonable view of the matter, for the whole subject of newspaper contempts arose from the doctrine of constructive contempts, and this originated from acts which obstructed the service of the king's process, which could only be served within the court's jurisdiction. If the act complained of was committed so near the place where the court was sitting that it could be said to have had a tendency to embarrass and obstruct the court, the offender may summarily be dealt with. It was attempted to overthrow this doctrine in *State v. Frew* (24 West Va. 416), in a case of which the Supreme Court had original jurisdiction. The evidence was all in and all arguments made, so that nothing remained but the court's decision. A newspaper of the city in which trial was pending published matter reflecting on the integrity of the judges, and commenting upon some political promises which they had made before trial. The court held this close enough to the court to warrant proceedings for contempt being instituted.

And in *People v. Wilson* (64 Ills. 194), where the matter was published in Chicago, while the Supreme Court of Illinois was sitting in Springfield. A criminal case had been under advisement on error for a long time, when a paper stated that the money raised to defend the accused was "operating splendidly," and "fourteen hundred dollars are enough nowadays to enable a man to purchase immunity from the consequences of any crime, the courts being completely in the control of corrupt shysters." The court promptly ordered the editor arrested. Although Springfield is some

(18) In the Matter of Sturco, 48 N. H. 428.

(14) *Myers v. State*, 22 N. E. Rep. 43.

(15) *Storey v. People*, 79 Ill. 50.

(16) In the Matter of Moore, 63 N. C. 407.

(17) *State v. Kaiser*, 20 Ore. 50.

two hundred miles from Chicago, yet this article was contemptuous.

*Orders of Court.* — Sometimes the court finds it advisable to order certain testimony or findings to be withheld from the public for a time, in order that a full and impartial hearing may be had. Especially is this done where it is apprehended that the testimony of witnesses will be conflicting; the court then orders certain witnesses from the court-room. If, under such an order, reporters should even publish testimony or the findings of a grand jury *without* comment, and the excluded witnesses should read it, the purpose of the court would be thwarted (19).

Even under the United States statute which so greatly reduces the inferior courts' power to punish for newspaper contempts, it is held that the statute does not deprive the court of the right to exclude reporters from within the bar pending the trial of a cause. The right of the court to exercise, not only this power, but the power to prohibit the publication of any part of the pleadings, testimony, or speeches of counsel, was upheld in *Tenney's Case* (23 N. H. 162), and *Dunham v. State* (6 Iowa, 246).

But where no such order is made, and publication is made of the evidence and argument of counsel, no contempt will lie, and any subsequent proceedings taken in relation to an attempt to commit for contempt will be void. Thus, in Iowa, contempt proceedings were commenced for the publication of certain evidence and speeches concerning which no order by the court had been issued, and before the hearing the editor, at three different times, published articles on the unlawfulness of the proceedings. For these acts the court had three more contempt charges made against the defendant. Had the first charge been lawful, the subsequent acts would have amounted to contempts, but such not being the case, it was held that the court was without jurisdiction in the other proceedings (20).

But before the court issues such an order, it must have a reason *in law* for issuing it, for it cannot prohibit the publication of evidence for some whimsical reason of its own. In California, while the trial of a divorce suit was pending, the court made an order prohibiting the publication of the testimony, which was very filthy. Defendant published such testimony in violation of such order, and of which he had notice. *Held*, that since it did not interfere with the proper performance of a judicial duty, such publication is a lawful exercise of the constitutional right, and is not a contempt of court.

"We are aware of the fact that there are Eng-

lish precedents for holding that the courts possess and exercise the power to prohibit in all cases the publication of their proceedings; but we know of no decision in this country upholding the right of a court to make such prohibition, except where the publication tended to interfere with the proceedings before the court. The constitutional liberty of the press, Judge Cooley says, "implies the right to freely utter and publish whatever the citizen may please, and be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity or scandalous character, may be a public offense, as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals; implies not only liberty to publish, but complete legal immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when tested by such standards as the law affords" (21).

While a newspaper may generally publish accounts of a trial, yet if a false report is made contempt will lie (22).

(To be concluded next week.)

#### BREACH OF CONTRACT — MEASURE OF DAMAGES — CONJECTURAL PROFITS.

CUNDIFF V. CUNDIFF, ETC.

Kentucky Supreme Court.

1. In this action by appellees to recover of appellant damages arising from the failure of the latter to roll the logs from land rented to appellee, to build fencing to keep out stock, and to dig a well according to the terms of the contract of rental, the appellees were not entitled to recover as damages the value of the crop which they might have produced upon such of the land as they did not cultivate by reason of the failure of appellant to remove the logs, conjectural profits not being a criterion of damages. And the appellees having failed to state the amount of damages sustained by reason of appellant's failure to build the fencing and to dig the well, they are without proof of actual damages sustained on that branch of the case.
2. There was no attempt on the part of the appellees to show the "reasonable value of the use of the land," of which they claim to have been deprived, and an instruction to the jury that "the measure of damages is the reasonable value of the use of the land of which he was

(19) In *re Cohen*, 5 Cal. 494; *Burke v. Terr.*, 37 Pac. Rep. 829 (Okl.).

(20) *Dunham v. State*, 6 Iowa, 246.

(21) In *re Shortridge*, 21 L. R. A. 755 (Cal.); *Anderson's Law Dict.* 284.

(22) *State v. Haskell*, 42 Pac. Rep. 285 (Mont.).

deprived, considering his force of work hands," etc., was erroneous.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge PAYNTER.

This is an action by appellees against appellant sounding in damages for the alleged violation of a contract by which appellant leased to appellees about twenty acres of land to be planted in corn, tobacco sorghum, etc. It is alleged that appellant was to roll the logs on the land, and fence it in time for the appellees to plant it in a seasonable time, and that appellant was to have a well dug on the rented premises for the use of the appellees; that the appellant failed to roll all the logs and fence it in time for appellees to put in their crop on all the land rented of appellant; that he failed to have the well dug in a suitable time, which required them to carry water some distance, and that the fence was not sufficient to turn stock; that stock broke into his fields and damaged his crop, and in consequence of these several violations of the contract the appellees were damaged in the sum of \$325. The several breaches of the contract were denied.

The appellee, W. H. Cundiff, testified that he was damaged \$325 "by the failure of defendant to comply with his contract." This was an estimate by a witness who, in reaching the conclusion, determined in his mind the rule for measuring damages; they may have been proximate or remote. On cross-examination he said: "The items that go to make up the damages of \$325 is what tobacco I could and would have raised on the land, judging by the crop of the previous years, which tobacco would have brought me about \$260, and the corn I could and would have raised on the land would have been worth \$60 or \$70."

The witness said: "Before I brought this suit I drove the defendant's mule out of my crop once or twice, and his cattle about the same number of times." He also said: "I carried water for domestic purposes a distance of about one-half mile for about one month prior to the digging of the well, about an average of three buckets per day." He did not state whether or not the mule or cattle damaged his crop, nor the value of his services in carrying the water.

Geo. Cundiff, the other plaintiff, testified as follows: "My father carried water about one month before the well was dug. I think I could have made about \$100 out of the tobacco I could have raised on the land we were to cultivate if we had got the crop planted."

Campbell Cundiff, in giving his testimony for the plaintiff, said: "I made the contract with the defendant to dig the well. \* \* \* I was to get \$4 for digging the well. My father carried water about one-half mile for a month before it was dug."

This constitutes the plaintiff's testimony on the subject of damages. The verdict was for \$155.

There being no proof as to the damages as to crop, or in the matter of failing to dig the well for a time, the plaintiff is without any proof as to the amount of damage actually sustained, except that which relates to value of the crop which the land would have produced, or profits on it. The court should have told the jury, in estimating damages, not to take in consideration the value of the crop which the plaintiff might have produced upon such of the land as he did not cultivate by reason of defendant's failure to roll the logs or build the fence; and further, that they could not take into consideration any profits which the plaintiff might have made on land which he failed to cultivate for the reasons indicated. When the witness gave an estimate of the value of the crop he could have produced, it was but a method of estimating what his profits would have been under the contract.

The court held, in *Smith v. Phillips, Jr.* (16 Ky. Law Rep. 616), that conjectural profits cannot be recovered, and were not the criterion of damages, but that the lessee could recover the actual damages which proximately flowed from the breach of the contract.

The court, in instruction No. 2, told the jury that "the measure of damages is the reasonable value of the use of the land of which he was deprived, considering his force of work hands, the trouble and expense of obtaining water up to the time the well was dug, and the damages to their (plaintiff's) crops by reason of the insufficiency of the fence."

This instruction was erroneous. There was no attempt to show the "reasonable value of the use of the land," of which plaintiffs claim they were deprived, except by showing conjectural profits; neither does it appear to us that such value can be shown in any other way. It, therefore, follows that plaintiff's damages cannot be measured in that way. It can be seen how a lessor might recover of a lessee the reasonable rental value of land which he rented to the lessee to be cultivated, and which the lessee failed to do.

If the plaintiff's contention is correct that the fence is not the kind which defendant's contract required him to build, and in consequence of it the mule and cattle injured his crop, then he is entitled to recover the actual damages resulting therefrom. If the defendant did not dig the well as soon as required by the contract, then the plaintiffs are entitled to recover the actual damages resulting from such failure. There was no attempt to show that damages other than we have mentioned resulted from the alleged breach of the contract; hence the question is not before the court as to whether any damages were recoverable other than indicated.

The judgment is reversed, with directions that further proceedings conform to this opinion.



## DUTIES OF THE BENCH AND BAR.

IN my early reading, said Judge Murray F. Tuley, of Chicago, at a banquet the other night, I learned that it was the custom of the great Lord Bacon, when he was chancellor, to call together the judges of England and to lecture them before sending them out on their circuits. On one occasion he condensed his lecture into a few terse, comprehensive sentences. I have always liked them so well, apart from what opinion I may have of some phases of the man's character, that I have copied them. They are sentences to be remembered. They were uttered nearly 300 years ago, but they are just as appropriate now. In reading them, it is needless for me to say that I reflect on no member of the bench, for they hit me as hard as they do anybody. They are sentences full of good advice to be studied, and they read as follows:

"Draw your learning out of your books, not out of your brain.

"Mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

"Continue the studying of your books and do not spend time upon the old stock.

"Fear no man's face, yet turn not stoutness into bravery.

"Be a light to jurors to open their eyes, not a guide to lead them by their noses.

"Affect not the opinion of pregnancy and expedition by an important and catchy hearing of the counselors of the bar.

"Let your speech be with gravity, as one of the sages of the law, and not talkative, not with impertinent flying out to show learning.

"Contain the jurisdiction of your court within the ancient mere stones without removing the mark.

"An over-speaking judge is no well-tuned cymbal. It is no grace to a judge to show quickness of conceit in cutting off evidence or counsel too short; or to anticipate or prevent information by questions, though pertinent.

"Do not hunt for popularity. Plaudits are fitter for players than magistrates."

Now I want to say something of the treatment of young practitioners. I have seen more than one young man crushed by an ill-timed remark from a judge and so cast down that he eventually was driven to abandon a profession in which he might have become a shining mark. I remember that for twenty years after I commenced to practice law I never addressed a judge without trepidation. I would say to the bench, treat the young lawyer with kindness.

There is another thing: A judge should not try to keep up his correspondence while he is trying a cause. I knew of one judge who utilized his time while hearing one cause to write a book, and

at the end of the trial he granted a new trial because, forsooth, the verdict was not in accordance with the evidence. It is the bounden duty of the judge to hear every word of evidence and every word the lawyers have to say.

On the other hand, I think we have a right to demand of the bar that it accord us credit for honesty of purpose. We have a right to ask you to consider the judge who sits there and not the man. His personality is absolutely sunk in his position.

We have a right also to the respect of the members of the bar. Fifty years ago I was admitted to the bar of this city, and I have seen times when the bench was not accorded all the respect to which it was entitled. But within the last twenty years, since I have been on the bench, we have had no cause for complaint on this score. In this respect our city compares favorably with any in the country.

I am no believer in form and ceremony. If a judge cannot command respect, no form or ceremony will bring it to him. But there is one practice I should like to see abolished. It seems to be the practice of lawyers to meet in the court-room at 10 o'clock every morning for the transaction of their private business. I have frequently been compelled to suspend court until they could get through with their talking. The same men will go into the Federal court-room and keep order. When the Federal judges enter they rise, as is the custom. Now, as Judge Gary says, "no odor of sanctity attaches to a Federal judge." It may not be necessary for you to rise when the judge in the State court enters, but you can at least cease conversation.

There's another thing I should like to suggest to this association. You should work to abolish the practice of holding two sessions of court a day. That practice is not suitable to a city like ours. It is characteristic of a village. Let the court sit at 9 o'clock in the morning and work until 1 if necessary, but let the afternoon be free. More would be accomplished, and justice would be better satisfied. It would give the jurors time for their private affairs. It would give the lawyers their afternoons for private business and consultation practice. It would give the judges opportunity to study their cases. As it is now, the judges must do their studying at night, and in consequence they are prone to draw the law from their brains and not from their books.

This association ought to take a hand in crushing out disreputable lawyers. In a village such a man's career soon ends, for everybody comes to know him. Not so in a city like this. You owe it to yourselves and to your own interests to cut short his career and to see that all such lawyers are punished, either by expulsion from your association or by suspension from practice under the

statute. These men are highwaymen, who go about cheating and robbing under the cloak of an honorable profession.

There is one practice, which is fortunately growing into disfavor—the practice of asking for a change of venue. It is practice which comes up from the justice courts, and it is most resorted to by these disreputable members of the bar I have mentioned. Sometimes such a motion may be necessary, but the mere fact that a judge has overruled a demurrer or an interlocutory motion is no reason why he should be deemed prejudiced against one side of a cause.

Now, we are all members of a profession which, we should remember, is concerned with inquest into rights, searching pursuit of facts and of law. We should practice this profession, on the bench as well as at the bar, for love of the profession, not with an eye to the dollars. When we are imbued with the high aims of our profession as a whole, then we can realize that we are co-workers in the dispensation of justice in the courts. It is a grand and noble profession—the grandest and noblest in the world. There is not a man in it who does not become a wiser and a better man with every day of practice. Let us then set our standard high. The bench is powerless without the aid of the bar—the bar is powerless without the aid of the bench.

#### SNEEZES INTERRUPTED COURT.

EVERYBODY WAS AT IT, AND THERE WAS NO ONE TO SAY GESUNDHEIT.

THE case of John H. Vette against John C. Obert was on trial in Judge Haughton's court yesterday, says the St. Louis Globe-Democrat. During the process of the suit the lawyers had a tilt over the admission of certain evidence, and the following dialogue ensued:

"Your honor, the assertion that was just made by the—ec-cachoo—on my—ec-cachoo—is absolutely—ec-cachoo!"

"Your honor, I—ec-cachoo—sir, to the statement made by my ec-cachoo!"

Judge Haughton admitted the testimony and the witness proceeded.

"Well, it was just this—ec-cachoo—I said to Mr. ec-cachoo-cachoo—and he said to me—ec-cachoo-cachoo-cachoo!"

At this point nearly every one in court was sneezing. Lawyers, clients, jurors, and witnesses joined in a sneezing chorus in which sneezes of various quality and a wide range of tone and discord were mingled. The pompous, ponderous sneeze of Constable Hand was a most effective basso that gave strength to the chorus, while the beautiful treble of Count Fredrick von Gereke rose clear and shrill above the minor notes. The jurors formed a perfect scale of notes, extending over an

octave and a half, and forming a melodious accompaniment to the general burden of the grand, sweet song.

Naturally during this outburst of Wagnerian solemnity court was interrupted. Judge Haughton rapped for order, but the only reply was from a big German butcher, one of the jury, who, with his magnificent tenor, sent his voice upward in a series of trills, runs and cadenzas in what was probably one of the most beautiful collection of sneezes ever heard. Then dropping, with a series of grace notes, to the lower register, he ended with a movement in rag time, in a five-flat finale that would have done credit to Sousa's band.

At this moment Judge Haughton looked through the open door into the back room, where Tom MacAleavy was unconcernedly rolling and breaking, in front of an open window, the supply of tobacco which he intends to take on his fishing trip. The fine dust from the dry leaf—and Tom is said to smoke the strongest tobacco in town—was being wafted into the court-room on the gentle breeze. The door was shut, all the windows opened, and the court proceeded. But, despite the comedy which had just been enacted, there was scarcely a dry eye in the room.

#### SOMETHING NEW IN JURIES.

A PRECEDENT was established in Hunt's court, in Denver, Col., the other day, according to the Times, of that city, which created considerable merriment. The first woman juror in the history of Arapahoe county justice courts was impaneled in the case against Dominie Gother, an Italian, who was charged with the theft of ten cents' worth of coal from a coal company. The woman juror was Mrs. Jennie Pierson, colored.

When the case was called the defense asked for a jury, and the court had to grant the request. Deputy Sheriff Howard La Due saw the court-room was crowded with spectators, and experienced a happy sensation, thinking that he would have no difficulty in securing a jury out of the people present. So six men were called inside the railing, and were subjected to a tiresome examination by the prosecution, who entertained fears that they were going to be buncoed. One after another they were excused until the six were all disposed of, and La Due had to return for more. This was repeated several times, and finally those of the spectators who had not been called feared that they might be, and departed.

Things were beginning to look bad for La Due, and he was about to take his hat and canvass the streets for jurors, when his eye rested upon Jennie Pierson, a buxom damsel weighing about 200. An idea came to the mind of the deputy. He stopped for a moment, scratched his head and thought. Why could Mrs. Pierson not answer his purpose and save him a half-day's work? He came to the conclusion that she could and summoned her.

Luckily she was accepted by both sides, and the case went to trial, Mrs. Pierson being honored with the position of foreman.

The court was a little in doubt as to whether or not he should allow a woman to sit on a jury. He remembered that the same question had agitated his friend, Judge Johnson, at the time Mme. Warren served on a jury in the District Court, and he supposed that the proceeding would be legal. "Let me see, though," thought he. "What if the jury refuses to agree and has to be locked up? What will become of Jennie?" At last a happy thought struck him. "La Due is the man who was so anxious, and I want to say right now that if there is a disagreement he will see that the lady is properly cared for."

This seemed to ease the judicial mind, and he allowed the case to proceed, with the result that after being out one minute by the court clock the jury returned a verdict of "not guilty," and all complications which might have arisen over the presence of a woman were avoided.

#### HOW TO STUDY LAW.

A CORRESPONDENT of the Chicago Post wrote the editor of that paper, under the *nom de plume* of "Law Student," saying in the course of his communication: "As a law student I am interested and instructed by your column in the Evening Post, but I am at a loss to understand the position that you take in regard to law schools. In reviewing the curriculum of a new law school recently you took occasion to deprecate the easy admission to the bar which follows a two years' course of study, and stated that great lawyers were never produced that way, and never will be. On other occasions you have criticised the rapidity with which lawyers are being turned out. Do you believe in law schools at all, or do you think the old method of studying law in an office and being admitted on motion best? Ex-President Harrison says that the same books from which the professors extracted their knowledge are open to students, and seems to think a course in a law school unnecessary. Do you agree with him? I am paying \$100 a year tuition for a legal education, and if this is an unnecessary expense I would like to know it. The fact that so many are entering the profession cuts no figure with me; the only subject I am interested in is the best means of securing a legal education. There are many others like me, and I know that an article on the subject would be appreciated, and I believe that the importance of the subject will justify the use of the space it will take in your columns. You have criticised the system. Will you give a correct one?"

This is the reply of the editor to "Law Student's" invitation:

There is no excellence without great labor. No man may enjoy the view from the Matterhorn without first climbing the rugged and tiresome paths that lead to that summit. He who gets the most out of fortune must first get the fortune. There is no grander profession than that of the law. The man who masters its mysteries not only achieves a mountain top lofty as any within the reach of humanity, but possesses an estate as broad as intelligence can compass. The ripe lawyer has understanding not of the laws alone, but of the widest range of subjects within the reach of the scholar. He knows more about more things than does any other. He knows as much Bible as the preachers know, and more statesmanship than do the politicians. He has learned the theories of the physicians without following them in their experiments. He understands the principles of the painter, and the poet relies upon him for the judgment of verse. No mechanic is so expert as to escape his searching cross-examination and no theorist so glib as to dull the lance of his common sense.

All common good has common price;  
Exceeding good, exceeding.

Now, one may be born at the summit of the mountain and so view the landscape without having labored in the climbing. And one may have a mind so wonderful as to grasp all these things with more of intuition than of study. But the rule is, men are not born on the Matterhorn, and the rule is men must learn what they are to know. There is no royal road to eminence. There is an easy way, a swift way now and then to the altitude from which a Barney Barnato fell so recently. But it is not for the lawyer; and it is not for the lasting happiness of any man. The ability to work, the faculty for study, the patience to master details, and the strength to remember—these are the title deeds to a lawyer's greatness. And no lawyer goes up by any other path. If he did he could not stay there an hour. One may sham in some things, but a bad pleader goes out of court.

Now, is it probable all these things can be attained in a year or in two years, or in three? Is it possible they can be compassed by two-hour weekly classes? Is it at all likely they can be achieved at all when one's day is filled with alien interests, and when one gives but the fag ends of energy, the warm ashes of endeavor to the study, instead of the hot flame of intent application? Can one sell goods all day and study law at night, learning anything of value? Can one use up strength at any other occupation and hope to master basic principles in an hour of weakness? The good lawyer is too many-sided a man to be molded with a weary hand.

An eastern owner of Kansas land went west to defend his title, and hired a local lawyer. He lost

the case. Next morning, as he passed his attorney's office, he saw a painter hanging a new sign:

.....  
:  
: JAMES BROWN, LAWYER. :  
:  
: .....

"Any man can hire that done," said the spoiled client.

And it is true. Custom and even law may give a man the right to put "Lawyer" on his card, and on his sign, and on his door. But custom and law and printer and painter all together cannot add one cubit to his lawyer stature. He loses more than any one else. The eastern owner of western land was not the great unfortunate. That was the attorney unequipped.

Out of the multitude "admitted to the bar" every year, some few lawyers will come. Elihu Burritt became a scholar in spite of difficulties. But his was not the best way to study. The plan would not prove successful, as a rule. Most of the multitude "admitted to the bar" will not become lawyers—ever. The longer they wait, groping among principles they do not understand, misquoting authors of whom they know nothing, having missed the reason on which the rule was founded, the worse for them. And, unfortunately, the worse for their clients, too. But this last is not the point. It is worse for the would-be lawyer. Without a good basis, he hurries with increasing speed to the day when it is too late to find fundamentals, and to master them. And presently he passes the place where the path declines. After that it is down hill all the way. There is no chance for him to come back. Unfitted for anything else, spoiled of his handicraft which he left for a chance at success in law, knowing just enough of law to make baser things distasteful, he stumbles through failure to oblivion.

What is the best way to attain the law? Why, to study for it. A man should know by the time he is through high school if he is going to be a lawyer, and if he is, all his later study should be chosen with that end in view. The things he will later need should be the things with which to diligently store his mind. When he has finished a general education, and has been graduated from the best law school he can find, he should then go into the office of some thoroughly educated, thoroughly successful lawyer, and should there read law and study practice until he is fit to try a lawsuit.

If you object that not many would then enter the law, you have stated the very thing to be desired. Not one in ten of the present multitude should enter the law. Not one in ten from the "rush" schools remains in it, or succeeds at it. And there is a species of dishonesty in making

your clients pay for your education when they have hired you on the assumption that you have already paid for it yourself.

### Legal Laughs.

"I want to be sure I understand you rightly," said the lawyer, who was cross-examining the locomotive engineer. "At the time the accident happened to the plaintiff, at what rate were you running? Please repeat your statement as to that particular."

"I had slowed down to about six miles an hour," replied the engineer.

"You are positive as to that, are you?"

"Yes, sir."

"You want the jury to understand that you had slowed down to six miles an hour, do you?"

"Yes, sir."

"Once again, you had slowed down to six miles an hour, had you?"

"Yes."

"Now, sir!" thundered the lawyer, rising to his feet and glaring fiercely at the witness, "did you not testify in your direct examination that you had slowed up?"

"Of course, but——"

"That will do, sir! Gentlemen of the jury, that's our case."

And the jurymen, without leaving their seat, brought in a verdict against the railway company. — Chicago Tribune.

It is said that Barnum once summoned a lawyer and laid before him a case which he claimed was troubling him.

"A neighbor of mine keeps peacocks. Suppose one of them should fly over into my yard—which they are doing all the time—and lay some eggs there. Would those eggs belong to me, or could my neighbor compel me to give them up?"

The lawyer, having duly scratched his head, replied that really he should have to look the matter up. "But," he continued, "meantime it would be best for you to keep the eggs, and let your neighbor sue for the possession; in that way your rights would be determined, and we should have a valuable test case."

"Well," said Barnum, "while you are looking into the matter, will you also find out how it would be if the eggs were laid by peahens?"

The matter was never looked up. — Chicago Post.

The following is clipped from Croake James' "Curiosities of Law and Lawyers:" "If a man were to give to another an orange, he would merely say, 'I give you this orange;' but when

the transaction is intrusted to the hands of a lawyer to put it in writing he adopts this form: 'I, A. B., hereby give, grant and convey to you all and singular my estate and interest, right, title, claim and advantage of and in the said orange, together with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck and otherwise eat the same, or give the same away as full and effectually as I, the said A. B., am now entitled to bite, cut and suck or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter, or in any other deeds, instrument or instruments of what nature or kind soever to the contrary in anywise notwithstanding.'"

The celebrated John Randolph met a personal enemy in the street one day, who refused to give him half the sidewalk, saying that he never turned out for a scoundrel. "I do," said Randolph, stepping aside and politely raising his hat.

### Legal Notes.

A judge of Janesville, Wis., granted a decree of divorce to a woman whose husband puffed tobacco smoke through the keyhole of a door leading into a room where her mother lay sick.

A law has been published in the official gazette at Madrid establishing a monopoly for the sale and manufacture of gunpowder in Spain. This monopoly will be submitted to public tender. The minimum tender is to be 3,000,000 pesetas annually, paid quarterly.

A specific tax levied under State statute upon every sewing machine company or its agents, and all wholesale dealers in sewing machines manufactured by companies that have not paid the tax, is held, in *Singer Mfg. Co. v. Wright* ([Ga.] 35 L. R. A. 497), to be constitutional.

The attachment by garnishment of the property of a defendant upon which the garnishee has a lien is held, in *Hartzell v. Vigen* ([N. D.] 35 L. R. A. 451), to be sufficient under the Minnesota statutes to give jurisdiction to render a valid judgment *in rem* against a non-appearing, non-resident defendant who is served by publication only.

The permanent and exclusive appropriation of a portion of a sidewalk next to a building for a fruit stand is held, in *Costello v. State* ([Ala.] 35 L. R. A. 303), to constitute an indictable nuisance, although it is erected on the covering of an open way to a cellar which had existed without objection for several years, and was erected under a license from the city.

McPherson county, Neb., has a population of about 500 souls, and it could not be expected that its court-house would compare with those of the more densely populated counties. And it does not — the temple of justice being a sod house containing two rooms. One room is used jointly by the county clerk and the county treasurer, while the other is used as the court-room. Judge Grimes held a term of court in that county this week. He and the attorneys with him arrived at Tryon, the county seat, at 4 o'clock Tuesday, and at half-past 6 the cases on the docket had been disposed of. — North Platte Tribune.

Gen. Alfred Orendorff, who has been elected president of the Illinois State Bar Association, to succeed Hon. John H. Hamline, is a graduate of the Albany Law School, class of 1866, and was admitted to the Illinois bar in June of the same year. In 1867 he entered the law office of W. H. Herndon, who had been the junior law partner of the immortal Abraham Lincoln, at Springfield, and soon after formed a partnership and practiced law for many years with Mr. Herndon. He has since been associated as senior partner with Hon. James A. Creighton, one of the judges of the Appellate Court, and Robert Patten, of Springfield.

### Notes of Recent American Decisions.

**Banking — Check — Time Within Which Check Must Be Presented.** — The payee of a check must present the same with reasonable diligence. In the absence of special circumstances a check must be presented to the bank on which it is drawn, if the bank be in the same place with the holder, or forwarded by mail if the bank be in another place, by the next secular day after it is received. The depositing of a check in a local bank for collection does not give the holder the benefit of an additional day. (*Gregg v. Beane* [Sup. Court Vt.], *Bankers' Magazine*, July, 1897.)

**Contempt — Injunction.** — A court of equity has undoubted jurisdiction to commit for contempt a person not included in an injunction, nor a party to the action, who, knowing of the injunction, aids and abets a defendant in committing a breach of it. (*Seaward v. Paterson*, Supreme Court of Judicature, Court of Appeal [1897], 1 Ch. 545.)

**Electric Light Wires — Contributory Negligence.** — It is not contributory negligence in the owner of property to attempt to remove a broken live electric light wire lying upon his premises, in such a condition as to endanger his property, although it is emitting sparks and a blaze of electric light. (*Leavenworth Coal Co. v. Batchford*

[Court of Appeals of Kansas, Northern Dept., E. D.], 48 Pac. Rep. 927.)

**Extradition — Evidence.** — Evidence that three checks were missing from check-books to which a bookkeeper, who was assistant cashier, had access, and that no corresponding memoranda were made on the stubs; that three checks of the same amount were presented to the drawee's bank by a bank at which he had a personal account, which showed a credit of such checks, and were paid on the day following such credit; and that he had no authority to sign checks for his employer, is sufficient evidence of forgery by him to justify a commissioner in committing him for extradition. On the extradition of a person charged with forgery, embezzlement and larceny, the demanding government and a commissioner need not elect the charge for which he shall be tried; but so long as he is tried upon the facts which appear in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny or embezzlement. (*Ex-parte Thomas Phillips Bryant*, U. S. Sup. Court, May 10, 1897.)

**Grade Crossings — Acts of June 19, 1871, P. L. 1360, and March 14, 1889.** — In determining what is "reasonably practicable" within the meaning of the act of June 19, 1871, P. L. 1360, with regard to the avoidance of grade crossings, the court must bear in view that safety of life and limb is the object sought to be insured by the legislature, and very considerable expense and difficulty should be incurred before exposing to risk either life or limb. The fact that an electric railroad company does not possess the right of eminent domain, and hence cannot, against the will of owners abutting on a street which crosses a steam railroad, elevate its own track for the purpose of an overhead crossing, affords no reason for permitting it to cross at grade the steam road. (*Perry Co. R. R. Extension Co. v. Newport R. R.*, 150 Pa. 193, and *Pa. R. R. v. Braddock Electric Ry. Co.*, 152 Id. 116, adhered to. *Scranton & Pittston Traction Co. v. D. & H. C. Co.*; *D. & H. C. Co. v. Lackawanna St. Ry. Co.*, Pa. Sup. Ct., Notes of Cases, July 9, 1897.)

**Husband and Wife—Wife's Separate Business—Ownership of Corporate Stocks.** — 1. A married woman may embark her own money and capital in any separate business or trade; may employ agents to carry on such business or trade, and may avail herself of their skill and ability to make it successful. 2. When a married woman employs her insolvent husband as such an agent, the transaction will be carefully scrutinized, but if there is evidence that the business was established by her with her own money, and no evidence that money or

capital of the husband was embarked therein, or that his employment was a device to shield from his creditors property or money which ought to be devoted to the payment of his debts, then the profits and earnings of the business will belong to the married woman, though partly due to the business ability, experience and energy of her husband. 3. A married woman united with her two sons and her insolvent husband in the formation of a trading corporation, and she and her sons took all the stock issued except one share, which was allotted to the husband without payment. The money paid in by her on her shares was her own. The husband was employed as president and manager of the corporation upon a salary not shown to be unreasonable. There was no sufficient proof that the arrangement was devised to cover from his creditors any property of his. *Held*, that the undivided earnings of the corporation, represented by her shares of stock, belong to her, though due in part to the skilful management of the business of the corporation by her husband. (*Taylor et al. v. Wands*, Court of Appeals, N. J., May 10, 1897.)

**Jury — Misconduct — New Trial.** — A verdict will be set aside when some of the jurors, during the trial, took dinner at a restaurant with the successful party, who invited them to do so, and paid for it. (*Marshall v. Watson* [Court of Civil Appeals of Texas], 40 S. W. Rep. 352.)

**Landlord and Tenant — Tenants Duty to Rebuild — Covenants.** — 1. A tenant need not rebuild, in case of destruction of the premises without his negligence unless he has expressly covenanted to do so. 2. A tenant expressly agrees to rebuild, in case of accidental destruction, by a covenant to maintain the premises during the term in as good condition and repair as when leased, and return them to the landlord at the expiration of the term in such condition, "reasonable wear and tear from ordinary use alone excepted." (*Armstrong v. Maybee* [Sup. Court of Washington], *Chicago Legal News*, June 19, 1897.)

**Married Woman — Debts of Husband — Payment by Wife's Estate.** — A., a married woman, by her will, directed that her personal property should be sold, "and the proceeds of said sale, after the payment of the debts of my husband, as agreed upon between myself and John Weigle," should be invested, etc. *Held*, that it was immaterial whether the agreement with Weigle were enforceable or not, as the creditors of the husband would take as beneficiaries, under the will, and not in any sense under the agreement, which could be looked to only as a means of identifying the objects of the testatrix's bounty, and the extent thereof. (*Heagy's Estate*, Appeal of Weigle et al., Superior Court [Pa.], Notes of Cases, July 9, 1897.)

**National Currency Act, Not a Revenue Bill.** — An act of congress providing a national currency secured by a pledge of bonds of the United States, and which in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is not a revenue bill which under the Constitution must originate in the house of representatives. (*Twin City Nat'l Bank of New Brighton v. Nebecker*, U. S. Sup. Court, May 10, 1897.)

**Practice of Osteopathy Not Prohibited in Illinois.** — The act of kneading and rubbing the body with the naked hands, for a compensation, for the treatment and cure of bodily disorders, by what is known as the osteopathic system, in which no drugs or medicines are administered, is not within the prohibitions of the Mosgrove law, and such acts are not in violation of this law. (*Eastman v. State of Ohio*, Summit Common Pleas Court [Ill.], Chi. Legal News, Vol. xxix., No. 44.)

**Preferences — Judgment by Default.** — The Supreme Court of Minnesota has ruled that it cannot be held, as matter of law, that because a technically insolvent merchant or trader suffers an action to be commenced against him upon a claim to which he has no defense, by creditors who know him to be technically insolvent, and allows a judgment to be entered and docketed against him for want of an answer, which judgment becomes a lien upon his real estate, that he intended to permit the judgment creditors to obtain an unlawful preference. (*Bean v. Scheffer*, 70 N. W. Rep. 854.)

### Notes of English Decision.

**Agreement in Restraint of Trade — Partnership Subsequently Entered Into by Covenantor — Death of Covenantor — Right of Surviving Partner to Sue for Breach of Agreement.** — In this case the defendant had entered into a written agreement with a Mr. Ward, in consideration of being engaged by him as assistant schoolmaster, not to carry on that business within nine miles of the place where the school was carried on for twelve years after leaving the school. Subsequently, and while the defendant was in his service, Mr. Ward took into partnership the plaintiff, who was, on the death of Mr. Ward, to succeed to the business. Mr. Ward died, and thereupon the defendant opened a school at the same place, and this motion was made on behalf of the plaintiff to restrain the defendant from doing so. On the hearing of the motion it was contended, on behalf of the defendant, that the agreement with Mr. Ward was strictly personal, and

was therefore confined to the period of his life, and that the same could not be, nor was in fact, assigned under the partnership agreement so as to vest in the plaintiff. It was held (1) that, as to the agreement, the true meaning was that, during the twelve years, the defendant was not to do any of the prohibited acts without the written consent of Mr. Ward, and was, therefore, not limited to his life, but extended beyond that period. *Held*, (2) as to the partnership agreement, that, though goodwill was not mentioned, the benefit thereof did pass so as to become a partnership asset, and to vest in the plaintiff on the death of Mr. Ward; that, according to the authorities, and particularly to *Jacoby v. Whitmore* (49 L. T. Rep. 335), the agreement entered into by the defendant was one which formed part of such goodwill; and that, therefore, (3) the plaintiff was entitled to the benefit of that agreement, and accordingly to the injunction asked for. (*Smith v. Hawthorne*, H. C. of J., Chan. Div., Law Times, July 3, 1897.)

**Husband and Wife — Maintenance — Non-liability of Husband to Maintain Adulterous Wife.** — In 1862 one William Henry Mitchell, the appellant, married Fanny Harris Mitchell. They lived together for a few months, and then the appellant joined the marines. The wife heard nothing of him for many years, and in 1889 she married Richard Gorvett, and lived with him as his wife. In 1895 she heard that Mitchell was alive, but still continued to live with Richard Gorvett. In July, 1896, she became chargeable to the Torrington Union, and the guardians applied to the magistrates for an order that the appellant should maintain her, and an order was made against him for two shillings and sixpence a week. *Held*, that the magistrates were wrong, and that as the wife had been guilty of adultery, the husband was not liable to contribute towards her maintenance. The order was quashed accordingly. (*Mitchell [App.] v. The Torrington Union*, Q. B. Div., Law Times, July, 3, 1897.)

### New Books Received.

*Jewett's Manual* (fifth edition), for election officers and voters in the State of New York, containing the General Election Law, Town Meeting Law, and provisions relating to school meetings, complete, with amendments to date; also provisions of the Penal Code, etc., relating to elections and election officers. By F. G. Jewett, Clerk to the Secretary of State. 1897. Matthew Bender.

*General Digest, American and English, Quarterly Advance Sheets.* No. 3 to April, 1897. Lawyers' Co-operative Publishing Co., Rochester, N. Y.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, JULY 31, 1897.

### Current Topics.

THE subject of the neutralization of submarine telegraphic cables, which was elaborately and carefully discussed in a leading article in a recent issue of the ALBANY LAW JOURNAL, by Alexander Porter Morse, of Washington, D. C., is attracting much interest, and is being generally discussed by the press of the country. The sentiment appears to be all one way, viz., in favor of placing these modern means of international communication under the protecting ægis of international law, in order that there shall be no possibility, or, at all events, a very remote one, of the interruption of such communication even for a brief period. The reverent message which was the first one flashed across thousands of miles of ocean, "What hath God wrought!" was more than the expression of a mere sentiment; it embodied the generally accepted belief among civilized nations scattered all over the habitable globe, that the marvelous achievement upon the accomplishment of which so much energy and treasure had been expended, and which was at last brought to glorious fruition, was really the working of an all-wise providence through human agencies, an achievement of inestimable importance in uniting widely-separated English-speaking peoples, a triumph of science which not only annihilated space and time, but accomplished more for the solidarization of the human race than any one previous event in the history of the

world. Well might one exclaim with reverence: "What God hath joined together let no man put asunder." It is in this light that the protection of such means of communication takes on added importance, not to say sacredness. This country being separated on either side by a vast ocean, and therefore particularly interested in the maintenance of the lines of communication, might very properly take the initiative in the proposed movement for a congress whose duty it should be to frame and put in force regulations having that most desirable end in view. While an international agreement to thus neutralize, or render sacred from violation, this inestimable boon, might not provide for all future contingencies, such, for example, as piratical expeditions, it would at least have the effect to prevent the authorized naval force of any nation which might be a party to the convention from stopping cable communication. Surely few higher or nobler objects could engage the attention of civilized nations than the preservation, in times of war as well as of peace, of this great connecting link of human brotherhood. As Mr. Morse well says, "The policies of States, the movements of fleets and armies, and the regulation of the markets of the commercial world depend upon advices, communications and orders that are habitually transmitted through the agency of submarine cables." It is to be hoped that the agitation of the question now going on on both sides of the ocean will be productive of speedy and tangible results.

A recent number of the "Green Bag" contains what purports to be "An Unpublished Letter from Chancellor James Kent," dated New York, October 6th, 1828. It is accompanied by the following explanatory note by the editor:

"This letter was recently found in the old capitol at Jackson, Miss. There is no record showing how it got there. The Thomas Washington to whom it is addressed was a lawyer of some note, who lived at Nashville, Tenn."

Any new letter from James Kent, the great



jurist, illustrious legal commentator, accomplished scholar and writer, would have imbuéd us with great interest. But before us was an unpublished letter from him which increased our interest to intensity, and anticipating an intellectual repast, we read it with close attention. Our reading, we regret to say, resulted in the conviction that it is a spurious production. We are led to this belief by many circumstances, among which are the following: The style of the letter is entirely unlike anything in Kent's extensive correspondence, or in any of his other written productions. Volumes of his correspondence with statesmen, jurists, authors, legislators and judges have been published. His letters, many of them written about the time this "unpublished" letter bears date, are characterized by unvarying purity, elegance and correctness of style, showing that he was a perfect master of epistolary writing, which is a distinct species of composition. To his intimate friends, especially to Joseph Story, one of the great writers on equity jurisprudence, a judge of the United States Supreme Court, ranking next to Chief Justice Marshall, Kent, in his letters, laid open his heart with entire freedom. We have compared many of his letters written to Story and others with the unpublished letter in the "Green Bag" without finding the least resemblance between them. The first are choice, elegant specimens of epistolary writing; the latter is a puerile production of coarse illiteracy. As has well been said by an accomplished scholar and journalist who has examined the "unpublished" letter, "It is impossible to believe that the learned Chancellor Kent did not know how to spell the word grammar (grammer); that he wrote Salust for Sallust; Quinctillion for Quintilian, Bynkersheek for Bynkershoek, Warberton for Warburton, distiny for destiny, vigilence for vigilance," etc., etc. Nor is it to be supposed that Kent wrote belles letters for belleslettres, or Maciavell for Machiavelli. Again, when we compare the style of the unpublished letter, bungling and coarse as it is, with any of Kent's authentic writings, who would believe that the following, which we take from

the pretended letter, was written by the most accomplished writer of his time?

"I was born, and nourished in boyish days among the highlands East of the Hudson, and I have always loved rural & wild scenry & the Sight of Mountains & hills & woods & Streams and do Still, & it is one Secrets of my Uniform health & Chirfulness."

\* \* \* \* \*

"We have three adult children. My son lives with me, and is 26, & a lawyer, & of Excellent Sense, & descretion, & of the purest Morals. My eldest daughter is well married & lives the next door to me, with the intimacy of our family. My youngest daughter is now of age. She lives with me and is my little idol."

\* \* \* \* \*

"I made much use of the *Corpus Juris*, & as the Judges, (Livingston Excepted), knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout & carry my point by mysterious want of French & civil law."

\* \* \* \* \*

"I mastered the best of the Greek, Latin and French classics \* \* \* read Maciavel & all collateral branches of English history Such as Libeletines H., and 2d Bacon's H."

On the whole, we cannot avoid the conclusion that this "unpublished" letter, the authorship of which is assigned to Chancellor Kent, is the production of an illiterate, ambitious writer who has taken material for his letter from one of the many biographies of Chancellor Kent extant, and to give it the appearance of originality, has clothed it in his own language and passed it off as a letter from Kent, addressing it to Thomas Washington, of whom nothing is known except his residence. It is very singular that, as he lived at Nashville, Tenn., the letter was found in the old court-house at Jackson, Miss. It is not surprising that "there is no record showing how it got there."

The English courts are having a great deal of trouble in interpreting the so-called Betting act of 1853. In March last five

judges of the Queen's Bench Division decided that the enclosure on a race-track known as "Tattersall's ring" was a "place" within the meaning of the act, and was illegally used for the purpose of betting. (*Hawke v. Dunn* [1897], 1 Q. B. 579.) Five judges of the Court of Appeal have now overruled this decision, Rigby, L. J., alone dissenting (*Powell v. Kempton Park Race-course Company*), and for the present, at least, the bookmaking fraternity may be happy. The act in question is entitled "An act for the suppression of betting-houses." The preamble recites that "a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting-houses or offices." Then, "for the suppression thereof," it is enacted, by section 1, that "no house, office, room, or other place, shall be opened, kept or used for the purpose of the owner, occupier or keeper thereof, or any person using the same. \* \* \* betting with persons resorting thereto." By section 2, any such "house, room, office, or other place" is declared to be a common gaming-house; and by section 3 it is made an offense for any owner or occupier knowingly to permit his "house, room, office, or other place" to be "opened, kept or used" for the purposes mentioned in the first section. It was admitted by all the judges who decided the *Kempton Park* case that some limitation must be put upon the word "place" as used in those sections. According to the *Solicitors' Journal*, the broad distinction between the opposing views is that "place" in the opinion of the majority of the Court of Appeal means a defined area capable of being used by a man as his betting office, while in the opinion of Hawkins, J., and the other judges who decided *Hawke v. Dunn*, and of Rigby, L. J., in the Court of Appeal, it means any defined area, whether capable of such exclusive user or not. The former interpretation is in accordance with the intention of the legislature as expressed in the preamble, and can be drawn from the language used by the application of the *ejusdem generis* rule; the latter depends upon

a strict construction of the words, and ascribes a meaning to "place" as something distinct from "house, room or office," and intentionally added by the legislature with a view to widening the scope of its net. The matter is clearly one which the legislature ought to decide, but it is not expected that parliament will show any great desire to grapple with so thorny a subject. Commenting on the subject, the *Law Times* says: "We care nothing about the practical results of the *Kempton Park* appeal, but we are concerned that two Courts of Appeal should stand in diametric conflict upon the construction of the same act of parliament. *Hawke v. Dunn* was decided on appeal from magistrates by a full Divisional Court, whose decision was final upon a *bona fide* prosecution. This decision can never be reversed. In theory it binds all judges and magistrates. The *Kempton Park* case was a civil action, said to be collusive, the judgment in which can be taken to the house of lords, and must, unless reversed, control all civil courts. But we know that it is boldly said that *Hawke v. Dunn* is no longer law — that although it cannot be reversed, there being no appeal from the decision, it is, nevertheless, pricked like a bladder by another court, from whose decision, *inter alios*, there is an appeal. What a system of jurisprudence! The provision in the Judicature Act that no appeal shall lie to the Court of Appeal in a 'criminal cause or matter' becomes an absurdity if decisions in criminal causes and matters can be thus got rid of. This, however, is not the first illustration of the anomaly, and if the legislature had time for the serious consideration of our judicial system, here lies to their hand a very important reform."

Early in his career at the bar, William M. Evarts was the counsel for the defense in an important criminal case. He conducted it with such skill, learning and eloquence as to gain the general applause of the public — but his client was convicted. Not long after the trial he met Ogden Hoffman, one of the most eloquent legal orators of his day. "Mr. Evarts," said Hoffman, "though you

conducted the recent criminal trial in a manner highly creditable to you, and while it may not be agreeable to you to know that your efforts have been defeated, let me say that the result of the trial was a fortunate circumstance for you. I was, some years ago, the counsel for a person accused of a great crime; my efforts resulted in his acquittal. While I gained in professional repute, it is true, I have ever been sensible (though my own conscience suggests nothing to reproach myself with) that the sober sense of the community has taken some umbrage at the result. Now, in the outcome of your late efforts you are at least safe from this influence. Take my advice; adhere to civil business, and let the criminal courts alone." The trial to which Mr. Hoffman alluded was his celebrated defense of Richard P. Robinson, indicted for the alleged murder of Helen Jewett. Hoffman's address to the jury on that occasion is scarcely equaled in the legal history of modern times. Though all the circumstances were against Robinson, the thrilling eloquence of Hoffman completely captivated the jury, who acquitted him against the almost unanimous voice of the public. Mr. Evarts, it may be added, took his friend's advice, for it is not known that the great lawyer, now retired from active practice, undertook any criminal cases thereafter. Criminal trials at the present day, as every lawyer knows, are seldom conducted with such depth of learning, eloquence and forensic skill as characterized this branch of practice a generation or two ago. They have come to be contests between expert scientists, who hire out their cunning to the opposite sides of a criminal case for a *quid pro quo*. Science becomes the football of opposing counsel, and justice assumes closer blinding than she is usually represented to have while holding the scales.

In one respect, at least, the laws of England relating to the punishment of offenses committed by youths may be studied by penologists in this country with profit. For example, the Larceny Act of 1861, section 4, permits the infliction of whipping in cases of simple larceny. Probably there will be a

consensus of opinion that when a boy of 13 or 14 years of age has been convicted of stealing, or of almost any crime, it is much better that he should receive a good flogging than that he should be sent to prison, to make the acquaintance of and learn the ways of hardened criminals. But even the laws of old England do not seem to be perfect, for in a recent case of a boy convicted on indictment, who had pleaded guilty to breaking into a shop and stealing some money, it was found that as he was convicted for housebreaking, under section 56, which does not provide that whipping may be inflicted, he, therefore, could not be punished in that way. In cases of youthful prisoners a good birching would doubtless exercise a greater deterrent influence than imprisonment, and, in addition, would not subject the young law-breaker to the vile influences and associations which are inseparable from residence in a penal institution. "Spare the rod and spoil the child" is just as true as it ever was, and the question is at least worthy of consideration whether the courts might not, with benefit to society, take up the rod where the careless or over-indulgent parents drop it. Every effort, at all events, should be made to keep the youthful criminals away from the penitentiaries and their contaminating influences as long as possible.

That somewhat celebrated suit over the right to name the baby, to which the ALBANY LAW JOURNAL some weeks ago referred, has, as we suspected it would, stirred up a very deep interest among heads of families all over the land. The daily press, as well as the legal journals, both of America and England, have taken it up, and the comment is interesting. For example, the Rochester Post-Express says: "It is not prudent to take part in a family quarrel. But we believe that our readers, by a large majority, on the foregoing statement of facts, will side with the mother. Not that they love Sweden less, but that they hold that when there is not unanimity in regard to the baby's name, the mother's wishes ought to prevail." The conclusion of the Post-Express is heartily indorsed by our brilliant neighbor, the Troy

Press, which adds these truly philosophic observations:

"In a case of dispute, and this will not arise in a well-regulated household, the wish of the mother should be final. She risks her own life to give birth to a child, and it is a brutal father who will seek to override her wishes in such a matter. In too many families, we regret to say, the father's despotic will governs absolutely, and the mother submits to injustice rather than to risk the displeasure of her husband. Where love reigns, however, there will be cheerful consultation, and each will be more anxious to please the other than to exert his or her preference in naming a child. But it is a very cruel or thoughtless father who insists upon having his own way in this respect."

As for ourselves, though we have an opinion, we do not propose to usurp the prerogative of the court and attempt to decide the delicate matter.

### Notes of Cases.

In *Foley v. The State* (N. J. Sup. Court, 30 Vroom., Part I, page 1), it was held, in a trial on an indictment charging the defendant with the statutory offense of sexual intercourse "with a single female of good repute for chastity, under the age of 21 years," etc., that proof that such woman had been unchaste with two other men was properly ruled out as being irrelevant. The opinion of the court, which was by the late Chief Justice Beasley, reads, in part, as follows: "That the testimony thus excluded was illegal is, in the opinion of this court, entirely clear. We think it was illegitimate because it bore no relation whatever to the issue then trying. By force of the statute that issue was whether the prosecutrix was 'of good repute for chastity;' the offer was to show the immaterial fact that she was not a chaste woman. The crime consists, under the conditions stated, in the seduction of the woman, whether she be chaste or unchaste, provided she be chaste in public estimation. The discrimination to be made, in view of the act, between the really chaste and the reputedly chaste female was briefly noticed in the opinion read in the Court of Errors in the case of *Zabriskie v. State*, reported in 14 Vroom. 646. 'There is a distinction,' is the judicial declaration, 'between actual personal virtue and 'good repute for chastity,' as used in our statute. The former may be preserved, while the latter is impaired by indiscreet conduct. It

does not necessarily follow that they are co-existent.' This being so, it follows of course that the testimony presented by the defense had no legal significance. If it had been admitted it could not have affected the result." Nor was the court impressed by the argument of counsel for the defendant, that it was the obvious intent of the act to protect chaste and virtuous females. This contention, in the opinion of the court, disregarded the fundamental rule of statutory exposition, which is where the legislative language is unmistakably clear, it is the duty of the court to enforce it in that sense without the least regard to results. The expressions used in the statute, in this case, are absolutely free from all obscurity or doubt; the description of "a female of good repute for chastity" is a definition of a class so plainly marked as to exclude all uncertainty, and such being the case, the court could not refuse to carry it into effect according to its terms.

John Hanna was a passenger on one of the lines of the Nassau Electric Railroad Company, on Bergen street, in Brooklyn. When the car reached the intersection of Fifth avenue he got a transfer slip entitling him to continue his journey on the line, upon that avenue. When a car came along he boarded it by the front platform. He surrendered his transfer ticket, after which he was directed by officials of the road who were riding on the front platform to enter the car. Finding this to be impossible, he refused to leave the platform, and was then ejected from the car by force. The Second Appellate Division, in affirming judgment secured by Hanna in his suit against the company for assault, held that the court properly charged the jury that if the plaintiff's ticket had been taken from him by the conductor, and there was not sufficient room in the body of the car to permit him to enter, his ejection was illegal; but that if there was room in the car, he was bound to enter it; his removal from the car was lawful, and the defendant was entitled to a verdict, unless excessive force was employed. A railroad corporation which has accepted a passenger's transfer ticket cannot, the court said, remove him from its car until it has either returned, or tendered a return, of the ticket to him. A transfer passenger has not necessarily, it was held, the right to board the first car that approaches him on the line, regardless of whether there is accommodation for him, and to force himself into a dangerous or improper position upon the car; his duty is to wait until a car approaches in proper condition to receive him, and should no such car appear, he can maintain an action against the corporation for its breach of its contract to carry him.

The Supreme Court of the United States, in the recently decided case of *Hovey* against *Elliott*,

devotes a considerable portion of the opinion to a criticism of the decision of our Court of Appeals in the contempt case of Walker against Walker, in which the opinion was written by Chief Judge Folger, and is to be found in the eighty-second volume of New York Reports at page 260. It was there held in substance that a court of equity possessed the power to disregard an answer lawfully filed by a defendant who had subsequently committed a contempt, and might pass upon the case as though there were no answer and grant the complainant relief accordingly. Mr. Justice White, of the United States Supreme Court, declares that this decision finds no support in the authorities upon which it is based. "Certain it is," he says, "that in all the reported decisions of the Chancery Courts in England, no single case can be found where a court of Chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt." Chief Judge Folger quoted a passage from the *Forum Romanum* of Chief Baron Gilbert as justifying his position, but Mr. Justice White insists that he misunderstood it.

An act of the Arkansas legislature, passed in 1889, requires corporations and persons operating railroads to pay their employes, on the day of their discharge, the unpaid wages then earned at the contract rate, without abatement or deduction, and, as a penalty for non-payment on that day, declares that the wages of the employe shall continue at the same rate until paid, etc. It was held by the Supreme Court of Arkansas, in the recent case of *St. Louis, I. M. & S. Ry. Co. v. Paul*, that the act is valid so far as it affects corporations; that the act, in imposing such liability on one class of corporations alone, does not deny them the "equal protection of the laws," within the inhibition of the fourteenth amendment to the Constitution of the United States; that the exemplary damages allowed as a penalty for non-payment of the earned wages at the time of discharge are not excessive or unreasonable; and that the act operates as an amendment of the charters of railroad corporations, in so far as it is inconsistent therewith, though it makes no reference thereto, notwithstanding Const. art. 5, § 23, which declares that no law shall be amended without enacting and publishing at length so much thereof as is amended.

A case involving an interesting question under the statute of limitations was decided recently by the Appellate Division of the New York Supreme Court, Third Department. It was in the case of *Costello v. Downer*, and the decision of Judge Smith, of Elmira, was affirmed. The defendant, who was sued upon a promissory note,

insisted that the note was outlawed because it fell due more than eight years before the suit was brought. In reply to this the plaintiff showed that the defendant, during all that period, had been a resident of New Jersey. It appeared, on the other hand, that the defendant, throughout the eight years, had attended during business hours every day at his office in the city of New York, and had there carried on his business. In order to prevent the statute of limitations from running against the note, or, in other words, to prevent it being outlawed by lapse of time, it was necessary, under the Code of Civil Procedure, to show that the defendant had remained "continuously absent" from the State for the space of one year or more. The Appellate Division holds, with Mr. Justice Smith, that continued absence is different from continued non-residence. It certainly was different in this case, for while the defendant was not a resident of New York at all, he was present here every day. This circumstance is deemed conclusive in support of his defense and against the right of the plaintiff to recover upon the note. The opinion is written by Presiding Justice Parker and concurred in by all his associates except Judge D. Cady Herrick, who dissents.

In *Perkins v. Pendleton* and others it was decided by the Maine Supreme Court, that for a person to wrongfully—that is, by the employment of unlawful or improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both on principle and authority as well to cases where the employer breaks his contract as where it is broken by the employe—in fact, it is not confined to contracts of employment. It was further held that whenever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and the rule is the same whether by these wrongful means a contract of employment, definite as to time, is broken, or an employer is induced, solely by reason of such procurement, to discharge an employe whom he would otherwise have retained, even if the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employe. Merely to induce another to leave an employment or to discharge an employe, by persuasion or argument, however whimsical, unreasonable or absurd, is not in and of itself unlawful, and the court does not decide that such interference may become unlawful by reason of the defendant's

malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employe, whom he desired to retain and would have retained except for such unlawful threats, is an actionable wrong. *Held*, that a cause of action in this case is sufficiently stated in the declaration.

### CONTEMPT BY PUBLICATION.

[Continued from last week.]

#### HAVE COURTS THE POWER TO PUNISH SUMMARILY?

In England the fiction that the majesty of the king, represented in the persons of the judges, is always present in court, and hence any outward act is in contempt of the king's authority, is resorted to in order to punish acts of constructive contempt.

In this country, where the power is derived directly from the people, the authority to punish as a contempt an act, whether committed in or out of the presence of the court, which tends to impede, embarrass or obstruct the court in the discharge of its duties, is based on the inherent power of the court, and as being a necessary incident to the execution of the powers of the court — necessary to maintain its dignity, if not its very existence (23).

Since the power to punish for contempt is a grave one, and of the most summary character, dispensing, as it does, with trial by jury, inferior courts had no such power to punish for contempt. The king could not be presumed to sit in an inferior court, nor his majesty vicariously represented, and so there, too, inferior courts may not proceed in cases of constructive contempt.

The process of attachment for contempt must necessarily be as old as the laws themselves; for laws without competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to hold for contempt, by an immediate attachment of the offender, results from first principles on which courts of justice are founded, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law extend (24). Judge Thatcher, in a very able opinion, delivered

in 1845 (25), attempts to show that as far as "by speaking and writing contemptuously of the court" is concerned, Blackstone is in error where he considers it as a part of "the law of the land," and the writer is inclined to think that, as Magna Charta was silent upon this point and seventy years after its signing, a statute was enacted dealing with contempts not committed in *facie curiæ*, Blackstone might be mistaken. "No authorities are cited by the learned commentator, and why parliament should have legislated upon consequential contempts, unless the evil was then for the first time discovered (13 Edw. I, c. 32), is not quite clear. If this was contempt before Magna Charta, and the power dwelt in the courts then to punish and check it, the statute was certainly uncalled-for legislation, but if so, it is a solitary and isolated instance of such at that early period."

However that may be, from the earliest legal history, the power of the court has been exercised in this direction, and it is too late now to call it in question.

The exercise of the power to punish for a contempt of this nature has for its object the punishment of a disrespect to the court or its order. A cardinal principle of free government is that judicial tribunals are created and maintained not for the benefit of those occupying judicial positions, but for the benefit of society and the protection of the people in the enjoyment of their rights. To this end it is essential to uphold the courts in the lawful exercise of their authority and jurisdiction (26).

Mr. Wharton also takes the stand that constructive contempt of court cannot be punished summarily, and says that the doctrine is of recent introduction, and not a part of the common law of the colonists (27).

Yet in *In re Chessman* a whole array of authorities is cited to show that this power was exercised by the English courts many years prior to the Declaration of Independence (28).

Lord Erskine, in 1806 (13 Ves. 237), says: "In a government where order is secured not so much by force as by the respect which citizens entertain for the law and those engaged with its administration, nothing which tends to preserve that respect from forfeiture on one hand or deterioration on the other can be hostile to the commonwealth."

*Superior Courts.* — Self-preservation is the right of all superior courts. They must necessarily have the power to punish contempts, otherwise they could not protect themselves from insult or

(23) *In re Shortridge*, 21 L. R. A. 750 (Cal.); *Re Cooper*, 32 Vt. 257; *Cooper v. People*, 22 Pac. Rep. 790 (Colo); *Wharton Pleading and Practice*, §§ 957-961; *Bishop*, 2 Crim. Law, §§ 257-262; *Midlebrook v. State*, 42 Conn. 257.

(24) *Blackstone Comm.* IV, 285.

(25) *Ex parte Hickey*, 4 S. & M. 741.

(26) *Burke v. Terr.*, 37 Pac. Rep. 829 (Okla.).

(27) *Wharton Pleading and Practice*, § 961.

(28) *In re Chessman*, 49 N. J. L. 144.

enforce obedience to their process; without it they would be powerless (29).

In this country we know no privileges but such as exist for the public good. Courts, their officers and process are shielded from invasion and insult, not from any sanctity in the institutions themselves, or the persons or those who compose them, but solely for the purpose of giving them due weight and authority, and to enable those who administer them to discharge their functions with effect (30).

Judge Jaue, in the case just cited, says: "To scandalize a court by speaking or writing in its presence is a high contempt." And as it is, from the very nature of things, necessary to keep in the minds of the people a disposition to submit to the lawful authority, so it is contemptuous to publish anything, during the pendency of a trial in any such court, by which an imputation is cast upon any of the judges thereof, as to their impartiality or integrity as respects that cause. At the common law every judge was regarded as the direct representative of the sovereign, and upon this fiction the power to punish for contempt was based. With us the people have been substituted for the crown, but the right to attempt by wanton defamation to prejudice the rights of litigants in a pending cause, degrade the tribunal and impede or corrupt the due administration of justice, which is so essential to good government, cannot be sanctioned (31).

But it has never been conceded in this country that courts have *inherent* authority to punish as contempts acts which do not affect causes actually pending before them, although the acts tend to degrade the court and bring the administration of justice into disrepute (32).

However, the jurisdiction to punish for contempt is at best an arbitrary power, and should be exercised only on the preservation and not on the vindictive principle (33). Great caution should be exercised when the court's attention is called to an alleged offense, because the judge occupies the position of prosecutor also, and when he punishes he is dealing with conduct which is contemptuous of his own authority, and perhaps insulting to himself (34). The judge should see if there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear on the subject, and should see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with

persons brought before him on accusations of contempt should be adopted (35).

"The liberty of the press to fairly criticize official conduct of judges or decisions, or proceedings of courts, and expose and bring to light any wrongful or corrupt act, should be carefully preserved and protected by the courts. If a public supervision and censure through the press are necessary to suppress corruption and keep the channels of justice pure, the right to exercise such supervision, and to censure and expose wrongdoing, should and must be upheld by the courts; but the publisher of a newspaper who assumes to criticize and censure a public officer must know whereof he speaks. If he censures unjustly, or charges falsely, he will be held strictly accountable. While his right is protected, his abuse of it will be punished" (36).

The liberty of the press is, after all, only the liberty which every man has to utter his sentiments, and can be enjoyed only in subjection to that precept, both of law and of morals, *sic utere tuo ut alienum non laedas*.

Courts have not unlimited power to declare what shall be contempt, neither do the publishers of a newspaper possess unlimited license to publish whatever they please. It has not been deemed expedient that any class of persons should be privileged to attack the courts with a view to interfere with the rights of litigants. "Imperfect as may be the conclusions of courts, in some cases, it would be a great mistake to substitute in their place the local comments or even the editorial opinions of the press" (37).

*Statutes.*—In the year 1788 a certain Oswald, editor of a Philadelphia newspaper, was arrested on some charge. Following his arrest, he published the following editorial: "Enemies I have had in the legal profession, and it may perhaps add to the hopes of malignity that this action is instituted in the Supreme Court of Pennsylvania. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country properly selected and empaneled, a jury of freemen and independent citizens, I must rest my suit" (38). This was declared a contempt, but Oswald did not rest until he had called the attention of the legislature to the decision, and an attempt was made to impeach the court, which, however, failed, but not without a very protracted discussion. The legislature of Pennsylvania then passed a statute taking away the court's power to punish for constructive contempt, and limiting the power to cases of official

(29) *Passmore Williamson's Case*, 26 Pa. St. 18.

(30) *Con. v. Dandridge*, 2 Va. Cases, 408.

(31) *Cooper v. People*, 13 Colo. 367.

(32) *State v. Kaiser*, 20 Ore. 50.

(33) *Stuart v. People*, 3 Scam. 395.

(34) *Cooley on Torts*, p. 422-425.

(35) *Clement v. Erlanger*, 46 N. J. Ch. 383.

(36) *Ex parte Barry*, 85 Cal. 603.

(37) *People v. Stapleton*, 33 Pac. Rep. 167 (Colo.).

(38) *Respublica v. Oswald*, 1 Dallas, 318.

misconduct of officers, to the negligence or disobedience of officers, parties, jurors or witnesses against the lawful process of the court, and misbehavior of any person in the presence of the court.

In 1832 a statute of the same effect was passed by congress governing United States courts. This act was occasioned by the strange conduct of Judge Peck in 1820, which led to the celebrated impeachment proceedings. These were the first statutes passed on this subject, and Tennessee, Ohio and some other States have enacted them into their laws.

These statutes have been held to apply only to those courts which depend upon the statutes for their creation, while those erected by the constitutions of the various States are not affected. The principle was clearly announced in *Storey v. People*: "Courts created under the Constitution can go beyond the provisions of the statute in order to preserve and enforce their constitutional powers by treating as contempt acts which clearly may invade them" (39).

And in *Ex parte Robinson* (19 Wall. 511), Mr. Justice Field held the federal statute to apply to the Circuit and District Courts, but he doubted its application to the Supreme Court, because it derives its existence and powers from the Constitution.

*Justices of the Peace.* — Rapalje, in his work on Contempts, says: "It is well doubted whether, at common law, a justice of the peace had any power to punish contempts by fine or imprisonment, except those committed *in facie curiæ*" (40).

Bishop, in his work on Criminal Law, quotes from Gabbett: "Courts of inferior jurisdiction can not attack or commit a party for any contempt which does not arise in the face of the court" (41).

But the Code in New York expressly provides that the justice of the peace has not power to commit for constructive contempt (42); while in Pennsylvania and New Jersey that officer has not even the power to punish for a direct contempt (43).

That the superior courts of record, or of general jurisdiction, are not hampered by these statutes we can safely assert. Colorado's court holds the power to punish to be inherent in courts, independent of statutes (44). "The legislature can not prevent courts of superior jurisdiction from punishing, or prohibit them from determining

what are contempts, but it may enlarge the powers of the courts in these respects and regulate the proceedings" (45). "The power is not from statute, but of necessity, to be implied because it is necessary to all other powers" (46).

One who has been charged with a contempt of court may also be proceeded against in a civil suit for damages, and one is no bar against the other (47). So, in Louisiana, the court said it was a mistake to suppose that the resulting liability is limited to a civil action for damages by the individuals who may be prejudiced by the publication. Such a contention ignores totally the consideration of public morals and public interests (48).

### III. — PROCEDURE.

The ancient mode of procedure was that when an act had been committed which was calculated to obstruct the efficient administration of justice, in a given case before a court of equity, the court would, either on motion of one of the parties to the action or of its own motion, investigate *ex parte*, and being satisfied that a contempt had been committed, direct that the guilty person stand committed unless he show cause to the contrary on a certain day.

This order *nisi* was served, and if no answer was made the accused was arrested and dealt with according to the terms of the sentence; but if the accused appeared, he would be heard either by the court itself or by a master, in any way that suited the convenience of the court, either by an oral examination or by affidavits, or by propounding interrogatories (49). However, this has been changed somewhat, so that instead of issuing the rule *nisi*, an order is substituted, compelling the party to show cause why he should not be committed.

Originally this rule was used when the evidence was not directly before the court, but it was converted into a procedure for determining the whole matter on its merits, and the court having the party before it, proceeded to try the whole question on the preliminary hearing.

Thus the answer of the respondent to such a rule in a court of law came to have the same effect as his answer to interrogatories in the more regular practice, and if the accused filed a statement which would free him from the imputed contempt, contradictory evidence would not be admitted, and the party would be discharged; but in Chancery his answer was not conclusive, and it could be inquired into and opposing testimony

(39) *Storey v. People*, 79 Ill. 50.

(40) Rapalje on Contempts, p. 5, and cases cited.

(41) Bishop Crim. Law, § 263.

(42) 5 Hun, 317.

(43) *Brooker v. Com.*, 12 S. & R. 175; 4 Vroom 344.

(44) *Hughes v. People*, 5 Colo. 436.

(45) *Cheadle v. State*, 110 Ind. 310.

(46) *In re Jesse Cooper*, 32 Vt. 254.

(47) 5 Ired. L. 199 (No Car.).

(48) *State v. Phelps*, 45 La. Ann. 1263.

(49) *U. S. v. Anonymous*, 21 Fed. Rep. 767.



heard (50). When the offense is committed in the presence of the court, notice to the offender is not required, and it is immaterial whether it is spoken openly or presented in a written or printed argument (51). When the words are insulting *per se*, proceedings need not be discontinued (52), and the court may proceed to judgment at once.

As the right to a hearing is absolute, and cannot be denied in a court of any grade (53), an attachment must necessarily issue when the act is not committed in the presence of the court. Such attachment is issued on an affidavit being filed, which affidavit is jurisdictional, and an oversight in not filing one cannot be remedied by a subsequent filing of the same (54). Such affidavit is entitled in the name of the suit pending in which the act occurred, but after attachment has been granted the proceedings are in the name of the people (55).

The affidavit must show affirmatively all facts which are necessary to give the court jurisdiction, and in a proceeding of contempt for a publication, if it does not state that the publication was made while the trial was pending, the proceedings will be reversed in an appellate court (56). Thus, if the affidavit charge merely that the publication "was false and grossly inaccurate," such affidavit will be held insufficient (57). If the party is proceeded against without notice being given him of the charge, upon appeal the proceedings will be reversed and the accused be given an opportunity to purge himself; and if testimony be taken *ex parte* it will be stricken out (58). The punishment for contempt is in a sense not a criminal proceeding, and if the act is committed in the presence of the court, process need not issue for the offender's arrest, and although he leave the court-room and abscond, the court may proceed to sentence him. It would seem, however, that this must be done before the close of the term, and in the absence of a statute, a contempt committed in term time cannot be punished in vacation (59). And in California, where the court

permitted fifty days to elapse from the time the act was committed until the defendant was adjudged guilty of contempt, it was held that the court was without jurisdiction after such a long period of time (60).

The meaning and intent of the words used will be determined by a fair interpretation of the language used (61). Even if defendant's counsel deny that any disrespect was intended, the court is not bound to accept such statement (62); but it may, in its discretion, accept such explanation and permit defendant to go free (63). The construction of a publication as bearing upon the character of the court is a matter of law for such court; and if the court finds that the words are obscure and ambiguous, testimony may be admitted explaining the meaning (64).

"If the article is *per se* libelous, making a direct charge against the court or jury, admitting of one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, then it would be trifling with justice to say the publisher could admit the publication and deny that he intended the plain and unmistakable meaning which the language used conveys. But when the language used is not *per se* libelous, and only becomes so and made to apply to the court by use of innuendoes, and if fairly susceptible of an innocent meaning so far as any reflection upon the court is concerned, and defendant answers under oath that he used it in a sense not libelous, and declares he intended no imputation upon the court, his answer must be taken as conclusive (65).

In Nebraska the court holds a contempt proceeding to be of a criminal nature in respect to the rules of strict construction which are applicable to criminal proceedings (66).

**Liability.**—The responsibility for the publication is upon the editor of the newspaper publishing the contemptuous matter; that he did not write it will not relieve him; but in a New Jersey case the court saw fit to mitigate the punishment when the article had been written by a reporter and printed without knowledge of the editor. Yet in Texas the Supreme Court, in a recent case, decided that where, in contempt proceedings for inciting and causing the publication of a criticism of a judge's judicial action, it appeared that the defendant had no agency in the publication or knowledge of it, a commitment for contempt is

(50) Underwood's Case, 2 Humph. 46.

(51) Re Woolley, 11 Bush. 95; 7 Wall. 372; 19 How. 13.

(52) 1 Cairnes, 484.

(53) Cooley on Torts, pp. 422-425.

(54) Wilson v. Terr., 1 Wyo. 155.

(55) Bensen v. Mitchell, 12 Johns. 460.

(56) State v. Sweatland, 54 N. W. Rep. 415 (So. Dak.); Cooley v. State, 65 N. W. Rep. 799 (Neb.); Gandy v. State, 12 Neb. 445; Ludden v. State, 31 Neb. 437; Hawthorne v. State, 45 Neb. 874.

(57) Worland v. State, 82 Ind. 49.

(58) Palmer v. Palmer, 18 So. Rep. 721 (Fla.).

(59) Middlebrook v. State, 42 Conn. 257; Taylor v. Moffatt, 2 Blkfd. 305.

(60) In re Foote, 76 Cal. 543.

(61) Henry v. Ellis, 49 Iowa, 205.

(62) Terr. v. Murray, 15 Pac. Rep. 145 (Mont.).

(63) Morrison v. Moat, 3 Edw. 25.

(64) People v. Wilson, 64 Ill. 194.

(65) Percival v. State, 48 Neb. 741; Fishback v. State, 30 N. E. Rep. 1088.

(66) O'Chandler v. State, 63 N. W. Rep. 373.

void, for want of jurisdiction (67). But in New Mexico it was held proper to attach an editor who published a libelous article on the court, but who did not know who the author of it was, either at the time of publication or at the time of the trial (68). So also in Illinois, where an attachment was issued against the editor and against the proprietor of a newspaper, the court held both responsible, although the proprietor showed that he took no part whatever in the management of the paper (69).

*Trial by Jury.*—In the beginning of this century it was a much disputed point whether a jury would not have to be called to try a charge of contempt. Blackstone says: "No freeman shall be imprisoned and condemned but by the judgment of his peers, or by the law of the land."

It was argued that the Constitution of the United States also guaranteed a jury trial in all cases for crime, excepting impeachments; and the eighth amendment declared: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State," etc. But in *Hollingsworth v. Duane* (70), the court held that the Constitution gave no new rights to the citizens, but merely secured the inestimable privileges heretofore enjoyed from being abridged or destroyed. It goes no farther than Magna Charta. The provision of the Constitution refers to those offenses against the United States which, had they been committed against the separate States, before the adoption of the Constitution, would have been considered offenses against such States.

And in an early case in Iowa the court held that when an order had been made within the scope of the court's authority, a disobedience may be punished by commitment to prison without trial by jury, the constitutional guaranty not applying to such a case (71).

The same view was taken in the New Jersey case of *State v. Doty*, already referred to.

However, in 1889 a case arose in Ohio where the defense contended that, as they would be liable for libel if the contempt proceeding was sustained, the judge against whom the article was directed was incapacitated from trying the contempt; but the Supreme Court held this defense without ground.

*Appeal.*—Although appellate courts are usually erected to hear cases both upon the law and the facts presented, yet they are to do this in view of a judgment already rendered by a lower court,

for its own protection, and if in such judgment nothing unlawful or unjust is found, it should be affirmed, whether in the minds of the judges appealed to it was politic or impolitic to set the prosecution in motion (72, 73).

The reason of this is because the contempt may consist in the manner of the person committing it, as well as in the matter presented (74). Thus, in a direct contempt, regard must be had not merely to the words used, but to the surrounding circumstances, the connection in which they were used, the tone, the look, the manner and the emphasis. These give meaning to the words, and might satisfy every bystander that they were used in an ironical and insulting sense. Of such contempts the court to whom they are offered, or in whose presence they arise, must be the exclusive judge, as the punishment should be immediate and on the spot (75). The statements of the judge embodied in the order must be taken as true, for the only question to be decided on appeal is, Did the court below have jurisdiction? If it did, the order must be sustained (76). And the power of one court to release a person illegally imprisoned for contempt by another court is confined to cases where the illegality or want of jurisdiction appears from the *record* of the committing court; for it is not competent for the court hearing the *habeas corpus* to inspect and revise the *evidence* upon which the committing court acted (77).

The same reasoning is applied to contempts by publication, for if the article tends to bias the minds of the people so that it will be likely to prevent getting an impartial jury, or if printed at a time when popular opinion is at fever heat, and great disregard to the orders of the court is liable to ensue, the appellate court will sustain the order.

When the contempt has not been committed in the presence of the court, and there is another mode of punishment equally as efficacious, the court will not proceed with the contempt proceedings.

"It would seem, therefore, to be the legitimate deduction from the opinions of the State courts, and from the principle of the matter, that, according to the great weight of authority, the power to deal summarily with constructive newspaper contempts, consisting of the publication of comments on matters pending judicially, and calculated to influence the due course of the proceedings therein, is vested in the superior courts, except so far as statutes or constitutions have curtailed it,

(67) *Ex parte Taylor*, 31 S. W. Rep. 641 (Tex.).

(68) *In re Hughes*, 43 Pac. Rep. 692.

(69) *People v. Wilson*, 64 Ill. 194.

(70) *Hollingsworth v. Duane*, Wall. 77.

(71) *Ex parte Grace*, 12 Iowa, 208.

(72) *In re Chessman*, 49 N. J. L. 144.

(73) *In re Jesse Cooper*, 32 Vt. 254.

(74) *Hughes v. People*, 5 Colo. 436.

(75) *In re Jesse Cooper*, 32 Vt. 254.

(76) *Ex parte Robinson*, 19 Wall. 511.

(77) 5 Coldw. 337 (Tenn.).

and that it is not wholly clear that courts will recognize the power of legislatures to deprive them of what is so frequently an inherent function of their beings" (78, 79).

ARTHUR C. MAYER.

### AMERICAN BAR ASSOCIATION.

THE ARRANGEMENTS FOR THE ANNUAL MEETING AT CLEVELAND, OHIO, NEXT MONTH.

THE coming meeting of the American Bar Association, which will be held at Cleveland, Ohio, on Wednesday, Thursday and Friday, August 25th, 26th and 27th, promises to be one of great interest to the members of the profession. The Hollenden Hotel will be the general headquarters of members during the meeting, where the annual dinner will be given at 7 o'clock on Friday evening. On Wednesday morning, at 10 o'clock, after the address of the president, James M. Woolworth, of Nebraska, there will be the nomination and election of members, election of the general council, reports of the secretary and treasurer, and report of the executive committee. Wednesday evening will be devoted to reports of standing committees. On Thursday morning the annual address will be given by John W. Griggs, governor of New Jersey, after which special committees on expression and classification of the law, Indian legislation, uniform State laws, Federal Code of Criminal Procedure, patent law, and uniformity of procedure and comparative law will report. On Thursday evening papers will be read by Robert Mather, of Illinois, on "Constitutional Construction and the Commerce Clause," and by Eugene Wambaugh, of Massachusetts, on "The Present Scope of Government." On Friday morning the principal business will be the nomination and election of officers, and the transaction of miscellaneous and unfinished business.

The sessions of the Section of Legal Education will be held on Thursday and Friday afternoons at 3 o'clock, when the following papers will be read: "Primitive Legal Conceptions in Relation to Modern Law," Henry E. Davis, attorney of the United States for the District of Columbia, and lecturer on the history of law in the Columbian University, Washington, D. C.; "The Law of Insurance in the Law School," John A. Finch, lecturer on insurance law in the Indiana Law School, Indianapolis, Ind.; "The Wage of Law Teachers," Prof. Charles N. Gregory, associate dean of the College of Law of the University of Wisconsin, Madison, Wis.

The meeting on Tuesday evening will be a con-

ference to be composed of the committee on legal education and admissions to the bar of the American Bar Association, the Section of Legal Education, and representatives of the State, county and other local bar associations of the United States.

The sessions of the Section of Patent Law will be held on Thursday and Friday afternoons at 3 o'clock. An address will be made by Edmund Wetmore, of New York, chairman of the section, and a paper will be read by Frank F. Reed, of Illinois, on "Trade Censorship by Equity."

A steamboat excursion on Lake Erie will be given to the association on Wednesday afternoon by the Cleveland bar.

The officers of the association for 1896-1897 are as follows: President, James M. Woolworth, Omaha, Neb.; Secretary, John Hinkley, 215 North Charles street, Baltimore, Md.; Treasurer, Francis Rawle, 328 Chestnut street, Philadelphia, Pa. Executive Committee: The president, the secretary, the treasurer, Moorfield Storey, of Massachusetts, *ex officio*; Alfred Hemenway, of Boston, Mass.; Charles Claflin Allen, of St. Louis, Mo.; William Wirt Howe, of New Orleans, La. Section of Legal Education: Edward J. Phelps, of Burlington, Vt., chairman; George M. Sharp, of Baltimore, Md., secretary. Section of Patent Law: Edmund Wetmore, of New York, N. Y., chairman; Wilmarth H. Thurston, of Providence, R. I., secretary.

### HE KNEW HOW TIME FLEW.

MERE BOY ON THE STAND ODDLY BEAT THE LEGAL BAND.

YOU can nearly always bet your money on a boy. Boys know some things better than even the angels. In an important lawsuit at Clay Center the other day, a 12-year-old boy was on the stand and testified that he had spent just ten minutes in getting a bucket of water for his mother. The question of time was a vital one, and the opposing attorney tried to rattle the boy. Finally one of them pulled out his watch and proposed to test whether or not the boy knew when ten minutes had elapsed. The opposing attorneys on the boy's side of the case strenuously objected to this test, for it is well known that nothing is harder than to sit still and gauge the passing of time. The judge ordered the test to be made, however, and after the court-room clock had been stopped and every chance removed for the boy to play a sneak, the trial commenced.

The stillness in the room became oppressive. Every watch was drawn, and the eyes of the multitude rested upon the youngster, who chewed gum, swung his foot against the round of his chair, and gazed placidly out over the benches, as though the proceedings had mighty little interest for him.

(78) Re Hirst, 9 Phil. (Pa.) 216.

(79) 16 Am. & Eng. Encyclopedia, p 499, note 3.

Two, four, six minutes passed, and still he made no sign. Then the attorneys commenced to worry him.

"Isn't time about up?" asked one of them.

"Nope," sententiously responded the boy, as he changed the cross in his knees. Seven and eight minutes passed.

"Haven't you got that water pumped yet?" said the attorney in a tone which was intended to convey the belief that ten minutes had more than passed.

"Reckon not," again replied the boy, and his own attorneys began to chuckle. Nine minutes passed, and tick, tick, tick, went the seconds towards the ten-minute mark, and up to exactly three seconds before the limit, when the boy drawled out: "I think I've got that water drawn."

The people burst into applause, and after the trial, when the boy was asked to explain how he hit off the time so correctly, he replied: "Oh, I just sorter knowed, that's all."—*Kansas City Journal*.

#### INSTRUCTION IN FEDERAL PROCEDURE

A NUMBER of the law schools of the country are now giving lectures upon Federal procedure. The Law School of the Columbian University, of Washington, as befits a school at the center of Federal law, seems to treat the subject more liberally than any other. In its examination of its post-graduate class candidates for the degree of LL. M., sixteen questions were put on the subject of Federal procedure alone. The scope of the examination can be seen by the following questions:

"How far are writs of error or appeals allowable at the same time, in the same case, to the Supreme Court and the proper Circuit Court of Appeals?"

"Are the requirements of the act of March 3, 1887, as corrected by the act of August 13, 1888, as to the districts in which suits should be brought in Circuit Courts applicable to suits by and against all aliens? If you answer in the negative, state further by what reasoning the natural import of the language of the act should be thus restricted."

"Are there questions outside of Federal law on which the Federal courts are not controlled by the decisions of the State courts? And if so, state some of them."

When it is seen that there were thirteen other questions equally searching, it is not surprising that one of the justices of the Supreme Court of the United States, to whom the questions were shown, remarked, with great surprise: "You don't expect me to answer all those, do you?"

The students, however, who had heard numerous lectures on the subject, presented extremely

satisfactory examination papers. The answer of one of them to the question first quoted was as follows:

"The Federal courts do not allow a party to hang his case on more than one peg. So that where a party has a chance to go up either to the Supreme Court directly or to the Circuit Court of Appeals, he must make his election as to which he will do; he cannot do both.

"Where a person in a Circuit or District Court has raised the question of the jurisdiction of the court, and the case is decided against him, he can either go up to the Supreme Court directly, under section 5, act of 1891, on the question of jurisdiction alone, or he can go up to the Circuit Court of Appeals for that circuit on the merits of the whole case. In that court the jurisdictional question may be raised, and that court can certify it up to the Supreme Court, if it wishes, and after decision in that court, the party can ask for a writ of *certiorari* from the Supreme Court, or go up on appeal or writ of error (provided the case involves more than \$1,000 besides costs) to the Supreme Court, according as the case is or is not made final in Circuit Court of Appeals by section 6, act of 1891. But the party cannot go up to the Supreme Court on the jurisdictional question and at the same time go up to the Circuit Court of Appeals on the merits. He must make his election which he will do.

"But one party may go up to the Supreme Court on the jurisdictional question, and the other party at the same time go up to the Circuit Court of Appeals on the merits, if he is also dissatisfied.

"But in such a case the Circuit Court of Appeals will delay proceeding in the case until the Supreme Court decides the jurisdictional question."

It is interesting to note that the last case on this subject, which was cited by name by a large number of the students, was decided February 1, 1897—*Robinson v. Caldwell* (165 U. S. 359)—while the examination was held in the early part of June. One of the students cited by name no less than fifteen decisions of the Supreme Court in his answers on the subject of Federal procedure.

#### A SLIP OF THE TONGUE.

JUSTICE FIELD ENJOYED THE JOKE, BUT DID NOT COMPLY WITH THE REQUEST.

THE correspondent of a great eastern daily newspaper narrated in a group of friends the other day, says the *New York Tribune*, how a slip of the tongue destroyed his chances of obtaining some matter he was seeking earnestly, and involved him in an unpleasant experience with one of the Supreme Court justices. He received a letter instructing him to see the chief justice and the

associate justices of the Supreme Court, and ask each of them to contribute to the columns of his paper a short essay on a subject pertaining to the history of the Supreme Court. He glanced over the note of instructions hurriedly, and when he met Justice Field a short time later he was not certain of its contents. To refresh his memory, he drew the letter from his pocket and began to read from it to the associate justice the instructions which had been sent to him. In the body of the letter was this sentence:

"Of course, the old duffers do not expect to be paid for this work," the correspondent read hurriedly, and he ran right into this sentence before he knew where he was. He stopped in the middle of it, and was about to omit the remainder, when Justice Field says:

"Hold on—what is that? Let me see that for a moment."

"Oh, that's of no consequence, judge," said the correspondent.

"Just let me look at it for a minute," said Justice Field. He glanced over the correspondent's shoulder and read the sentence. There was a twinkle in his eye that showed that he appreciated the humor of the situation, but the correspondent said to himself: "This ends my search for essays." It did not end the search, but it might as well have ended it, for none of the essays were ever written. Justice Field appreciates a joke, but he does not like to encourage it at his own expense.

#### MADE LEARNED BY LAW.

REBUKE ADMINISTERED BY THE VETERAN TO THE NEW OFFICERS OF THE COURT.

**I**N the territorial days, before Iowa had attained the dignity and prestige of Statehood, when the population consisted almost entirely of pioneers and Indians, and the territory was a veritable *terra incognita* to the far east, there was heard in the United States District Court a noteworthy bit of gentlemanly sarcasm well worthy of repetition, says the Chicago Times-Herald.

Gilman Folsom, of the Iowa City bar, wit, scholar and veritable old-school gentleman, had occasion to try a case in that court before a judge confessedly young in years and professional experience, who had secured the place because of political influence rather than on account of his eminent fitness for the judicial ermine. Opposed to Folsom in the case was the United States district attorney, who, like the judge, had been appointed for political reasons instead of his ability.

During the trial of the case Folsom, with true professional courtesy and politeness, continually referred to and addressed the district attorney as "my learned opponent." The judge was also characterized as the "learned court." The district attorney, fully conscious of his own shortcomings,

and realized the little claim he had to the adjective, felt instinctively that he was being made a subject of ridicule. He fidgeted around until it seemed to him that patience had ceased to be a virtue, and then appealed to the court, asking that Mr. Folsom be required to desist in his persistent sarcastic references to him as "my learned opponent."

When informed by the court that his sarcasm was unnecessary and uncalled for, Folsom looked up with a well-affected air of surprise and said, with the inimitable accent and grace of the old-school gentleman:

"I sahcastic? Your honor, I did not realize that I was sahcastic. I said he was leahned, and he certainly is."

He then proceeded with his argument as though nothing had happened, continually referring to the district attorney and the judge as learned. The judge soon interrupted him, and administered a stern rebuke for his persistent sarcasm, telling him it must cease.

Folsom protested, saying:

"But, your honor, I simply said he was learned, and I insist that he is."

He then turned to the United States statutes, and read to the court the statute providing for the appointment of men who shall be learned in the law as judges and attorneys of the District Courts.

Closing his book and removing his glasses, he continued: "So, your honor, you see that he is learned; not in the sense your honor is learned, not in the sense I try to be learned, but from the fact, your honor, that he is made learned by act of congress!"

No further objection was made to his sarcasm.

#### Legal Laughs.

It was in a local damage suit against a railroad, and the medical experts were having their innings. Indeed, if the whole truth is to be told, some of them were having their "outings," for the counsel for the railroad company, an uncommonly astute and keen lawyer, who, in fact, knew more anatomy and physiology than some, if not most, of the expert witnesses for the plaintiff, handled them without gloves and without mercy, either for their feelings or their professional reputation. In this way several of the doctors who had taken the stand with a self-satisfied, nonchalant, know-it-all sort of air left it crestfallen and mad all the way through, like a feline whose fur had been stroked the wrong way. Then the plaintiff's lawyer called their leading expert, a well-known young Albany physician, who was not only well up in his anatomy and kindred subjects, but had been "up against" railroad attorneys before, in similar cases, and was not easily unhorsed. Being thus on his mettle, and in a

measure prepared for rough handling, he was not the easiest man in the world to "rattle." The all-important question at issue was as to the extent and nature of the injuries sustained by the plaintiff, a woman, and when the witness was turned over to the tender mercies of the railroad attorney's astute counsel, for cross-examination, there was a wicked gleam in that lawyer's eye and an air of confidence which said, as plainly as words could do: "Here's another victim; watch me tangle him up!" The defense had an anatomical manikin, which had been brought into requisition, playing an important part in the plan of the attorney to show how little the medical experts really knew.

"You have made a study of the human anatomy, I presume?" asked the railroad's attorney, insinuatingly.

"Yes, somewhat," mildly replied the young but alert disciple of Æsculapius.

"What do you think of this model?" was the next question shot at the physician.

"I don't think much of it," was the reply, not quite so meekly given.

"Ah! You don't, eh?" roared the attorney, licking his chops, figuratively speaking, of course, over the meal he had already enjoyed, and preparing for another choice morsel, for his appetite for doctors seemed to be insatiable, growing with what it fed upon.

"Well, really, doctor," he went on, in his most insinuating tone, and sheathing his claws for the nonce, while he prepared to make the final and fatal spring upon his supposedly unwary victim, "won't you be kind enough to tell the court and jury what is the matter with this model?"

"Merely that its maker has taken too many liberties with nature," meekly replied the young surgeon. "It's out of proportion, has too many sins of omission and commission, and is faulty all the way through."

"Ah, that's your opinion as an expert, is it? Well, doctor, do you think you could produce a better one?" demanded the attorney, as he glared over the top of his gold-bowed eye-glasses at the witness for whom he was preparing such a neat little trap.

"Most certainly I do," was the quiet but positive reply of the surgeon-witness.

"Have you ever made a model which was better than this one?" was the next query which the lawyer snapped at him.

"I have."

"How many of them?"

"Two."

At this point the judge, who had been an interested listener, took a hand in the examination.

"Will you kindly bring your models into court to-morrow morning, doctor, in order that we may have the benefit of them in the further trial of this cause?" asked the judge.

"Certainly, your honor," was the reply of the witness, with a merry twinkle in his mild, blue eyes. "With the greatest of pleasure, if their mother will consent to their remaining out of school long enough."

There was a momentary silence. Then as the full import of the doctor's reply dawned upon the court, lawyers and spectators, every face broke into a smile, which in most cases became audible. The court, too, joined unrestrainedly in the general merriment, while the railroad company's attorney, himself unable to entirely restrain his facial muscles, remarked *solto voce* to the witness who had so cleverly turned the tables upon him: "That will do; you are excused!"

### English Notes.

The death is announced of Sir Joseph Henry Warner. He was called to the bar in 1863, and in 1872 was appointed counsel to the chairman of committees of the house of lords. He was knighted in 1892.

Sir William Harcourt wore, at a fancy dress ball recently given by the Duchess of Devonshire, the state robes worn by his ancestor, the first Lord Harcourt, when lord chancellor of England, from 1712 to 1714.

The late Mr. Joseph Travers Smith, solicitor, left personalty to the value of £209,314. Numerous hospital and other excellent institutions receive liberal legacies, but the Solicitors' Benevolent Association and the United Law Clerks' Society are both left out in the cold.

The form of oath in courts of justice was referred to in the house of commons recently, when Sir W. Foster asked the attorney-general whether he had considered the form in which the oath was administered in courts of justice in England with reference to the sanitary objections urged against it; and whether it was the intention of the government to make any proposals for amending the law so as to abolish the objectionable practice known as kissing the Book. The attorney-general, in reply, said: "I can only repeat my reply to the honorable member that I think the sanitary objections to the present method of administering the oath have been somewhat exaggerated. Personally I believe the option at present existing of swearing in the Scotch form, which is becoming every day more generally known, is sufficient. It is not the intention of the government to amend the law, at any rate during the present session."

The power of the court to compel the publisher of a libel to disclose the identity of the author was asserted by Mr. Justice Bruce in a case which recently came before the Court of Appeal. The alleged libel had appeared in the West Cumber-

land Times. The owners of that journal, when sued, admitted the publication and assumed full responsibility for it; but they pleaded an ample apology and the payment into court of a sum of money which they deemed sufficient to satisfy the plaintiff's claim for damages. The plaintiff then applied to Mr. Justice Bruce for an order compelling the defendants to produce for his inspection the original manuscript containing the defamatory matter, and the judge granted the application. Upon the appeal the order was reversed. The Appellate Court said the rule was not to order the defendant in an action for libel to reveal the name of the person who gave him the information or materials for the publication. The judges would not decide that it could never be done; but if it existed, it was a discretionary power not to be used unless there were special circumstances, and there were none in this particular case.

### Legal Notes.

The Pennsylvania Supreme Court holds, In re Grimm's Estate, that a liquor license is a personal privilege which ends with the life of the grantee; that it is not assignable by him, does not go to his personal representatives, and is not an asset of his estate.

In Texas juries are the judges of the law and the facts in Justices' Courts. In Bexar county, at an early day, a jury in a Justices' Court declared the statute prohibiting the sale of intoxicating liquors on Sunday to be unconstitutional, and their decision has now become *stare decisis* in that county.

With the July number a new management takes hold of the Minnesota Law Journal. Charles S. Roberts manages the publication, and promises to "bring the Journal down to some system as to its date of issue and the character and arrangement of its contents." It will be issued the 20th of the month hereafter.

A recent compilation of a legal directory shows that there are in Chicago nearly 5,000 lawyers attempting to earn a living. This is a lawyer to every 350 of the inhabitants. It may also be said that the great bulk of legal business in Chicago and its environs is transacted by not more than 100 law firms, and this leaves about 4,900 to skirmish around and eke out an existence the best way they can. Many fail to do even that much.

There was a breach of promise suit in the Sheriff's Court the other day, in which the evidence presented was quite as amusing as the famous case to which Mr. Pickwick was a party. Miss Eliza Lily James, a dressmaker, aged 28, claimed £500 damages from Herbert Lawrence Crisp, a greengrocer, for refusing to marry her.

She recited his attentions to her for several years until last February, when he wrote a letter breaking off the match. Some of the previous correspondence, which was read in court, was heartrending, including a letter written by the defendant while he was ill, in which he dropped into poetry and expressed his intentions as follows:

"When I am fat  
And off my back,  
I shall come back  
To the lass I lack."

The jury awarded the plaintiff damages to the amount of £175. — London Cor. Chicago Record.

Dan Balling yesterday sued his wife, Lottie Balling, for a divorce, because on July 17, 1895, she took a bath, says the Kansas City Times. He says the ablutions were performed without his knowledge or consent, and that he was kept in ignorance of them until three months thereafter, whereupon he immediately left her, and has since continued to live apart from her. The balneary breach of the marriage ritual was committed at Washington Park in company with three other people of diversified sex. Mr. Balling says: "There was no excuse for my wife to go bathing in Washington Park lake. We have a porcelain-lined bathtub at home, with hot and cold water on tap, and standard brands of soap, and sponges that look like a summer squash, and she can even have ammonia put in the water if she wants it. But no—she must go to Washington Park and put on little old dinkey bathing suit about as big as a pocket handkerchief, and paddle around in the water with her bare feet. Bah! The thought disgusts me!"

The practice of granting parliamentary divorces has not wholly passed away in Great Britain, but still prevails where the domicile of the parties is in Ireland. The English Divorce act of 1857, which empowered the courts in England to grant absolute divorces, did not extend to Ireland, where the courts might decree a judicial separation of the parties from bed and board, but could not wholly dissolve the marriage relation. On the 2d of July there came before the house of lords a bill to divorce Lieut.-Col. Alfred L. Sinclair, of the Indian Staff Corps, from his wife, Isabella Sinclair, to whom he was married at Bombay in 1878. He had already procured an absolute divorce in the English Divorce Court, but the validity of this decree was questioned on the ground that he was a domiciled Irishman, over whom that court had no jurisdiction. The bill was ordered to a second reading upon the recommendation of the lord chancellor. The established rule of the house is to pass a divorce bill relating to Irish parties where the proof would justify a court of law in England in granting a decree dissolving the marriage.

**Notes of Recent American Decisions.**

**Banks and Banking—Knowledge of Bank Officer.**—In *Gunster v. Scranton Illuminating, Heat & Power Co.* (37 Atl. Rep. 550), decided by the Supreme Court of Pennsylvania, it appeared that the vice-president of a bank was also treasurer of a corporation doing business with the bank. As such vice-president, he discounted two notes of the corporation, and placed the proceeds to its credit, and as treasurer of the corporation drew a check on the bank, with which he obtained two drafts of the bank, signed himself as vice-president to his order as an individual, and appropriated the proceeds to his own use. It was held that his knowledge, as vice-president, of his intent to misappropriate the funds obtained on the drafts, was not the knowledge of the bank, so as to enable the corporation to set off the amount obtained by him on such drafts against the notes of the corporation.

**Criminal Practice—Grand Juries—Presence of Other Parties.**—No person, other than a witness undergoing examination and the government attorney, can be present at the sessions of a grand jury; and an indictment should be quashed where an expert witness remained in the jury-room while another witness was being examined, and put questions to him. (*United States v. Edgerton* [U. S. D. C., D. (Mont.)], 80 Fed. Rep. 374.)

**Criminal Law—Use of Dangerous Weapon—Simple Assault—Conviction.**—Under Pen. Code 1895, art. 592, subd. 3, providing that "the use of a dangerous weapon, or the semblance thereof, in any angry or threatening manner, with intent to alarm another and under circumstances calculated to effect that object, comes within the meaning of an assault," such use of a loaded gun, which is incapable of being fired, because of a broken firing pin, is a simple assault, and not an aggravated assault, under article 601, as with a deadly weapon. (*Pearce v. State* [Tex.], 40 S. W. Rep. 806.)

**Easement—Adverse Possession.**—Where the purchaser of a tract of land through which the vendor had granted to a railroad company a right of way had for fifteen years been in the adverse possession of the land, including the right of way, which the company had originally marked by stakes, the right of the company was barred, although the company had, within fifteen years, entered upon the land and restaked the right of way, such a re-entry not being sufficient to break the continuity of the purchaser's adverse holding. (*Maysville & Big Sandy R. R. Co. v. Holton* [Ky. Ct. of App.], Ky. L. Rep., Vol. xix, No. 1, p. 1.)

**Easement—Implied Reservation.**—1. Where

an owner of a tract of land has made and maintained a private way over his land to a public highway, and such way is his only means of ingress and egress to his home, sells and conveys to another a portion of it, lying on the public highway, and is thereby deprived of all access to the highway, except by the way he had previously constructed and maintained, and which passes through the granted part, and the facts were well understood by both parties at the time in such case, the way is reserved to the lands of the grantor by implication, although the deed contains a covenant against incumbrances. 2. It is a general rule that one cannot derogate from his grant; so that to warrant the inference of a way reserved by implication, it must be one of strict necessity to the remaining lands of the grantor; it is not merely a matter of convenience, and if the grantor has another mode of access to his land, however inconvenient, he cannot claim a way by implication in the lands conveyed, though he may have been in the use of a way over it to a public highway at and a long time before the conveyance, and of which the grantee had notice at the time. (*Meredith v. Frank et al.* [Ohio Sup. Court], Ohio Legal News, Adv. Sheets, Vol. lvi, p. 280.)

**Estoppel—Purchaser of Mortgage Note.**—Where plaintiff, at the time he took the assignment of the mortgage made by a corporation, was aware that it was given to secure a loan made for the purchase of the stock of another corporation, he is estopped to claim that the mortgage was void, because given in an *ultra vires* transaction. (*Woodcock v. First Nat. Bank of Niles* [Mich.], 71 N. W. Rep. 477.)

**Landlord and Tenant—Holding Over.**—Sickness of a lessee at the end of his term does not excuse him from promptly vacating the premises, as against the lessor's right to treat his failure to do so as a renewal. (*Mason v. Wierengo's Estate* [Mich.], 71 N. W. Rep. 489.)

**Torts—Injuring Plaintiff's Business.**—For defendant, who sold the same kind of goods as plaintiff, to threaten to discharge its employes if they traded with plaintiff, and to tell them that their pay checks, made good for merchandise at its store, and non-transferable, would not be received when they had passed through plaintiff's hands, is not actionable, though having the result intended—of injuring plaintiff in his business. (*Robison v. Texas Pine Land Assn.* [Tex.], 40 S. W. Rep. 843.)

**Will—Trust.**—Testator devised \$20,000 in trust for his niece, the income to be paid to her for life with remainder over, with the provision that, if at any time she should desire to increase her income by an annuity, the trustee could at her request invest any part of the fund in an an-



nunity for her. By codicil he added \$10,000 to the bequest. *Held*, that the provision in regard to the purchase of an annuity does not destroy the trust so as to authorize the trustee to pay directly to the beneficiary the whole trust fund, to dispose of as she might think proper. (*In re Lejee's Estate* [Penn.], 37 Atl. Rep. 554.)

### Notes of Recent English Decisions.

**Husband and Wife—Deed of Separation—Covenant Not to Molest—Proceedings Instituted Abroad—Injunction.**—By a deed of separation which was entered into by a husband and wife to terminate certain divorce proceedings, the husband covenanted not to molest his wife or to institute any proceedings for restitution of conjugal rights. The husband recently served on the wife in England notice that he intended to proceed in the court at El Paso, Texas, for a divorce on the ground of desertion, the desertion alleged being the separation which had taken place under the deed, and also that he intended to examine witnesses in England. The plaintiff in the present action asked for an injunction to prevent the husband from molesting her and for the damages she had been put to by means of his breach of the covenant. *Held*, that although the *bona fide* taking proceedings for divorce in England after such a deed would not amount to molestation, yet, taking proceedings, as the husband had done, in America, when both he and his wife were British, was vexatious and unreasonable, and amounted to a breach of the covenant. An injunction was therefore granted restraining him from doing any act or taking any proceedings in this country, and £15 damages given to cover the expenses the wife had been put to. (*Hunt v. Hunt* [H. C. of J., Q. B. Div.], Law Times, July 10, 1897.)

**Married Woman—Restraint on Anticipation—Admission Defeating Life Interest—Estoppel.**—Under an indenture, dated the 26th of June, 1867, Lady Bateman, a married woman, was entitled to the rents and profits of certain estates, called Kelmarsh and Shobdon Court, during her life, for her separate use without power of anticipation, with a proviso that, if at any time she should succeed to an income in her own right of £8,000 or more per annum for her separate use, her interest in the estates should determine, and they should be held upon trust for her husband, Lord Bateman. In July, 1886, Lady Bateman became entitled to a life interest in certain estates in Norfolk and Suffolk. On the 4th of March, 1890, Lady Bateman, in order to assist her husband to make an arrangement for the mortgage of his interest in the Kelmarsh and Shobdon Court estates, executed a deed-poll, whereby she admitted that her life interest in the Kelmarsh and Shobdon Court estates had determined under

the proviso, and released her life interest in favor of her husband and his mortgagee. It was subsequently ascertained that Lady Bateman's interest in the Norfolk and Suffolk estates did not, as at first supposed, amount to £8,000 per annum. In an action by Lady Bateman for a declaration that her admission was not binding on her, and that notwithstanding the deed-poll she was entitled to the income of the Kelmarsh and Shobdon Court estates: *Held*, that Lady Bateman was not estopped by her admission from showing what the facts really were; and that, whether she purported to assign or release her life interest, or to admit that it had determined, it came to the same thing, she was by her own act depriving herself of the benefit of the restraint on anticipation which was inseparably connected with the life interest; and that consequently, notwithstanding the deed-poll, she was entitled to the income of the Kelmarsh and Shobdon Court estates. (*Lady Bateman v. Faber* [H. C. of J., Ch. Div.], Law Times, July 10, 1897.)

**Will—Construction—Illegitimate Child Comprised in "Issue."**—A testatrix, by her will made in July, 1879, gave the income of certain personal property amongst her nephews and nieces and great-nieces therein named, Mary Addams being one of the nieces so named, and she directed that if any of them should die leaving issue him or her surviving, such issue should take the share of income which his, her or their parent would have taken. Mary Addams had, in 1865, gone through the ceremony of marriage with her deceased sister's husband, and had a daughter, Gertrude Susannah Addams. The testatrix, by her will, gave other property in trust for "my niece Mary, the wife of F. H. Addams, for life, free from the control of her present or any future husband, and upon the death of Mrs. Addams in trust for her daughter, Gertrude Susannah Addams, if living, absolutely," and by a codicil she gave certain chattels to "Gertrude Susannah Addams, my great-niece." Mary Addams survived the testatrix, and died leaving Gertrude Susannah Addams living, and the question was raised whether Gertrude Susannah Addams, being illegitimate, was comprised in the word "issue" so as to be entitled to the share of the income of the personal property to which Mary Addams was in her lifetime entitled. *Held*, that although the word "issue," which in this will meant "children," must *prima facie* be taken to mean legitimate children, the testatrix, by describing her niece Mary as the wife of Mr. Addams, and referring to Gertrude as the daughter of such niece, and (in the codicil) as her own great-niece, had declared that, for the purposes of the will, Gertrude was to be regarded and taken as legitimate, and held that she was entitled to the share. (*Re Walker, deceased: Walker v. Lutyens* [Ch. Div.], Law Times, July 10, 1897.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, AUGUST 7, 1897.

### Current Topics.

THAT the newspaper correspondents are clever fellows, whose industry, versatility and omnipresence often surprise those to the manner born, as well as intelligent foreigners, may be conceded, but in the more important quality of accuracy there is perhaps still a little room for improvement. An illustration in point is the statement, made the other day by the intelligent and usually well-informed Washington correspondent of the New York World, that "Judge McKenna surrendered a life place on the bench when he accepted the portfolio of the judicial department, with the understanding that he was to succeed Supreme Court Justice Stephen J. Field, who will have reached the age limit in a few months." Now, the fact is that there is no "age limit" which requires justices of the United States Supreme Court to retire; they may do so at the age of 70 years, but it is entirely optional with them. "In a few months," that is, on November 4th next, Justice Field will celebrate the eighty-first anniversary of his birth, and though still vigorous in intellect, it seems not improbable that he will retire at that date from the bench he has so long and so signally honored. A few facts with reference to Justice Field cannot fail, in view of this impending event, to be of more than ordinary interest to the bench and bar of the country. He was born in 1816, at Haddam, Conn., where his father, D. D. Field, was

VOL. 56 — No. 6.

pastor of a Congregational church. He is a brother of Cyrus West Field, of transatlantic cable fame; of David Dudley Field, principal author of the New York Code, and of the eminent author and editor, Rev. Henry Martyn Field. He is also uncle to Judge Brewer, of the same court, one of the Venezuelan commissioners, a sister, Emilia, having married Rev. Josiah Brewer, in whose school at Smyrna, during the Greek troubles, Stephen was a teacher. On quitting Smyrna during the plague, he was shipwrecked; narrowly escaped, returned home, resumed his studies, and graduated at Williams College in 1837, at the head of his class. He studied law in the office of his brother David. He arrived in San Francisco in 1849, and after paying two dollars for his breakfast, had only one dollar left. From a real estate agent to whom he had a letter of introduction, he bought on credit a lot in a town platted as "Vernon," near where Capt. Sutter first found gold. Arriving there on a little steamer, he found the town covered by a flood, except the only house, and this the headquarters of a motley crowd of 1,000 adventurers, only one of whom was a woman, and in her honor the name was changed to Marysville. Field was appointed its alcalde. He was a member of the first legislature of California.

Judge B. F. Burnham, in his lately published book, entitled "Leading in Law and Curious in Court," mentions a thrilling scene during the trial of a suit wherein Field was counsel, involving ownership of a mining claim, which will be of peculiar interest in these days of Alaska mining excitement. He happened to overhear a midnight conversation wherein bribes were being offered to some of the jurors. In summing up he said: "Gentlemen, with uplifted hands you have declared that you will return a verdict according to law. Will you perjure your souls? I know that you (pointing to one of them) have been approached. Did you spurn the wretch who made the proposal? And you, sir (pointing to another), I overheard talking over the case last night, listening to a proposal for a foul bargain." Revolvers now began to click all over the court-

room, but he continued without a tremor: "There is no terror in your pistols, gentlemen. You cannot win your case by shooting me. You can win it only by showing title to the property. I openly charge attempted bribery; *attempted*, I say — whether successful or not will depend on what may occur hereafter. Jurors, you have invoked the vengeance of Heaven upon your souls if you fail to render a verdict according to the evidence!" His client obtained a verdict, and in two weeks took from the claim in gold dust ninety thousand dollars.

In 1857 he was elected a judge of the State Supreme Court, and in 1859 he succeeded as chief justice D. S. Terry, who once tried to assassinate him. In 1863 he was appointed by President Lincoln a justice of the Supreme Court of the United States, congress having just provided for a tenth member of that bench. Thus decisions wherein he participated begin in the second volume of Jere Black's Reports, and continue through the Wallace and the Otto series. His opinions evince the usual characteristics of our noble highest Federal bench—independence, clear statement, compact logic and a well-ordered equipment of wide learning. Eminent among these was his opinion in the test-oath case, annulling the "iron-clad oath;" also his dissenting opinions in the Legal Tender cases, in the Confiscation cases, and in the New Orleans Slaughter-House case—the latter a leading one on the powers of municipal corporations.

He was a member of the electoral commission in 1877, and voted with the minority. In 1890 he delivered the address at the centennial anniversary of the organization of the United States Supreme Court. His life has been as varied in incident as is his character in attainments. As a single instance may be cited the fact that, in 1865, he received through the mail an explosive package from some squatters who had been dispossessed by one of his decisions.

The trial of Howard C. Benham for the murder of his wife, by poison, which had been in progress for more than a month past, at Batavia, N. Y., was concluded on the

29th ult., with a verdict of guilty, a result which the prisoner, according to all accounts, did not at all expect. Living in the atmosphere of his own defense, and evidently relying upon the medical experts to create doubt enough in the minds of the jury as to the value of the analyses made of the dead woman's vital organs to bring about at least a disagreement, the prisoner was evidently wholly unprepared for the verdict which now brings him face to face with the death chamber and the electric chair. The conduct of the prisoner toward his wife, as indicated by the testimony, was brutal in the extreme; he is shown to have had none of the finer feelings and instincts, but, on the contrary, was a lecherous brute, whose *liaisons* were conducted openly and without shame. His motive for removing the plain wife, who had made a will in his favor disposing of some \$30,000 in property, was evidently two-fold—to get the little fortune and to be free to marry the paramour whose charms had so wildly infatuated him. The circumstantial evidence against the accused was damning enough—especially his proven purchase of prussic acid, distinct traces of which were found at the autopsy in the dead woman's viscera—in the minds of the jury, to outweigh whatever doubts the warring medical experts may have succeeded in inciting as to the actual cause of the victim's death. This feature of the trial was little less than disgraceful, adding one more to the many recent examples in point of the odium which is brought upon the profession of medicine, as well as upon the administration of the law, by experts hiring themselves out to opposing sides, for a *quid pro quo*, and airing their professional quarrels and personal squabbles in court. This was, indeed, the only strong feature of the defense, for their whole energies seemed to be bent on discrediting the poison theory. If it had been possible for them to successfully assail any of the links in the strong chain of circumstantial evidence against the accused, they certainly would not have failed to do so. The fact, too, that the prisoner, while stoutly protesting his innocence, declined to go on the stand and testify in his own behalf—

evidently because he feared he would not be able to successfully withstand the ordeal — was calculated to strengthen the belief in his guilt. It seems to be quite clear, from all the evidence in the case, that if Benham did not administer a fatal dose of poison to his sick wife, he certainly killed her with neglect, abuse and open unfaithfulness, and in either event he seems richly to deserve the fate which the verdict of the jury has pronounced upon him.

The death of William Cookson Carpenter, the oldest practicing lawyer in New York city, occurred on the 27th ult. The deceased was 94 years old, and had practiced law in the metropolis for nearly seventy years, leaving his work only a few weeks ago. He is described as having had "shrewd, smiling black eyes," snow-white hair, and a voice which remained firm and mellow till the last. He never carried a cane, and boasted that he had never known a day of illness since attaining his majority. Mr. Carpenter was born on the Maine coast, in what was then known as the eastern district of Massachusetts, for Maine did not come into the Union until he was about seventeen years of age. He attributed his long life and uniformly good health to regular habits, "plenty of sleep and plenty of good whiskey." While the ALBANY LAW JOURNAL does not make any pretensions to being a temperance organ — using that term in the ordinary sense — we are quite well convinced that Mr. Carpenter did not prolong his life by the use of alcohol. And while on this subject we cannot refrain from giving an incident in point, which is related by H. W. Lucy, in his article "The Queen's Parliaments," in the North American Review for July. Mr. Lucy tells about a serious-mannered Irish member named Blake (not to be confounded with the ex-premier of Canada, sitting member for South Longford), who is remembered for a brief correspondence he read to the delighted house. It was introduced in a speech delivered in debate on the Irish Sunday Closing bill. Mr. Blake had, he confidently informed the house, an uncle who regularly took six tumblers of whiskey

toddy daily. This troubled him, and after much thought he resolved to write and remonstrate with his relative. The following was the letter:

"My Dear Uncle: I write to say how pleased I should be if you could see your way to giving up your six glasses of whiskey a day. I am sure you would find many advantages in doing so, the greatest of which would be that, as I am persuaded, it would be the means of lengthening your days."

The Uncle replied:

"My Dear Nephew: I am much obliged to you for your dutiful letter. I was so much struck by what you said, and, in particular, by your kind wish to lengthen my days, that last Friday I gave up the whiskey. I believe you are right, my boy, as to my days being lengthened, for, bedad! it was the longest day I ever remember."

Statistics compiled by the superintendent of New York State prisons show that there were 230 hangings in New York from the creation of the State up to 1890, when the law providing for the death by electricity of persons convicted of murder in the first degree went into effect. Since 1890 there have been 40 executions, or an increase of more than 200 per cent. per year. These facts are certain to be pointed to by the opponents of capital punishment to prove that no matter what the method, the enforcement of capital punishment does not exercise a deterrent influence, but rather has the contrary effect. Such a conclusion, however, would seem to be unwarranted, or at least premature. The figures above quoted may perhaps show rather that a larger number of convictions have been obtained, since juries are more willing to bring in verdicts of guilty in view of the (supposedly at least) more humane manner of taking the life of the murderer. At all events, it is not likely that the State of New York will soon consent to abolish the death penalty altogether.

In the death of Clarence A. Seward, which occurred at his country home at Geneva, N. Y., on July 24th, whither he had gone about a month previously, from his city

home, 33 Madison avenue, New York city, accompanied by his wife and his unmarried daughter, to recuperate his failing health, the legal profession of the Empire State loses one of its most brilliant ornaments. The deceased was born in New York city, October 7, 1828. His parents died when he was a child, and he became a member of the family of his uncle, William H. Seward, in Auburn, N. Y. His uncle was becoming widely known as a politician at the time, and before long was to become known as a great statesman. Clarence attended school in Auburn until he entered Hobart College, from which he was graduated in 1848. As soon as he left college he began the study of law. When he was admitted to the bar, in 1850, he became the partner of Samuel Blatchford, in Auburn, and aided him in the compilation of the work entitled "New York Civil and Criminal Justice." In 1854 Mr. Seward went to New York city and established himself there in the practice of law. Partly through the influence of his uncle, who represented the State of New York in the United States senate, Mr. Seward was appointed judge advocate-general of the State in 1856, and he retained that office until 1860. During the Civil War Mr. Seward was practicing law in New York. After the assassination of President Lincoln and the attempted assassination of William H. Seward, then secretary of state, Clarence A. Seward was called to Washington and was appointed acting assistant secretary of state, his cousin, Frederick W. Seward, having been attacked and wounded by the assassins also. Clarence A. Seward remained in office in Washington for a time, and then returned to this city and resumed the private practice of law. Mr. Seward's law practice was connected chiefly with railroads, patents and express companies. He was not prominent as a politician, although he was a presidential elector in 1880, and was a delegate to the national republican convention in 1878. He was known as a consulting lawyer rather than as an advocate. Recently he was the head of the law firm of Seward, Guthrie & Steele, at No. 40 Wall street, his partners being William D. Guthrie

and Charles Steele. As a clubman Mr. Seward was well known. He became a member of the Union Club in 1865, and he was a member of the governing committee for several years before he was elected the president of the club in 1890. Since 1890 he had been re-elected president of the Union Club each year. Mr. Seward also was a member of the Bar Association, the University Club and The Players'.

In the case of Ellen F. Harkin, plaintiff and respondent, v. George B. Crumbie, defendant and appellant, the New York Supreme Court, Appellate Term, rendered an interesting decision as to the liability of owners of apartment houses for injuries sustained by visitors of tenants through slipping on ice. The action was brought to recover for personal injuries sustained by the plaintiff while visiting a tenant of the defendant who lived in his apartment house, No. 334 East Sixty-sixth street, New York. In leaving the house at 10 o'clock at night, plaintiff slipped upon a patch of ice in front of the building, in a passageway or courtyard, leading from the stoop to the sidewalk. Judgment was rendered in favor of the plaintiff for \$300, and affirmed by the General Term of the City Court, from which judgment the defendant appealed to the Supreme Court. The latter, in reversing the judgment and ordering a new trial, pointed out the fact that in the present case there were large and small patches of ice left in the courtyard or approach to the front steps of the defendant's house; that the ice upon which the plaintiff fell was a patch of smooth ice about one foot in width and three feet in length, running along the side of this passageway leading from the stoop to the street. Conceding that these patches of ice were on his premises and not on any part of the sidewalk, they were not accumulations constituting obstructions such as hummocks or ridges, but were smooth, slippery places formed by natural causes by a succession of snow and sleet storms. Their only danger arose from their inherent quality of being slippery, and the court found that the failure to remove them was not negligence render-

ing the landlord liable to persons going in and out of the premises who might chance to slip upon them. In other words, unless such formation constituted an obstruction by which the ordinary traveler approaches were rendered unsafe, other than by the mere slippery condition of the walk, there was no duty to remove such ice. The cases in which the landlord has been held liable for that part of his premises used in common by all his tenants are those in which the dangerous condition or obstruction to safe passage has been caused by him.

The standard of admission to the legal profession in England is high. A table of the results of the last four preliminary examinations at the Law Institute, according to the London Law Journal, shows that no less than two-fifths of the candidates failed. At the final examination, in April, the results were no better, for the percentage of failures was nearly fifty — as against sixty-seven candidates who passed there were thirty-seven who failed. At the bar final examination the percentage of failures is even greater. But even in the light of these results, our English contemporary seems to entertain doubts whether the increased severity will result in a better race of lawyers, and it expresses the opinion that, comparing the present with the past, any attempt to establish the superiority of the present generation would not be unattended by difficulty. While welcoming any endeavor to improve the educational status of the profession, our contemporary concedes that to provide means of education is rather different from putting entire faith in examinations, a fact which was recognized by Mr. Travers Smith, a lately deceased member of the profession, who directed a sum of £6,500 to be invested in consols in the names of four trustees for the purpose of founding three scholarships of £50 a year each. One of these scholarships is to be given in each year to the student who, out of the three candidates to be certified as having passed the best final examination in Michaelmas term, shall be "the best qualified by personal character, general intelligence and

cultivation, and the nature and class of his attainments, to do credit to their selection and the scholarship." It will be seen that the holding of the scholarship does not absolutely depend on examination results. The student who obtains the scholarship may be the least successful of the three candidates in the examination if he is their superior in the other qualities that are mentioned in Mr. Travers Smith's will.

### Notes of Cases.

The availability of reserve funds in the payment of death losses in assessment life insurance associations was passed upon recently by Judge Maddox, in the Supreme Court, Brooklyn. The question came up on a motion for a new trial in the suit of Catherine Bird against the Rochester Mutual Union Association. The action was brought to recover on a certificate of membership in the defendant's senior life department, issued to Thomas Bird, husband of the plaintiff, and providing for the payment on proof of his death, from the mortuary fund only of the department, a sum not to exceed \$1,000. Bird died on June 29, 1885, having met all the required monthly payments of \$1.33. The mortuary fund consisted of so much of the aggregated monthly payments made by the members of the senior life department as remained after deducting, first, 15 per cent. for the cost of collecting; second, the amount required for expenses and adjusting, and, third, 25 per cent. for the reserve fund. The defendant claimed that the sum payable to the plaintiff realized but \$376.06, and from this there was to be deducted the 15 per cent. for cost of collecting, the amount for expenses and adjuster and also the 25 per cent. for reserve fund. This left, according to the testimony, a balance of \$92.31. At the time the defendant accumulated its reserve fund, Justice Maddox said, the only purposes for which the reserve fund could be created were for payments of assessments, death losses or for disability benefits, and no authority to evoke such a fund for other purposes can be implied or inferred from the statute. When the defendant accumulated the reserve fund it could have been for no other purpose than that indicated by the statute, and that applied to the whole fund and not to a part of it. The new trial was denied.

The case of Dunham v. St. Croix Soap Company, in the New Brunswick Supreme Court, presents some interesting features. The defendant company, as a means of advertising their soap, offered a piano as a prize for the person guessing the correct weight, or the nearest to the correct

weight, of a large cake or block of soap at an exhibition. The guessing was free, and all persons who desired to guess were provided with coupon tickets upon which to mark their guesses. The tickets were deposited, or were supposed to be deposited, in a box, and the corresponding coupons retained by the respective guessers. The plaintiff guessed within a shade of the correct weight, and after the soap had been weighed presented her coupon with her guess marked thereon, but the judges could not find her ticket in the box and awarded the prize to another person whose guess was not so near the correct weight as the plaintiff's. The plaintiff afterward brought an action for breach of contract. It was held on demurrer to the plaintiff's declaration that the competition was not a lottery within the meaning of the Criminal Code, and that the exercise of judgment required in the guessing was a sufficient consideration to support the contract.

Frederick Fox and Melvine L. Evans, owners of dogs within the limits of the city of Albany, brought suits in the Supreme Court against the Mohawk and Hudson River Humane Society, to have the dog law, passed two years ago, declared unconstitutional, and to restrain defendants from destroying their dogs. Justice Chase, who presided at the trial, has given judgment for the defendants, holding that the law, which requires that every person who owns or harbors a dog in cities of a certain class shall procure a yearly license for the animal upon payment of \$1, and authorized the destruction of an unlicensed dog who has not a certain metal tag attached to his collar, is constitutional. Justice Chase says that, although the State recognizes that dogs are property, their destruction, when found chasing sheep, has been authorized for more than 100 years, and in view of their slight value, an act which provides for the destruction of unlicensed dogs, which may suddenly become dangerous, is a proper exercise of the police power of the State, and their destruction under the act cannot be deemed to constitute a taking of property without due process of law or without just compensation, within section 1 of article 5 of the Constitution of the United States, or within section 6 of article 1 of the Constitution of this State. The act is held not to be amenable to the objection that it is an unauthorized exercise of the power of taxation, as the purpose of the act is to protect human life and not to raise revenue; and the act is not objectionable because its execution is permitted to societies for the prevention of cruelty to animals, as these societies exercise certain public duties, and their officers are declared by law to be peace officers.

In *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.*, decided by the Supreme Court of New Jersey in June, 1897 (37 Atl. R. 609), it was

held that a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it, is not invalid as against public policy, because covering losses resulting from its negligence, or the negligence of its servants. The court points out the fact that the insurer does not contemplate the relaxation of the carrier's vigilance which would be inimical to the public interest, holding it to be obvious that if a contract indemnifying the common carrier of passengers against liability arising from his negligence tends to a relaxation of vigilance, so such a contract with respect to goods must have the same effect. Yet it now seems well settled that a common carrier of goods may enforce contracts of insurance on goods carried against all losses other than those occasioned by his negligence or the negligence of his servants. The United States Supreme Court has held, in such a case, that by obtaining insurance the carrier does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. The court refused to hold that the insurance was an insurance against negligence, and contrary to public policy, and void. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the carrier of goods, is to afford him a fund out of which he may be reimbursed, and that, too, but partially, for in all these policies the liability of the insured is always limited and confined to a specifically designated sum.

**BAILER AND BAILEE—GRAIN DESTROYED BY FIRE—QUESTION OF NEGLIGENCE.**

NEW YORK SUPREME COURT — APPELLATE DIVISION — THIRD DEPARTMENT.

PARKER, P. J.; LANDON, HERRICK and PUTNAM, JJ.

ALBANY, May, 1897.

The Liberty Insurance Company of the City of New York, Respondent, agt. The Central Vermont Railroad Company, and Others, Appellants.

Louis Hasbrouck for Appellant, C. V. R. R. Co.

A. H. Herriman for Appellant, O. & L. C. R. R. Co.

Charles G. Idler for Appellant, Og. Terminal Co.

Davies, Short & Townsend (John P. Kellas of Counsel) for Respondent.

The defendants, with the exception of Ladd & Smallman, are corporations, and at the time of the fire hereinafter mentioned operated together an elevator situated at Ogdensburgh, receiving,

transporting, storing and delivering grain from vessels arriving at Ogdensburgh.

Some time in August, 1890, Ladd & Smallman shipped to themselves, at Ogdensburgh, about ten thousand bushels of grain. Upon its arrival it was transferred from the vessels to such elevator, and was there stored and kept pursuant to a general agreement by Ladd & Smallman with the superintendent of said elevator, that it was so to be kept and forwarded to them from time to time as requested.

On or about the 9th day of September, 1890, the elevator was destroyed by fire and the grain therein burned or damaged.

The plaintiff is an insurance corporation with which the firm of Ladd & Smallman had insured the grain in said elevator. The plaintiff paid the loss thereon, and has become subrogated to the rights of Ladd & Smallman.

The elevator was situated on the bank of the St. Lawrence river; it was 180 feet in length by 80 feet in width, and its height from the deck was 117 feet. There were docks on three sides of it, and the vessels were unloaded into the elevator on the east and west sides.

The outer walls of the building up to the bottom of the bins hereinafter referred to were of brick, and about twelve inches thick; above that the walls were of wood veneered with brick, about the thickness of a single brick.

Upon the first floor there were several doors of iron. The upper part of the building consisted of bins for the holding and storage of grain. The height of these bins was about fifty or sixty feet, and for that distance there were no windows or other openings in the building. The bottom of the bins formed the ceiling of the first story. On the east and west sides of the building were projections, built of wood, coming down to within about twelve feet of the dock, and in the upper part of each projection was an iron door, which led into the main building, some seventy feet above the dock. There was an opening from each of these projections into the building about thirty-five feet above the dock, through which a wooden spout was constructed to receive the grain coming from the marine leg, and conveying it to the receiving bin immediately on the inside of the elevator wall.

The marine leg, so-called, was substantially an iron box about fifty-six feet long inside the wooden projection; at each end was a pulley, around which passed a belt carrying buckets for scooping up the grain. The lower part of the marine leg was free, and when a boat was to be unloaded it was lifted from the dock, lowered into the hold of the vessel, and by means of machinery the buckets were kept revolving and scooping up the grain from the hold of the vessel and carrying it up to the spout, from whence it passed through the wall of the elevator into the

receiving bin above mentioned. From the receiving bin the grain passed into what was called a hopper bin, in or at the bottom of which were located scales for the purpose of weighing grain. This hopper or weighing bin rested upon the first floor of the elevator building. At one side of this weighing bin was a lofting leg, which was constructed upon the same general principle as the marine leg situated outside of the building. It was constructed of iron, and was about sixty-five feet in height. Inside of it ran a belt, upon which were fastened buckets that carried the grain from the weighing bin to the top of the building, from thence it was distributed into the various bins for storage. The bottom of the lofting leg containing the lower pulley around which passed the belt to which the buckets were attached, extended about four feet below the floor. The bottom of the lofting leg went into what is called a boot, composed of iron, and that rested on a timber upon the ground under the floor. The first story of the elevator was about fourteen feet high.

Around the bottom of the lofting leg, and below the floor, was a wooden bin three or four feet deep, used to receive the grain from the lofting leg in case it became choked.

The arbor, so-called, upon which the iron pulley at the bottom of the lofting leg was fastened, revolved in a box of iron packed with Babbitt metal; the arbor required frequent oiling to prevent friction. The operation of the lofting leg and the hoisting of the grain caused a considerable amount of dust to accumulate around the bottom of the leg enclosed in the small box of iron above described.

There is evidence to show, although it is controverted, that the dust accumulated during the day from the operation of the elevator, had not been swept or cleaned out the evening before the fire at the close of the day's business, something that the rules of the company required its employes to do.

The fire, when first discovered, was in the wooden projection on the west side of the building, about thirty-five feet above the dock, being seen through the second window in such projection. The theory of the plaintiff is that the arbor at the foot of the lofting leg became overheated and set fire to the accumulations of dust there, and the fire was then transmitted through the weighing bin into the receiving bin, and thence through the wooden spout into the projection, there being communication through these different places.

The referee found that there was negligence upon the part of the defendants, which caused the fire in question, and rendered judgment in favor of the plaintiff, from which judgment the defendants appeal to this court.



HERRICK, J.—An action arising out of the same fire which gives rise to the appeal now here has heretofore been before us (*N. B. & M. Ins. Co. v. C. V. R. R. Co.*, 9 App. Div. 4), and in that case the referee found that the fire was not caused by the negligence of the defendant, and this court, after a consideration of the evidence, came to the conclusion that the decision of the referee in that respect was correct.

I have not been able to find, nor have counsel pointed out, any substantial difference between the evidence in that case and the one now before us.

While the fact that this court, in a former case, affirmed a judgment where the finding as to negligence was directly the contrary to the finding in this case, is not conclusive (*Underwood v. Cook*, 3 State Reporter, 487), and while it may well happen that, in a case that is somewhat close upon the facts, the court upon appeal will not disturb a finding made either way, and as different minds equally intelligent and upright may take different views of the evidence, and come to diverse conclusions, and there being evidence to sustain either conclusion, the appellate court, under well-settled rules, would not feel at liberty to reverse either as against the weight of evidence.

Yet conflicting decisions upon the same evidence are to be avoided if possible, being calculated, in the non-professional mind at least, to lessen confidence in the administration of justice. When, therefore, a case is presented where, upon conflicting evidence, or evidence from which different inferences may be drawn, the trial courts have come to directly opposite conclusions, one of which we have already sustained, it becomes our duty to ascertain, if possible, the causes for such differences, whether improper elements have been allowed to enter in, or the evidence weighed and the facts considered upon erroneous principles.

In all contests over questions of fact upon conflicting evidence, or evidence susceptible of different inferences, the question as to who has the burden of proof resting upon him is a very important one, and the decision of that question may, and frequently does, practically determine the finding as to the facts.

Hence the holding of the trial court in that respect becomes a matter of importance.

Formerly, in a properly tried case, this could be ascertained by an inspection of the rulings upon requests to find, but under the present practice that resource, as a general rule, is not open to us. It seems to me, therefore, that when there is an opinion we may properly look into that to ascertain the standpoint from which the trial court viewed the evidence, and see whether he came to its consideration with any erroneous views as to the rules which should govern him in

its consideration. (*Kenyon v. Kenyon*, 88 Hun, 211, and cases cited.)

It is somewhat difficult in this case to determine precisely just what views the referee had as to the burden of proof.

In the course of his opinion he says: "The demand by the bailer of his property in the possession of the bailee, and the simple refusal to deliver without explanation, is sufficient evidence of conversion, a loss or destruction of it, and would be deemed sufficient proof to maintain an action and recovery of damages.

"Again, if the bailee alleges and proves that it has been destroyed by fire, or had been stolen, he must show that the fire or the theft occurred without his fault.

"Hence it may well occur that the bailer, instead of proving a demand and a refusal, proves the destruction of the property by fire. The party (plaintiff) has proved one fact, viz., that the fire destroyed the property; but he has not proved the other fact, viz., that the fire occurred and destroyed the property without the fault of the bailee.

"Now I think it well established by the cases that the nature of an accident may itself afford *prima facie* proof of negligence. (*Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y. 534, 544; *Story on Bailments*, 338, and other cases cited in *Russell Manf. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121, 127.)

"Negligence may be inferred from the circumstances of the case. Where the accident is one which, in the ordinary course of events, would not have happened but for want of proper care on the part of the defendants, it is incumbent upon him to show that he had taken such precaution as prudence would require, and the failure to furnish the proof, if it existed, it would be in his power to make, may subject him to the inference that such precautions were omitted. (*Scott v. Landon, Etc., Dock Co.*, 3 Hurlst. & C. 596.)"

Taking these passages in connection with the rest of his opinion, it seems to me that he approached the consideration of the evidence and made his findings of fact upon the assumption that when the fire was proved, that then the burden of proof rested on the defendants to affirmatively prove that it occurred without negligence upon their part.

This I think was error.

The referee has held that the defendants were acting as warehousemen in keeping the grain in the elevator, and that such grain was retained in the elevator for the mutual benefit and advantage of the defendant corporations, and of Ladd & Smallman, and in so holding I think he was correct.

The complaint alleges the destruction of the grain by fire, and also alleges that such fire occurred by reason of the defendant's negligence.

The answer denies any negligence upon the part of the defendants, and the question of negligence was practically the only question litigated.

As a rule, the burden of proof remains where the issue made by the pleadings places it, although the weight of evidence on one side may have a controlling effect, unless met by proof of the other party. (*Blunt v. Barrett*, 124 N. Y. 117.)

This rule has not been changed, nor the case of an action against a bailee for loss of merchandise made an exception to that rule by the case of *Wintringham v. Hayes* (144 N. Y.), wherein it is said that, "while it is true, as a general proposition, that a bailer charging negligence on the part of a bailee rests under the burden of proof, yet oftentimes slight evidence will shift the burden to the bailee. In an action against a bailee for loss or damage to goods by accident, proof of nature of the accident may afford *prima facie* proof of negligence."

The expression used in that and some other opinions as to the "shifting" of the burden of proof has led to some confusion and misapprehension as to the rule. The true rule, I think, is as I have above stated, where the issue made by the pleadings placed it, and it never changes.

"During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient, it may be, to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the facts which constitutes the issue, and this burden remains during the trial. (*Heinemann v. Hurd*, 62 N. Y. 448; *Heilman v. Lazarus*, 90 N. Y. 672; *Spencer v. C. M. L. Ins. Assn.*, 142 N. Y. 505.)

"As a general rule, where a bailee fails on demand to deliver to the bailer property to which the latter is entitled, the presumption of liability arises, and if the goods cannot be found it furnishes the imputation of negligence as the cause.

"But such *prima facie* case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident *not within the control* of the bailee. Then the onus continues upon the bailer to prove that it was chargeable to the want of care of the bailee.

"And although it may be that the proof given by him, explanatory of the reason for non-delivery, may disclose circumstances which in their nature permit or require the inference of negligence on his part, the affirmative of the issue is not shifted to the defendant, but remains with the plaintiff.

"In the present case the plaintiff alleged in his complaint, and it appeared, that the loss resulted

from the destruction of the factory by fire. From that fact alone no presumption arose to furnish a *prima facie* case against the defendant. But upon the main issue, whether it was attributable to the negligence of the defendant, the burden was with the plaintiff." (*Stuart v. Stone*, 127 N. Y. 500.)

The burden of proof is upon the plaintiff, who alleges negligence against a warehouseman who accounts for his failure to deliver goods by showing their destruction by fire.

The plaintiff must in all cases suing him for the loss of goods allege and prove negligence. This burden is never shifted from him. A demand and a refusal to deliver unexplained are sufficient *prima facie* to show negligence, but if it appears, either in the plaintiff's or defendant's proof, that the goods were lost by fire, the evidence must show that the fire arose from the negligence of the warehouseman. (*Claffin v. Meyer*, 75 N. Y. 260; *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271.)

I think, therefore, that the burden of proof of negligence of the defendants rested upon the plaintiff all through the case.

Neither do I think that the doctrine of *res ipsa loquitur* applies to this case.

The occurrence of fires without negligence is frequent, and the mere fact of a fire does not justify the inference or constitute a *prima facie* case of negligence. (*Whitworth v. Erie R. R. Co.*, 87 N. Y. 413; *Stuart v. Stone*, 127 N. Y. 500.)

The attendant or surrounding circumstances may characterize the fire as one caused by negligence, but the fire alone does not speak for itself, and proof of the circumstances showing the fire to have occurred through the negligence of the defendants must be given by the plaintiff; he cannot rest by merely proving the fire, and then call upon the defendants to show that it did not occur through their negligence.

In this case it does not seem to me that the evidence, in addition to the mere proof of the fire itself, establishes affirmatively the fact that it occurred by reason of the defendant's negligence. As first above stated, the plaintiff's theory, which was apparently adopted by the referee, is that the arbor at the foot of the lofting leg became overheated and set fire to the accumulation of dust there, and the fire was then transmitted through the weighing bin into the receiving bin, and thence through the wooden spout into the projection.

There is evidence that the dust at the foot of the lofting leg had not been brushed away at the close of the day's work, as the rules adopted for the working of the elevator required, although that is disputed by the foreman of the elevator; and there is also evidence that the arbor was liable to become overheated by friction, and that it required constant oiling, and that the tubes through which the arbor was oiled had been re-

moved; and also evidence that the dust from the grain was inflammable in character; and there is also evidence that at the close of the day's work, and before nine o'clock in the evening, the arbor was somewhat heated, and that there was a smell as though of something heated or burning, although there was no evidence of any fire at that time. The witness testifying to the heat of the arbor testified that it did not burn his hand in placing it upon it. There was evidence also that the watchman employed was inefficient. Notwithstanding this evidence, I do not think that the facts in the case justify a finding that the fire was caused in the manner or originated at the place claimed by the plaintiff.

The defendants controverted all the evidence as to the matters just stated, but assuming the plaintiff's testimony to have substantiated them all, yet unless those acts of negligence or omissions caused the fire, it cannot be said that it occurred by reason of the defendant's negligence.

The finding that the fire occurred through the defendant's negligence is predicated upon the assumption that its origin was at the foot of the lofting leg; and that the defendant's neglect in caring for the machinery at that point produced the fire; and that if the watchman had been efficient and alert he would have discovered it in its incipency and extinguished it.

Unless, then, it appears that it did so originate at the foot of the lofting leg, the whole foundation for the finding that the fire occurred by reason of the defendant's negligence is swept away.

The first seen of the fire was between four and five o'clock in the morning, in the west projection, about thirty-five feet from the ground. One witness testified that he was in the building at the first outbreak of the fire and before any alarm was sounded, and that he saw fire in two places upon the first floor. According to his testimony they were apparently small fires, and neither one of them was near the foot of the lofting leg or arbor.

Five other witnesses, four of them members of the fire department, came in there very shortly afterwards, looking for the fire, and all of them testify that there was no fire in or upon the first floor of the building.

The lofting leg itself was composed of iron; there was no inflammable material inside of it; the pulleys around which the belt passed were of iron; its lower end rested in an iron boot, so that there seemed to be nothing that could furnish a blaze that could be carried up through the interior of the pipe. The only inflammable material at or near the foot of the lofting leg was the dust, if any, the wooden box and the wooden floor. If the fire originated there it must have been the box and floor that furnished the burning material from which the fire would be communicated up through the receiving bin and thence through the spout into the west projection. It

could not go up through the lofting leg, and must consequently have gone up directly from the floor. Not only these facts, but the testimony of the witnesses I have referred to, dispute the fact that the fire originated either at the foot of the lofting leg or upon the first floor, so that neither the alleged negligent care of the machinery of the lofting leg caused the fire, nor did the alleged inefficiency of the watchman prevent its early discovery, because however vigilant he may have been, he could not discover what did not there exist.

For these reasons the judgment should be reversed, the referee discharged, and a new trial granted, costs to abide the event.

All concur except MERWIN, J., dissenting.

### CURIOUS PROCEDURE.

THE earliest form of trial was that of ordeal, or *judicium Dei*, and was based on the special intervention of God in behalf of truth and innocence, says Benj. F. Burnham, in his interesting work, "Leading in Law and Curious in Court." There have been at least seven methods. The Jewish method was that of the jealousy-offering, reported in the fifth chapter of Numbers. Let it pass; it was an everlasting ignominy upon the race of priests and husbands.

A second method of ordeal, and similar, was the corned, practiced by our Anglo-Saxon ancestors. Blackstone tells us that a piece of bread was exorcised by the priest, praying God to cause paleness of cheek and convulsion if the suspected man be guilty; but if he be innocent, it was to turn to nourishment upon his swallowing it. In the time of Edward the Confessor, Godwin, Earl of Kent, was reported by the priests to have died of a corned sticking in his throat. Blackstone informs us that in Pegu the priest uses rice therefor; and in Monomata an emetic infusion from the bark of a tree, which the priests declared would, if the man be guilty, prank him as did Jonah the whale. The only difference between this and the corned seems to be that in the former the man's innocence depended on his "cheek," and in the latter on his "gall."

A third method of ordeal was trial by the cross. The accused and the accuser were required to hold their arms raised before a cross while the priest said mass, and he who first let them fall was decided to be in the wrong.

A fourth method of ordeal was trial by water. That by boiling water was prescribed by the Salic law, but in 603 was proscribed by Pope Gregory I, and in 816 by Pope Stephen V. Nevertheless the city of Hanover revived it by decree in 1436. The accused was required to pray and fast three days with a priest, and if married, be meanwhile debarred from conversing with his wife. He was

then led to the altar, and after sacrament, he was required to plunge his naked arm to the elbow in a caldron of boiling water, and bring up a ring or stone. The priest then wrapped the arm in linen and sealed it with a holy seal for three days. If on unsealing and unwrapping there remained no mark of burning, the priest proclaimed the man to be innocent. The trial by cold water was also preceded by fasting, prayer and sacrament. The accused was then thrown into cold water, and if he floated without exertion, the priest pronounced him guilty, but if he sank he was acquitted. It is said that as late as the last century persons accused of witchcraft were thrown into a pool of water and drowned to establish their innocence. Tacitus tells us that the Scythians and Celts used to determine the legitimacy of a babe, when questioned, by placing it on a shield and launching it on a river. If it floated it was legitimate; if it sank it was illegitimate.

A fifth method of ordeal was trial by fire. The accused was required to lift a hot iron, and if after three days his hand retained no trace of the burning he was adjudged innocent. Sometimes the accused was compelled to walk upon burning coals, or carry them in his bosom. Sometimes he could only establish his innocence by coming out unscathed after being three times thrown into the fire. Sometimes this *judicium Dei* was applied to books to test their veracity or inspiration.

A sixth method of ordeal was trial by lot. In case of a murder, the nearest relative of the deceased might designate seven persons whom he or she suspected of the crime. These persons were conducted to the altar, upon which were laid two rods, wrapped in linen, upon one of which had been marked a cross. A priest then took up one, and if it proved to be the cross-rod, each of the accused was made to mark his name or sign upon a separate rod, which were each wrapped in linen, and laid upon the altar. The priest then took these up successively, and he whose rod came last was adjudged guilty. A wicked wag once suggested that the reason why so few murders were committed was that the Almighty didn't like to be bothered in His government of the universe by being summoned by a priest to specially visit this little planet of the solar system, and help the hocus-pocus detection of the murderer.

A seventh method of ordeal was the trial by duel, or wager of battle, described by Blackstone. The tenant in a writ of right would offer to produce the body of a champion, and if the demandant accepted the challenge, a piece of ground was set off, the judges of the Common Pleas attended in scarlet robes, and the two champions, bareheaded and barearmed, fought with batons an ell long. Each first made oath as follows: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone nor

grass, nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil be exalted. So help me God and His saints." The tenant prevailed if his champion could defend himself until the stars of evening appear. Victory would be obtained if either champion pronounced the horrible word "craven" (from the Saxon "crafan" — "I crave"), or was killed. This ordeal was abolished in England by Henry II, who, with consent of parliament, substituted the Court of Grand Assize. In France it was abolished in 1260, by St. Louis.

#### JAMES LOUIS PETIGRU.

THE lives of successful and distinguished lawyers are always interesting. Success at the bar in a high degree involves and implies mental activity and diligent research. There must be preliminary preparation both of an academic and a professional nature. Assuming a fair degree of the first, we may enlarge a little on the second. The great exponent and apostle of the law, Sir William Blackstone, has to be studied. The principles which he discusses and elaborates have to be read, digested and stored away in the mind. The student has to familiarize himself with Story and Adam's Equity. Smith's Mercantile Law, or some other work of a like nature, has to be mastered. The statute law of the State has to be learned. Works on pleading and practice must be perused and made part of the mental equipment. This preparation and these books necessitate the exercise of the intellectual faculties, their expansion and development. Practice of the profession calls for more. Cases have to be studied. Principles of the law as they have been expounded and adjudicated in the courts have to be learned. Nice discriminations of thought have to be traced through their various ramifications and followed out to their logical conclusions and their application to facts. And then there must be a wide range of general knowledge, a familiarity with practical business, and a deep insight into human nature. One must know how to unravel sophistries, to detect truth from falsehood, and to read character from the lineaments of the face. A mind developed amid such environments as these must itself be an object of interest. How interesting, therefore, must a lawyer be who has a training such as that set forth above, and who has clothed and armed himself with a vast array of facts, illustrations and incidents! You can hardly touch upon a phase of any subject but what he has a case at hand to illustrate the idea or an example embodying the principle involved. At one time he is going down to the fountain sources of the law, and there imbibing its first principles and cardinal doctrines. At another he is standing before a

jury of his countrymen, and with flowers of poesy and beauties of rhetoric, in language terse and bold, he is battling for the right and vindicating injured innocence. At another, you would suppose him a medical expert as he discusses some disease and elaborates upon its cause, its nature and the remedies therefor. At still another you find him engaged upon some principle of finance and its application to practical business. The life of Mr. Petigru comes up to these demands, fulfills all these requirements, and has woven around it an interest far above the average. He was admitted to be the foremost lawyer of South Carolina by his profession and the public generally. If I were to say that he was the foremost lawyer of the south I do not believe the statement would be challenged. As a practitioner in Charleston, S. C., as solicitor of his circuit, and as attorney-general of his State, he fairly earned and richly deserved the designation, a great lawyer.

Mr. Petigru was born in a fortunate period in his country's history. He first saw the light in May, 1789. At that time the foremost minds of America were studying constitutional questions and the underlying principles of government. No wonder that this bright young Carolina lawyer should have become interested in affairs of state, formed a definite line of politics and settled for himself the question whether he would assume the rôle of a demagogue or plant himself upon the high plane of statesmanship. He was fortunate, too, in the place of his birth. Abbeville county, South Carolina, was the home of his nativity and the place of his childhood. It was and is a county prolific of great men. She can rightly claim as her children, either by birth or adoption, John C. Calhoun, George McDuffie, Judge Cheves, Dr. Geddings, Judge James Calhoun, George and Aleck Bowie, Dr. John T. Pressly, the two Wardlaws, and many others whom I might mention. Genius thrives best when it finds kindred spirits around it. If I wanted an illustration of this fact I would cite Boston, with its long list of eminent men. Mr. Petigru received his primary and academic education in his native county, at the school of the celebrated teacher, Rev. Dr. Moses Waddell. He was as fortunate in having such a teacher as Dr. Waddell to start him off as he was in being born of Scotch-Irish parentage mingled with the French.

He completed his education at the South Carolina College, graduating therefrom in 1809, with the highest honor of his class. We frequently hear people speak disparagingly of first-honor men. I am sure the facts do not warrant any such characterization. If you will study the history of the alumni of any institution you will be surprised to learn how many of the more distinguished graduates were first-honor men. If, however, to win the first honor is a misfortune and a burden to carry in after-life, Mr. Petigru had no

harder fate than many others, among whom I may name Judge David L. Wardlaw, Dr. J. H. Thornwell and Hugh S. Legare, each of whom merits the designation, *clarum et venerabile nomen*. Mr. Petigru was well versed in literature. He was familiar with the poets and with all the great masters of literature. When a boy he was fond of reading Pope and Dryden, and as the years glided swiftly by he found his interest in them continuing as strong as ever. There have been a great many lawyers in Carolina who have affected literature, and at the same time excelled in their chosen profession, notably the silver-tongued orator, William C. Preston, and the accomplished man of letters, Hugh S. Legare. The latter was fortunate enough to enjoy almost every advantage afforded by education and travel, and he did not fail to embrace and improve his opportunities. It was a mooted question in that day, and it has never been settled yet, whether it is best, or even good, for a lawyer to be known as dabbling much in literature. Mr. Legare was afraid that it hurt himself. Judge Story has presented some strong arguments on the other side. He maintains that literature benefits and improves the very means which a lawyer uses to attain success. It sharpens the wit. It enlarges and improves the diction. It broadens the mind and widens the scope of vision. It cultivates and develops the powers of analysis and discrimination, stimulates the imagination and strengthens the memory. On the other hand, it is argued that literature unfits one for practical life. It tends to make one shun the aggressive, bustling world, and to long for quiet and repose. The drift of opinion and the force of example in this country perhaps tend to sustain this latter view, while in England the opposite is the case. Again, Mr. Petigru excelled as a conversationalist. He was noted for his wit and repartee, and many of his bright sayings have been handed down to us, and pass current yet, no doubt considerably exaggerated. His home in Charleston and in the up-country was the favorite resort of those who wanted to be entertained with ideas, experiences and incidents that were fresh, sparkling and vivacious. He was very hospitable and practically kept open house. As a host he was generous, liberal and free. We can't help but admire such a character. No one likes a man who is close, mean and stingy. No one likes the company of a man who is sullen, morose and taciturn. We are delighted to meet a warm-hearted, whole-souled, hale-fellow-well-met style of man like Mr. Petigru.

In his home life Mr. Petigru was in every way a model. He was devoted to his mother, wife and other members of his household, and in return received their warmest love and affection. His wife was for many years an invalid, and it is touching to see how delicate and tender he was

in his attention to her. Oftentimes he himself would go to the market to procure something suited to her taste.

We have reserved for the last the great, overshadowing feature of Mr. Petigru's character, namely, his politics and stand on public questions. Here he stands out conspicuously in his devotion to principle and duty. He was no time-server. He did not trim his sails to catch the popular breeze. He had the courage of his convictions. He believed in doing right, let the consequences be what they might. He was no demagogue. He would not condescend to lower his standard to gain office. He would not pander to the public taste, and he was far above appealing to the prejudices and lower elements of our nature. He was all his life on the minority side of politics. He was a Union man, and was opposed to nullification and secession. In Carolina at that time his was an exceedingly unpopular stand to take. Indeed, South Carolina was the leader in both these movements. Our people had but little sympathy for those who entertained opposite ideas on these subjects. And yet there were a few men in the State who, especially in the secession movement, dared to run counter to the prevailing sentiment, cost what it might. Among them I may name Governor B. F. Perry, Judge J. B. O'Neill, Governor James L. Orr and Mr. Petigru. These constituted in several respects a remarkable group of men. In the first place, they were beginning to reach the shady side of life, with the exception of Mr. Orr, who was then in his prime. In the second place, they were calm, cool-headed men, and conservative in their ideas and views. In the third place, they were men of high character, wide experience and more than average ability. They loved South Carolina. She was their native State, and was as dear to them as the apple of the eye. Around and about her were centered their affections and interests. They well knew that their own fate was united and interwoven with the destiny of their beloved commonwealth. They knew, too, that it was suicidal to attempt to stem the public current. To face the issue, to brave public opinion, would cost them much in political and possibly in social life. But they loved the Union and loved it with the supreme affection. From early childhood they had learned to sing its praises, to study the lives and emulate the example of its long line of illustrious men, and no less distinguished women. To point with pride to its star spangled banner, its battlefields and long list of heroes and heroines, and with an enthusiastic ardor which knew no bounds to proclaim its greatness and boast of its grand and glorious past. And yet they were devoted to their State. To them secession was not simply a bitter pill; it was a grievous mistake and a national calamity. Grave, earnest, serious, sad men were these. They turned their faces sky-

ward and read in the stars gloomy auguries. They came before the people and foretold war, ruin and desolation, and only too true did their prophecies prove. And they asked the people over and over again the question, Why secede? What cause for separation exists? Having done the best they could to stem the tide, but in vain, they quietly and sadly determined to share the fate of their people, whatever that fate might be.

To the credit of Carolinians be it said, they honored and respected these noble old men to the last. It was no new thing for Mr. Petigru, however, to find himself upon the unpopular side of politics. That was usually his fate. But under all circumstances, throughout his life, though generally on the side of the minority, he boldly avowed his views and had at least the consciousness of knowing that he had his own self-respect.

And, as I have already said, he commanded the respect of his people to the last. He was appointed to codify the laws of the State. He was made president of the South Carolina Historical Society, and at the time of his death he was also an honorary member of the Massachusetts Historical Society.

But Mr. Petigru was not perfect. He, too, had his faults. He was fond of joking, and his jokes were sometimes too coarse and broad in their character. And then, too, like George Washington, he would occasionally swear, both to his own hurt and that of his reputation. These were blemishes upon his character. A great man cannot be too careful in his conduct. Others will observe him closely and oftentimes follow in his footsteps.

And now that we have reached a conclusion, how shall we sum up his life? Judge Samuel McCowan, formerly a member of the Supreme Court of South Carolina, who knew Mr. Petigru well, in speaking of him to the writer, said that he was a great man, that he was honest and charitable, and that he was loyal to his friends. Hon. Daniel Pope, a professor of law in the University of South Carolina, in an address upon his life, ascribes to him genius, wit, magnetic oratory and quaint originality. Judge John Belton O'Neill showed the high estimate he put upon Mr. Petigru by dedicating to him his own great work, O'Neill's Bench and Bar of South Carolina. I will close by saying that Mr. Petigru was a fine lawyer, a great statesman; that he was loyal to his convictions of duty, his friends and his country, and that he was a brave, honest, generous, noble-souled man.

WALTER L. MILLER.

ABBEVILLE, S. C.

### English Notes.

Mr. Graham Hastings, Q. C., will retire at the end of the present year.

The Court of Appeal decided, in the case of Lipman v. Branch, that there was nothing novel,

from the patent point of view, in reducing the buttons on a lady's shoe to one and covering the instep with nothing but a strap.

It is announced that the queen has been pleased, on the recommendation of the secretary for Scotland, to whom the names were submitted by the lord justice general, to confer the rank and dignity of counsel to her majesty in Scotland on the following members of the Scottish bar: John Comrie Thomson, Æneas James George Mackay, John Cheyne, Henry Johnston, John Rankine, Andrew Jameson, Charles John Guthrie, David Dundas and Alexander Ure.

At the Luton County Court, on the 8th inst., Judge Marten delivered an important judgment with regard to the custody of cycles. The question at issue was whether the proprietor of the George Hotel, Luton, was liable for the loss of a machine of a cyclist who left it on his premises while he had luncheon in the hotel. His honor said that an innkeeper was *prima facie* liable for the loss of the goods of his guests, and he held there was no distinction between a bicycle or any other goods a guest might bring with him. Judgment was given for £21 damages, with costs.

The case of Mrs. Carew, who was tried at Yokohama recently for the murder of her husband, has been the occasion of an interesting decision as to the position of British subjects resident abroad in countries where the queen is by treaty entitled to exercise jurisdiction, says the Solicitors' Journal. The trial took place before a judge and a jury of five persons, and Mrs. Carew was convicted and sentenced to death, a sentence which was afterwards reduced to imprisonment, with hard labor, for life. It has now been contended, on an application to the privy council for special leave to appeal against the verdict and sentence, that Mrs. Carew, while liable to be tried by the British court in Japan, was entitled to be tried by a jury of twelve. Some foundation is afforded for the contention by the terms of the treaty with Japan of 1858, under which the queen is empowered to try British subjects residing in Japan "according to the laws of Great Britain." But this provision only regulates the right of jurisdiction as between the queen and the Japanese government. As between the queen and British subjects the matter depends on the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), which, after reciting that the queen has by treaty and otherwise jurisdiction within divers foreign countries, provides, by section 1, that she may exercise such jurisdiction "in the same and as ample a manner as if her majesty had acquired that jurisdiction by the cession or conquest of territory." This, as the lord chancellor observed, gives the queen in foreign countries where she has jurisdiction the powers of a conqueror, not of a constitutional sovereign. She can make, therefore, any regulations

she pleases for the exercise of the jurisdiction, and she was empowered to make the order of council under which the jury of five persons was constituted for the British court in Japan. Practically, of course, it is essential that there should be power to depart from the usages of English law. It might well be difficult to procure a jury of twelve persons, and it is more important to preserve the institution of trial by jury than to insist on a uniform number for its members. The alternative for British subjects resident abroad would be trial by the foreign power, and this the jury of five enables them to avoid.

### Legal Notes.

A clause in the new tariff act prohibits the placing of coupons in tobacco or cigarette packages.

A man in San Diego, Cal., got a divorce from his wife and she is now keeping house for him at \$20 per month. They no longer quarrel, and the arrangement appears to be satisfactory.

The Supreme Court of Minnesota has joined the ranks of those who hold that under the married women's acts, a wife may maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them. (*Lockwood v. Lockwood*, 70 N. W. Rep. 784.)

The annual convention of the Canadian Bar Association is to be held on August 31st, either at Toronto or Halifax. It is expected that Right Hon. Sir Henry Strong, chief justice of Canada, will read a paper, and that addresses will be given by Sir Charles Hibbert Tupper, Q. C., M. P.; Dr. Weldon, Q. C., and it is hoped also by Ontario's veteran judge, Sir John Hawkins Hagarty.

The general meeting of the Brussels International Congress of Advocates will be held next month. The objects of the council are declared to be: (a) By a comparative study of legislation on the legal profession to promote reform; (b) to bring the bars of different countries into more direct and frequent communication with each other by the means of the exchange of views on legal questions and mutual hospitality.

A singular case is reported from Kosciusko county, Ind., where a wife was prevented, by injunction, from leaving her home for a visit in California. The injunction was obtained at the instance of the husband, who failed, by persuasion, to keep her at home. Of course some good reason must have existed, or the court would not have granted the injunction asked for. This is believed to be the first instance in which a wife has been kept at home by such means.

Judge William L. Dayton, of the New Jersey Court of Appeals, died at Trenton on July 28, aged 59. He graduated from Princeton in 1858.

He accompanied his father to Paris in 1861, and served as assistant secretary of the American legation there until 1865. Governor Marcus L. Ward, in 1866, chose Mr. Dayton as his private secretary. Twice he served as city solicitor of Trenton. For three years he was a member of the common council. He was the United States minister to The Hague from 1882 to 1885. Governor Griggs last year made him a judge of the Court of Errors and Appeals.

In *Loiseau v. State* (22 South. Rep. 138), decided by the Supreme Court of Alabama, it appeared that several persons each dropped nickels into a slot machine owned by defendant, agreeing among themselves that the one after whose play the machine would indicate the highest card hand should have all the cigars that the nickels purchased. Defendant furnished from his stock a nickel cigar for each nickel put into the machine, and delivered them to the person who obtained the best hand. It was held that the machine, when put to such use, was a lottery, within Const. art 4, § 26, declaring that the general assembly has no power to authorize such.

The ancient ceremony of promulgating the laws passed by the insular legislature of the Isle of Man during the preceding twelve months took place last Monday on the Tynwald-hill, in the island, says the *Law Times*. His Excellency Lord Henniker, the lieutenant-governor, sat in a state chair on the top of the hill, surrounded by members of the legislature, clergy and coroners; and abstracts of the acts of parliament to be promulgated were read by the first deemster, first in English and then in the Manx language. Subsequently a congratulatory jubilee address was signed for presentation to her majesty the queen. The interesting ceremony was watched by several thousand persons, principally visitors.

Law and pathos are one and inseparable. It has been said of the lawyer's success: "Success is a sunflower growing upon the crest of a distant peak, with face toward the rising sun, beckoning to youth in the morning of life to climb the dizzy heights that intervene and partake of that keen enjoyment to be derived from feasting beneath its beauty and grandeur; but after years of unremitting toil, when the flower is almost reached, the aged man discovers to his horror that it has turned its face from him toward the land of the setting sun, and directs his inmost thoughts to that solemn hour when he must leave the undeveloped resources of his native state to other hands and he himself emigrate to "That oft-discovered country from whose burns No worn-out legal trav'ler e'er returns."

Good for Governor Bradley, of Kentucky! In pardoning a colored inmate of the Kentucky penitentiary, he says: "This poor and friendless man,

surrounded by his wife and six children, was ordered, without warrant of law, to leave his little home, after which he was fired on and wounded. He defended himself, as every dictate of reason and humanity demanded and justified. He did no more than any other man should or would do. Instead of a convict's garb, he is entitled not only to acquittal, but entitled to the admiration of every citizen who loves good government and desires the perpetuation of free institutions. Too long have mobs disgraced the fair name of Kentucky, and while I am governor of this commonwealth no man, however obscure and friendless, shall be punished for killing a member of a mob who elect to take his life or drive him from his home."

That Canadian judges and barristers know something about cricket as well as law was demonstrated one day last week, when the bench and bar defeated the St. James Club by seven wickets, on the grounds of "Elmcroft," the beautiful farm of Mr. R. D. McGibbon, Q. C., near Strathmore. The teams were as follows:

Bench and Bar—Hon. Sir Melbourne Tait, Acting Chief Justice Superior Court; Hon. Mr. Justice J. A. Ouimet, Court of Appeals; Hon. Mr. Justice Davidson, Superior Court; Donald Macmaster, Q. C.; Harry Abbott, Q. C.; C. J. Fleet, A. R. Oughtred, J. F. Mackie, C. H. St. Louis, Charles Baynes, J. H. Dunlop, Peers Davidson.

St. James Club—Lieut.-Col. E. A. Whitehead, F. Hilton Green, Herbert S. Holt, E. A. Small, A. W. Stevenson, Henry Joseph, Duncan McIntyre, R. P. McLea, Major A. H. Sims, T. D. Bell, Dr. Charles McEachran, Allan McKenzie.

Umpires—Col. Kittson, of the Royal Military College, Kingston, and Mr. James B. Allan.

Scorers—Alex. Stewart and Henri Bouthillier.

### Legal Laughs.

"Oh," said the lady lecturer, "I have had such a delightful conversation with the gentleman you saw bow to me as we left the train. He told me that the emancipation of woman had been his life work for ever so many years." "Yes," said the woman who had come to meet her, "that is so. He has been a divorce lawyer ever since I could remember."—*Law Times* (London).

A good story is told of a Glasgow baillie on the occasion of a witness being sworn before him. "Hold up your right arm," commanded the lineal descendant of Baillie Nicol Jarvie. "I canna dae't," said the witness. "Why not?" "Got shot in that arm." "Then hold up your left." "Canna dae that either—got shot in the ither arm, too." "Then hold up your leg," responded the irate magistrate; "no man can be sworn in this court without holding up something."



**Notes of Recent American Decisions.**

**Champertous Deed Void—Co-trustee—Action Not Maintainable on Such Deed.**—1. A deed to trustees to enable one of them, who is an attorney at law, to conduct litigation for the title and possession of real estate on his own account and at his own cost and expense, in consideration of one-third of the property recovered, is void for champerty. 2. The joinder of another person as co-trustee in a champertous deed, made to enable the other trustee to conduct litigation on his own account and at his own cost and expense, for a part of land to be recovered or the proceeds thereof, does not make the deed valid. 3. An action by trustees claiming under a champertous deed cannot be maintained, although a similar action might be maintained by the grantors in their own name. (*Ezra J. Peck and Leo Simmons, Plffs. in Error, v. Christian Henrich*, U. S. Sup. Ct. Decided May 24, 1897.)

**Contracts of a Dissolved Corporation.—When Binding Upon It on Its Reincorporation.**—1. Disincorporation of a municipality by legal proceedings does not avoid its legally subsisting contracts, but on the reincorporation of the same inhabitants, and of a territory including street improvements for which bonds were given, the obligation to pay them devolves upon the new corporation. (*Augustus F. Shapleigh, Plff. in Error, v. San Angelo*, U. S. Sup. Ct. Decided May 24, 1897.)

**Contract for Attorney's Compensation.**—A contract to give an attorney as compensation for services in three suits 50 per cent. of the mesne profits, damages, and costs which may be recovered in one of them, provided that if this amounts to less than \$5,000 he shall "have such sum of \$5,000," and "have a lien therefor upon said judgment and property as may be recovered," entitles him to a lien for that amount on property the title to which is successfully defended for the client in one of the other suits, although he failed of recovery in the action which he brought for mesne profits. (*Mackall v. Willoughby*, U. S. Sup. Court. Decided May 24, 1897.)

**Dower—Interest.**—Where a widow was entitled to dower in the real estate of her husband, which was sold to satisfy a judgment against him, and the property was not susceptible of division by metes and bounds, she was entitled to have allowed her a stated portion of the rents or a gross sum in lieu of dower, computed in accordance with the life tables. And it was proper for the chancellor to render a personal judgment in favor of the widow for the amount so ascertained, as well as to make the award a charge upon the property. The widow was entitled to interest on the sum allotted, not from the date of the death of her husband, but from the institution of the suit

to recover same. (*Hogg v. Hensley* [Ky. Ct. of App.], Ky. L. Rep., Vol. xix, No. 1, p. 44.)

**Findings of Fact Conclusive—Possession of Land, Notice of Rights Therein.**—1. Findings of fact are conclusive upon the Supreme Court of the United States on writ of error to a State court. 2. One who obtains a patent from the United States for land, with full knowledge of the rights, equities and estate therein of a person who is in possession of the land, and has attempted to locate a military bounty warrant thereon, although by mistake the land is registered in the application as being in range 17, instead of range 14, takes the patent as trustee for the equitable owner. (*Hedrick, Plff. in Error, v. Atchison, Topeka & Santa Fé Ry. Co.*, U. S. Sup. Court. Decided May 24, 1897.)

**Negligence—Tow-Boat—Proximate Cause—Abatement.**—The owner of a tow-boat towing a vessel, whether astern by a hawser or lashed alongside, is, as to third parties, the active, directing and responsible agent controlling the movements of the vessel it is undertaking to tow. A third party injured through the fault of the master of such tow-boat may recover of the owner therefor, even though those upon the vessel being towed were also in fault. The pendency of an action against the owner of the vessel for such fault does not bar, nor abate, an action against the owner of the tow-boat for the fault of the latter. (*Inhabitants of Cumberland Co. v. Central Wharf Steam Tow-Boat Company*, Me. Sup. Court.)

**Partnership—Liability of Retiring Members.**—A promise made by the continuing partner to the retiring partner to assume the firm debts is not a consideration for a release of the retiring member by a firm creditor. (*Motley v. Wickoff* [Mich.], 71 N. W. Rep. 520.)

**Notes of Recent English Decisions.**

**Adulteration—Skimmed Milk—Knowledge of Purchaser—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Costs Against Magistrates.**—The respondent was charged before certain magistrates with selling for new milk an article not of the nature, substance and quality demanded, contrary to section 6 of the act of 1875. A sergeant of police, acting on the instructions of an inspector under the act, purchased the milk of the respondent. It appeared that he asked for new milk, and that he was only charged a penny a pint. The justices differed, one of them being of the opinion that, the respondent only asking a penny a pint, the sergeant must have been aware that he was buying skimmed milk. The other justice thought that his knowledge was immaterial. A case was therefore stated for the opinion of the court. *Held*, that the magistrates must convict, for if such a defense were permitted, a con-

viction would never be obtained. The magistrates having appeared on the hearing, the appellant, the inspector, asked for costs against them, the respondent not appearing. *Held*, that he was entitled to them. (Heywood [App.] v. Whitehead [Resp.] [Q. B. Div.], Law Times, July 17, 1897.)

**Insurance — Marine Policy — Master Part Owner — Loss Through Master's Negligence — Liability of the Underwriters.** — The ship *G.* was insured with the defendants. On the face of the policy it appeared that one of the co-owners for whose benefit the insurance was effected was the master of the *G.* While on a voyage covered by the policy, the *G.* stranded and received serious damage. The owners sued the defendant on the policy, and the defendants pleaded (*inter alia*) as an answer to the action, that the damage alleged arose through the negligence of the master, who was himself one of the assured. At the trial before the court and a special jury the jury found that the damage did arise from the negligence, but not from the wilful negligence, of the master in navigating the ship. The court reserved for further consideration the question whether this finding relieved the defendants from liability for the loss under the policy. For the plaintiffs it was contended that, if the loss was immediately due to perils of the sea, the court would not look to the remote cause, or inquire whether the loss might not have happened had the assured been more careful. The mere negligence of the assured did not relieve the assurers. To relieve them, it must be shown that the negligence was wilful and knowing, or, in other words, that it amounted to *dolus*. (Dudgeon v. Pembroke, 36 L. T. Rep. 382; L. Rep. 2 App. Cas. 284; Thompson v. Hopper, 6 El. & Bl. 172.) For the defendants it was urged that, if the negligence of the assured were continuing negligence, that is, if it was continued until the loss actually took place, and was at that time an active agent in bringing the loss about, it constituted a complete defense to the action. Here the failure to keep a proper lookout was the negligence found, and that negligence existed at the moment the ship stranded. (Bell v. Carstairs, 14 East, 374; 2 Camp. 544; Pison v. Cope, 1 Camp. 434.) *Held*, that to constitute a defense to an action on the policy for a loss arising directly from perils of the seas, the negligence of the assured must be wilful and knowing negligence, and that the negligence proved in this case was not sufficient to relieve the defendants from liability. (Trinder, Anderson & Co. v. The North Queensland Insurance Company, Limited [Q. B. Div.], Law Times, July 17, 1897.)

**Mortgage — Foreclosure Decree — Certificate Made — Interest Calculated Up to Time Fixed for Redemption — Payment Off Before That Period.** — In an action brought by a mortgagee to enforce his security, the usual foreclosure decree had been made, and the master had made his

certificate in the ordinary form, finding the amount due for principal and interest up to the date of the certificate, with interest calculated up to the time fixed for redemption, six months from the date of the certificate. The mortgagor then applied to the court that he might be allowed to redeem before the expiration of the six months upon payment of the amount so certified, with interest only up to the date of the proposed payment off. Romer, J., before whom the application came on to be heard, refused to allow it. The mortgagor appealed. The cases of *Smith v. Smith* (65 L. T. Rep. 334; [1891] 3 Ch. 550), and *Re Alcock*; *Prescott v. Phipps* (49 L. T. Rep. 240; 23 Ch. Div. 372), were referred to. *Held*, that whatever might be the case if the mortgagor tendered his money before judgment, the mortgagee could not, after the judgment and certificate, be compelled to receive his money, except on the terms contained in the certificate; that the period of six months allowed was in accordance with the usual practice, and was for the benefit of both parties, giving the mortgagor time to obtain his money and the mortgagee time to find a new investment; and that, therefore, the decision of Romer, J., was perfectly right, and the appeal must be dismissed with costs. (*Hill v. Rowlands* [Ct. of App. No. 2], Law Times, July 17, 1897.)

### The Magazines.

Mr. Charles A. Conant, of the New York Journal of Commerce, contributes to the American Monthly Review of Reviews for August an admirable exposition of the new Tariff Law. His article is intended to tell the business man what he may expect from the operation of the new schedules. So much of the newspaper discussion of the Dingley bill has been warped by partisanship that the ordinary citizen is at a loss to know the real animus of the measure or its probable bearings on individual and general interests. Mr. Conant writes with moderation and candor; his article is calculated to enlighten the public on a topic that requires first of all impartiality in treatment. The editor, in his department entitled "The Progress of the World," discusses harvest and trade prospects, the new tariff, the coal strike, American annexation policies, our diplomacy on the seal question, Japan and Hawaii, British interests in Canada, European politics, and many other timely topics. Dr. C. F. Nichols has an illustrated article on "Hawaiian Island Climate," from which it appears that one may find in the islands almost any desirable kind of climate, and several that are undesirable.

The North American Review presents for August a table of contents notable for variety and timeliness. The opening pages contain the second and concluding portion of "Gen. Grant's Letters to a Friend," the same extending over a most

interesting period of the illustrious soldier's career. Mr. Edmund Gosse furnishes a brilliant essay on "Ten Years of English Literature," and "Has Judaism a Future?" is a question very thoughtfully considered by Prof. Abram S. Isaacs. The Hon. Henry C. Ide, late chief justice of Samoa, writes upon "Our Interest in Samoa," and Gen. Green B. Raum contributes a trenchant article on "Shall the Civil Service Orders Be Amended?" Michael G. Mulhall, F. S. S., presents the fourth paper in his series of articles on "The Progress of the United States," treating in this instance of "The Prairie States." Admiral P. H. Colomb, R. N., deals with "The Progress of British Warships' Design," and Dr. Alvah H. Doty writes very entertainingly about "Quarantine Methods." E. T. Hargrove, president of the theosophical societies in America, Europe and Australasia, discusses the subject of "Theosophy and Ethics," and Alex. R. Smith, secretary of the American Merchant Marine Association, forcibly considers "The Export Bounty Proposition." Under the title of "Speaker Reed and the House of Representatives," Mayo W. Hazeltine criticises the article on "How the House Does Business," which was contributed to the June number of the Review by Speaker Reed. The Hon. James H. Eckels, comptroller of the currency, discusses "The Menace of Legislation," and the injury inflicted upon the interests of the country at large by the tendency of law-makers to subject the undertakings of private citizens to legislative inquiry. Other topics cleverly dealt with are: "Pooling Railroad Earnings," by J. A. Latcha; "How the Red Cross Society Works," by Jane Marsh Parker, and "The Opportunity of the Girls' Private School," by Charlotte W. Porter.

The opening article for the midsummer Harper's is a story, by Frederic Remington, of Indian fighting in winter, entitled "A Sergeant of the Orphan Troop." The illustrations are by the author, and include the frontispiece of the number, in color. There are, in addition, seven complete stories. "Sharon's Choice," by Owen Wister, pictures the life of a small western town, and is sympathetically illustrated by A. B. Frost. "The Cobbler in the Devil's Kitchen" is an amusing romance of voyageur days in Mackinac, by Mary Hartwell Catherwood, illustrated by C. Carleton. "In the Rip" is a story of farm life in Maine, by Bliss Perry, illustrated by A. B. Frost. "The Marrying of Esther" is a story of country life, by Mary M. Mears; and "A Fashionable Hero" is a story of the city by Mary Berri Chapman. "A Fable for Maidens," by Alice Duer, makes an amusing little comment on the feminine attitude towards marrying, put in the guise of a fairy tale. The Editor's Drawer opens with "A Prearranged Accident," a farce by Albert Lee, illustrated by W. H. Hyde. In "The Inaugura-

tion," a companion article to "The Coronation," Richard Harding Davis contrasts our political and social life, as manifested in our greatest national ceremony, with that of the Old World. The illustrations are by C. Dana Gibson and T. de Thulstrup. In "The Hungarian Millennium," F. Hopkinson Smith writes of the distinctions and humors of the recent exposition at Buda-Pesth, and illustrates the article by characteristic drawings of the buildings and landscapes. "A State in Arms Against a Caterpillar," by Fletcher Osgood, gives an illustrated account of the ravages of the offspring of the gypsy-moth, which, having devastated large tracts in the suburbs of Boston, is being prevented from spreading throughout the country only by organized effort on the part of Massachusetts. The tenth instalment of "White Man's Africa," by Poultney Bigelow, contrasts British and Boer government, with special reference to the Jameson raid, and the present troubles in the Transvaal. The illustrations are by R. Caton Woodville. In the series of illustrated articles on the contribution of the nineteenth century to science, Dr. Henry Smith Williams, in his second paper on "Physics," discusses ether and the theories concerning the constitution of matter. The third instalment of Frank R. Stockton's new novel, "The Great Stone of Sardinia," brings the submarine voyage of exploration to the North Pole to a successful issue. The illustrations, by Peter Newell, are in rare sympathy with the naive humor of the story. The second instalment of "The Kentuckians," by John Fox, Jr., develops the dramatic contrast between the mountaineer statesman and the representative of the Blue-Grass Region. The illustrations are by W. T. Smedley. The Editor's Study, by Charles Dudley Warner, discusses current topics of interest.

The Century's midsummer number is a beautiful specimen of typography, and presents an enticing array of varied literary matter. The frontispiece is an excellent portrait of John Burroughs. "The Lordly Hudson" is a popular article by Clarence Cook, with excellent illustrations by A. Costaigne; Thomas Dwight Goodell describes "A Journey in Tessaly," and there is a timely article by John Muir on "The Alaska Trip." Other features are: "Down to Java," by Eliza R. Scidmore; "A Day in Norway," by Hjolmar Hjörth Boyesen; "Characteristics of Jenny Lind," by Henri Appy; "John Burroughs," by Hamilton W. Mabie; "London at Play," by Elizabeth R. Pennell; "The Days of Jeanne d'Arc," by Mary Hartwell Catherwood; "A Wind Storm on the Caribbean," by Louise Morgan Sill; and the second instalment of "Up the Matterhorn in a Boat," by Marion Manville Pope. In the department of Topics of the Time there is a very fair and thoughtful article on the subject, "Is the Senate Justly Criticised?"

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, AUGUST 14, 1897.

### Current Topics.

**A**NNOUNCEMENT comes through the press of the country of the pitiful condition of Thomas M. Cooley, news especially sad to the legal profession in whose ranks he has labored so long and with such great effect. Few men living have earned as much praise and few have accomplished more than Mr. Cooley, either as a judge or commentator. He is acknowledged to be the leading living expounder of the constitution. Judge Cooley has been a hard student all his life and his whole career has been marked by assiduity and application, the real attributes of the scholar. The collapse of his health is due largely to the severe strain which has been put upon his physique by the arduous and telling duties which the learned judge has assumed. In the course of his legal experience Mr. Cooley has written many text books, some of which can be called classics of legal literature, notably his "Elements of the Constitution and Constitutional Limitations." He is also the author of a well known work on torts. These books were written while he was an instructor in law at the University of Michigan, to whose sons he has become endeared not only for the services he has rendered that institution of learning, but because of his kindness and wonderful amiability, brought out in his personal contact with those who attended Ann Arbor in the days of Professor Cooley's residence there. Judge Cooley has been a member

VOL. 56 · No. 7.

of the inter-state commerce commission, in which capacity he rendered valuable service by his certain knowledge of the law and familiarity with the current problems of the day. We believe it can be sincerely said that the legal fraternity is a unit in extending sympathy and condolence to the family of Michigan's famous jurist in the illness which has overtaken him on the threshold, of what it was hoped would prove, a ripe old age. Thus far his has been a life so rich in content that it may well serve as one worthy of emulation to the young lawyers of this and coming generations who would desire to be an ornament to their profession and of real service to their country.

Our pro-English contemporary, the Nation, in an editorial on the subject of the Alaskan gold fields, in its issue of July 29, succeeded most admirably in "putting its foot in it." After showing that the great gold discoveries are in British territory, and that the successful miners, the men who come home with tales of fabulous wealth attained in a few weeks are largely American citizens, who are allowed to carry away its chief treasure without let or hindrance, the Nation asks its readers to imagine the case reversed. "Imagine," says our contemporary, "the gold fields on our side of the Alaskan border, and Englishmen swarming in to despoil us. What shrieks to high heaven and appeals to Congress there would be! We should have laws in a twinkling to make all alien miners pay nine-tenths of their findings into our treasury. We should tax them heavily to get into the territory, and not let them get out without paying the uttermost farthing."

\* \* \* \* \*

"The incident throws light on the terrible 'land-grabbing' propensity of England. She grabs everywhere, but she throws what she grabs open to all the world. She is well known to grab with peculiar fury when it is a question of getting a bit of gold-bearing land; that always drives her frantic. But, as the Klondike

gold-finds show, she lets foreigners come and help themselves to the gold after she has grabbed it. She polices the territory acquired; she makes life and property safe there; she establishes courts; she fosters education and religion; but she gives Frenchmen, Germans, Italians, or even her dearest foes, Americans, the same rights there as Englishmen. This is a policy of incredible silliness, according to American standards. It might be justified on the theory that law and international policy are intended to promote trade and industry, and make human liberty and happiness as secure as possible; but we know that theory to be entirely mistaken."

In its zeal to make political capital our contemporary has put itself in a ridiculous plight. What are the facts? While the Nation's presses were working off the edition of July 29th, or before, the Canadian cabinet, in session at Ottawa, was engaged in imposing a ten to twenty per cent. royalty on all placer diggings in the Yukon district, in addition to a registration fee of \$15 and \$100 annual assessment. But this is not all. These most magnanimous Canadians also decided that every alternate claim of future claims staked out in that region should be the property of the Canadian government, and should be reserved for public purposes and sold or worked by the government for the benefit of the Dominion. Action was also taken looking toward the building of stations all around the various entrances and exits of the Yukon gold country, showing that every effort possible will be made to collect the blood-money tax thus imposed upon the struggling miners. Further comment would be superfluous; but we cannot refrain from remarking on the danger of newspapers as well as individuals going off at half-cock. Meanwhile the Canadian government will doubtless find its hands full in enforcing the outrageous regulations it has, in its inordinate greed, seen fit to impose.

—  
The vast army of wheelmen in this coun-

try, particularly that portion of it resident in the Empire State, will be interested in the decision recently rendered by Justice Daly, of the Supreme Court of this State, in a suit brought against an accident insurance company, to recover the amount of money guaranteed to the holder of the policy in case of accident. The insured was so badly injured by falling from his bicycle that he was prevented from pursuing his ordinary occupation for more than a year. His contract with the company, as set forth in the policy, provided for the payment of \$20 a week during any illness caused by accident. There were, however, two conditions limiting the right to this compensation. One bound the insured to submit the question of the amount of damages to arbitration in the event of a disagreement with the company. The second and important condition was that if the policy-holder should be injured while engaged temporarily in any occupation or exposure of an extra-hazardous nature he should be entitled to a lower rate of indemnity, specially fixed for extra-hazardous employments. The company resisted the holder's claim on these grounds and suit was brought. Justice Daly ruled for the plaintiff on both points. The agreement for arbitrating the question of damages, he declared in the opinion, while perfectly valid, did not extinguish the right of appealing or invoking the aid of the courts. In regard to the question of extra hazard, the court held that bicycling as practiced by the average citizen is no occupation at all, but a pleasurable pastime, and a reference in a policy to extra-hazardous occupations cannot be deemed applicable to ordinary cycling. Even where bicycling is specifically named along with baseball, football, polo and other games, it must be construed to refer to professional bicyclists who make their living by racing on their wheels. True, the contract speaks of "exposure" as well as "occupation" in the extra-hazard clause, but the court rules, as a matter of law, that wheeling for pleasure is not an extra-hazardous exposure in this age of

universal use of the wheel by men, women and children. This decision will be hailed with pleasure by wheelmen and wheelwomen. It appears to be founded on reason and justice, and is likely to be sustained by the highest court in case of appeal. The law must adapt itself to modern conditions, and it seems to us that it would be the height of injustice to apply the extra-hazard clause to a pastime so universally prevalent and popular, among both sexes, as bicycle riding for pleasure and exercise. With about as much propriety might the application be made to travel by railroad or steamboat.

A large and promising crop of law-suits is promised in connection with the new tariff act which went into effect a few days ago, the prospective plaintiffs being importers of merchandise who were obliged to pay duty on goods affected by the new tariff law that were imported after midnight of Friday, July 23d. The bill passed the senate at 3:07 P. M. on Saturday, and was signed by the President at 4:04 P. M. the same day. But, acting presumably, upon the assumption that the law takes no note of parts of a day, the Treasury Department has instructed collectors of customs that the department holds that the new tariff became operative after midnight of Friday, July 23d. Nearly every importer of merchandise entered at the custom house before 4 P. M. on Saturday has filed notice of protest against the ruling, and these protests will undoubtedly be made the basis of litigation intended to test the correctness of the Treasury Department's decision. The duties on the goods imported on the steamships Normannia, Paris and Umbria, which were entered on Saturday, amount, it is stated, to about \$900,000 under the new law. Under the old law they would have been only \$600,000, so that a difference of \$300,000 is involved in the question so far as relates to these three vessels alone. The ruling referred to seems to be based upon the doctrine laid down by Blackstone, in his celebrated Commentaries, that "in the space

of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes." But Prof. Lewis, in his new edition of Blackstone, adds this foot-note:

"It is true that for many purposes the law knows no division of a day; but whenever it becomes important for the ends of justice, or in order to decide upon conflicting interests, the law will look into a fraction of a day as readily as into the fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it.' Smith v. Jefferson Co., 10 Colo. 17; Denver v. Pearce, 13 Colo. 390 (1889); Benson v. Adams, 69 Ind. 354 (1879); 2 Greenleaf's Cruise on Real Prop. 381; Angell on Limitations, 46 (6th ed., 1876)."

The New York World has been looking up other authorities, and finds an important decision of Mr. Justice Story, in 1843, which bears directly upon the disputed question when the new tariff duties took effect. In this decision Judge Story said:

"There is no ground of authority and certainly there is no reason to assert that any such general rule prevails as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing portions of a day whenever it will promote the purposes of substantial justice. Indeed, I know of no case in which the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*."

After citing a number of decisions, English and American, and the language of the Constitution relating to the approval of bills by the President, Mr. Justice Story proceeded.

"It seems clear to me, from the language of the Constitution, that in every case of a bill which is approved by the President it takes effect as a law only by such approval. The approval cannot look backward and by relation make that law at any antecedent period of the same day which was not so

before the approval. Surely the Constitution is not to be set aside or varied in its intendment by mere legal fictions. On the contrary, it appears to me that in all cases of public laws the very time of approval constitutes, and should constitute, the guide as to the time when the law is to have its effect, and then to have its effect prospectively and not retrospectively."

The Supreme Court passed upon the same question again in 1878, at which time through Mr. Justice Hunt, it gave a like decision, as follows: "The time of the President's approval points out the earliest possible moment at which it could become a law, or, in the words of the act, at which it could take effect."

It is, no doubt, the custom of the treasury officials to rule invariably in favor of the government—in other words, to claim everything so as to be on the safe side—but in view of the decisions quoted it does not seem that they can have, in this case, any very lively hope of success. The enacting clause of the new tariff act itself, provides that the duties which it prescribes shall be "levied, collected and paid on and after the passage of this act," which, aside from the decisions quoted, ought to be conclusive, if law is crystallized common sense.

A more flagrant abuse of the pardoning power which, by the various State constitutions is lodged in the chief executive, than that shown by the official records of the State of Kentucky, has perhaps never been presented. According to the record as compiled and printed by the Louisville Post, the pardons granted by Governor Bradley and by Lieutenant-Governor Worthington, while the Governor was absent from the State, between December 10, 1895, and July 30, 1897, number no less than 675; and this number does not include the pardons given in order to restore the recipient to citizenship. Among those pardoned were thirty-two murderers, who were serving life terms, and sixty-four men who had committed murder and had been convicted of manslaughter, making ninety-six

murderers turned loose upon society. Besides these 579 persons convicted of robbery, assault and other crimes were given their freedom. This record would be almost beyond belief but for the reliable character of the newspaper which is our authority. These facts and figures throw a flood of light upon the administration of justice in the Blue Grass State. Such wholesale emptying of the State prisons cannot fail to have important effect in undermining the popular respect for the laws and their just and orderly enforcement, as well as in rendering life and property still more insecure. The community which demands, or even permits, such mockery of justice to be consummated is in a pitiable condition, and it is little wonder that lynch law rules where the pardoning power is thus flagrantly abused.

As is well known the Constitution of this State, while providing that goods produced by convicts in the penal institutions of the State shall not be sold or given away to any person, firm or corporation, permits the disposal of them "to the State or any political division thereof, or for or to any public institution owned or managed and controlled by the State or any political division thereof." Under this provision the question arose whether the municipalities of the State, which are, of course, corporations, are thus prohibited from using convict-made goods. The counsel for the corporation of Brooklyn has decided that cities are "political divisions of the State," a decision which seems to us in every way just. Reference to the debates in the constitutional convention shows that it was the general idea that the public institutions in the various cities would make use of the prison products, and it is not unlikely that this idea exercised much influence in causing the adoption of the clause in the Constitution which forbade the traffic in these products.

According to the recent decision of the Court of Appeal, in the case of Pennington

v. Crossley & Sons, the courts of England will be slow to depart from the rule that a check sent by post is at the risk of the sender. Briefly stated, the facts in this case appear to be these: On December 10, 1896, the plaintiff, a wool merchant at Bradford, sold wool to the defendants, and on the same date forwarded an invoice. On the 24th of December the defendants posted at Halifax a crossed check for £503, and with it a form of receipt, both being contained in an envelope properly addressed to the plaintiff. The check never reached the plaintiff, but was cashed by a stranger and the proceeds misappropriated. In an action brought by the plaintiff for the price of the wool, according to the solicitors' Journal, to which we are indebted for the facts of the case, the defendants gave evidence that for about twenty years before this transaction payments for wool as between the plaintiff and the defendants were always made by check sent by post with the form of receipt enclosed, and at the trial before GRANTHAM, J., at the Leeds Assizes, that learned judge drew the inference that the course of dealing showed an agreement between the parties that payment should be made by crossed check sent in this manner. But in this inference the Court of Appeal declined to concur. For some purposes the post-office is treated as the agent of both parties, and hence, when an acceptance of an offer to contract is sent through the post, the contract is complete from the moment of posting the letter, and none the less because the letter is never received by the addressee (*Household Fire, etc., Insurance Co. v. Grant*, 4 Ex. D. 216). But this is a special rule designed to facilitate contracts by correspondence, and it does not authorize the assumption by a debtor that he may safely entrust the amount of his debt to the post-office as the agent for the creditor. It is a different matter, of course, where the creditor expressly authorizes payment by check through the post, but the mere regularity of payment in this way was held by the Court of Appeal not to warrant the inference that the creditor had agreed

to take the risk of the transit. The judgment of GRANTHAM, J., accordingly was reversed.

#### INCIDENTS IN THE PROFESSIONAL CAREER OF CHARLES O'CONOR.

"IF, with the observation and reading of half a century," said the late John K. Porter, "I were called upon to name the three greatest men of Irish lineage who have illumined the annals of jurisprudence of New York, I should have no hesitation in naming Charles O'Connor, Thomas Addis Emmet and James T. Brady.

"If I were called upon to name the four greatest lawyers this country has produced, I should claim for our imperial State the highest honors in the names of Alexander Hamilton, John C. Spencer, Nicolas Hill and Charles O'Connor."

The Hon. James C. Carter voiced the sentiment of the American judiciary and the legal profession in regard to Mr. O'Connor when he said: "Rarely, indeed, has any private professional life received such general and highly deserved commendation as has that of Charles O'Connor. He never occupied any of the high places of power and patronage. Listening senates never hung enraptured upon the language that fell from his lips. He never incited or led any great popular movement. He never courted popular applause—the froth of politicians that bubbles a moment and then vanishes. He habitually shunned, as far as he could, public observation. He stood the admitted leader among an array of names, embracing those of James T. Brady, Francis B. Cutting, Daniel Lord, William Curtis Noyes, James W. Gerard and others quite as distinguished, while he divided with Nicholas Hill the honors of supremacy in our great Court of Appeals. Charles O'Connor was a model American lawyer. He never carried his manhood—his soul—to the public treasury and asked, 'What will you give me for these?' He never touched the political Aceldama and signed a bond for cursing to-morrow what he applauded to-day. He never sold the warm feelings of his youth and manhood, his professional independence, for an annual sum of money and an office. If he had faults, and it is not pretended that he did not have many, they were neutralized by his virtues.

Mr. O'Connor believed that the history of politics teaches that the tendency is to bring a great man down to a common level, to discover or invent faults which show that he is but a small man after all; that the envy of little but ambitious men is gratified by evidence, however flimsy, tending to prove that those who have eclipsed them in genius, talents, learning and eloquence are no better than themselves, and they are made happy by anything showing that they are worse.



"If we were asked what were some of O'Connor's chief mental characteristics, judged by a careful reading of his legal arguments and his speeches on public occasions, we should say, as was said of the distinguished John H. Ashman, the pride of the Massachusetts bar, that "they were sagacity, perspicuity, learning and strength. His mind was rather solid than brilliant; rather active than imaginative; rather acute in comparing than fertile in inventing. He was not a rapid, but a close, thinker; not an ardent, but an exact, reasoner. He always studied brevity and significance in expression. Hence his language was peculiarly sententious, terse and pointed. There were occasions when it was quite epigrammatic. Few persons left upon the minds of judges and jurors so many original, striking thoughts uttered with such attractive simplicity. It was natural, therefore, that they should become fixtures in their minds. They were philosophy brought down to the business of the lawyer and disciplined for his purposes."

Mr. O'Connor did not enjoy many educational advantages in his early youth; that is to say, he was denied the advantages of classic halls and institutions of learning. He had the foundation of a good English education. He devoted every leisure moment of his life to close, systematic study. In this way he became an accomplished, practical scholar. In the storehouse of his memory every useful, intellectual treasure was found, while every superfluous embellishment was rejected. Few men ever studied to greater effect. Thus he acquired an intellectual strength which belongs peculiarly to superior minds—that of thinking—always working out trains of thought. As a legal orator O'Connor occupied a commanding position. His countenance, voice and general manner were prepossessing in general. He was by no means a perfect orator; but his acquirements were admirable, his language fluent, natural, unaffected, and his logic was conceived with a cogency that amounted to one continued flow of reasoning. He had the peculiar faculty of impressing courts and juries with his sincerity and high sense of honor. In sudden flashes of wit, and in the playful description of men or things, O'Connor was often distinguished by that natural felicity which is the charm of pleasantry, to which the air of art and labor is more fatal than to any other talent. O'Connor well understood that splendor of diction, when it only pleases or amuses, without disposing the auditors to adopt the sentiment of the speaker, is an offense against the first law of public speaking; it obstructs instead of promoting its only purpose. It has been well said that if one were asked to what particular faculty O'Connor's pre-eminence was due, the answer would be difficult. Perhaps none could be specially assigned; it should rather be attributed to a fortunate union of many high intellectual attainments.

It was generally believed that he was a harsh,

severe, haughty, unamiable man, and this belief was not without foundation; but he exhibited in his professional life a demeanor altogether different from that which marked his private life. Indeed, he seemed to live almost a dual life. In the depth of his mind, in the recesses of his inner life, there were fountains of feeling, of generous sympathy, beautiful devotion to religion, to charity and the memory of his departed friends. There was one being whose memory lived in his heart of hearts. Like the eternal candles of Mecca, it shed a soft, gentle light upon his whole life. This was the memory of his mother. He never heard the word "mother" mentioned when it did not bring moisture to his eyes and sanctity to his thoughts. We cannot forbear relating an incident in his professional career illustrative of the almost holy sympathies the word "mother" stirred in his heart.

One day, while deeply absorbed over a brief in a great case in which many thousands of dollars were involved, a poorly clad boy, perhaps twelve or fourteen years of age, entered his private office and stood silently before him. For some time he remained unnoticed by the great lawyer. At length, raising his eyes from his work, his gaze rested upon the silent figure before him. The countenance was expressive and pleasing. It would have been vivacious with the animation of youth had it not been for a sadness that shadowed it with something which indicated want and suffering.

"What are you doing here, sir?" asked O'Connor, a slight frown lowering over his features.

"I have come—come—to—to—I—"

"Well, sir; what have you come for?" said O'Connor, in a voice of deeper sternness.

"I've come to—to—to ask you for a little help, for I need it, O, so very much, sir!"

"Why do you trouble me for help? How came you to get in here? I allow no one here, especially beggars."

"I don't know how I came to come here," said the boy, trembling before the severe expression of the lawyers' face. "I thought I would find some great and good man who might take pity on me."

"You are very bold to come here. Who are you that you should dare intrude into my private office?"

"I have no friends. I—I can work, but I am sorry I have troubled you. I have no one in the world who cares for me. I did have until a few days ago, and that was my mother, but, O sir, she died a few days ago, and she was—she was all the world to me," said the boy.

"Well, sir, I can do nothing for you. Here, James," he said to a clerk, "show this boy out, and don't let such persons get in here again," said O'Connor, directing his attention to his brief. But he paused. A sudden thought seemed to flash over him. The words of the poor boy, "My

mother died a few days ago. She was all I had to live for. She loved me, but I've no one to love me now," rang in his ears, and tears suffused his eyes. They brought the memory of his own mother vividly before him. Indeed, it seemed that she stood there with her loving, pitying face. He heard her say, "My darling boy, be kind to the poor waif you have turned away." Throwing down his pen and seizing his hat, he hurried into the street in pursuit of the boy. He soon found him standing before the window of a large restaurant gazing wistfully at the tempting viands displayed therein.

"I wish to speak to you, my boy," said O'Connor, laying his hand kindly on the youth's shoulder. "I want you to tell me something more about yourself."

The boy looked up with astonishment. There was something in his face that attracted O'Connor and insensibly interested him. In a few intelligent, well-expressed words he related the simple story of his life—how his father, a reputable mechanic, had died, leaving him and his mother some means, which, with his own and his mother's industry, rendered them very comfortable. But through the cruel designs of the trustee who held their funds they were defrauded of them and cast penniless on the world. For a time they struggled with want, and then the mother died, and the boy was left friendless and alone in the world. He had for his years received a good business education, he was more than ordinarily intelligent, and there was something like unpretentious superiority in his manner and bearing. Mr. O'Connor became deeply interested in him. When the story was ended he led the way to a large clothing store, and after ordering a complete, genteel suit of clothes for the boy, directed him to put them on and accompany him to his office. This was done, and on reaching it O'Connor wrote the following note to the senior member of one of the great dry goods firms in the city:

"*My Dear Mr. —:* Please take the bearer of this into your employment. Take care of his wants until he can be useful to you, and hold me responsible for all you do for him. I desire that you treat him in all respects as one in whom I am much interested. I will tell you all the circumstances when I see you, which will be soon. I regard him as a very promising youth. He wants to be a merchant, and I want you to see that he is duly educated for that by practice and experience.

"Yours very truly, C. O'CONNOR.

"NEW YORK, July 15, 1849."

Directing the note to the merchant, he handed it to the boy, saying: "Take this to the person to whom it is addressed. You will remain with him for the present. You will be in his employ, and will be well taken care of; and if you are a good boy, will one day be a merchant."

Taking the note as directed, the boy made his way to the great mercantile house, and delivered the letter to the senior member of the firm, who received him kindly and observed all of Mr. O'Connor's directions. The young man soon developed extraordinary business abilities and a character of sterling honor and integrity, which became invaluable to the firm. In due time he became a partner, and later on he took the place of the senior partner in it. Mr. O'Connor, in speaking of this incident to a friend, declared that if he had not found the boy when he left his office he would never have forgiven himself for ordering him to leave his office. We have thus described O'Connor's sympathy and generosity against the charge that he was wholly a stern, severe, unfeeling man. Often playful and humorous replies would come spontaneously from him.

He once met a friend on the street, who said: "I am on the way to attend the funeral of Mr. Robert Stimpson. Won't you accompany me?" O'Connor and the deceased were on bad social terms and mutually disliked each other.

"No, I cannot attend Mr. Stimpson's funeral under the circumstances," was the reply. But he reflected a few moments, and then replied: "On the whole, I think I ought to attend his funeral, for he would have been delighted to attend mine."

The great triumph of O'Connor's professional career was the result of the Forrest divorce suit. Few events have excited more deep and general interest in this country than this trial produced. The interest was nearly as great in England as in this country. Perhaps no man ever became such a general favorite in his profession as Edwin Forrest; indeed, the admiration shown him was well-nigh universal. Even his faults were so blended with his embellishments as to go far toward disguising the former. There never was a doubt of his broad affection, his liberality to his friends and generosity to those who needed his aid. When it is remembered that he brought all this immense popularity and influence to bear in his behalf on the trial, and that his opponent was a weak, defenseless, though a beautiful and accomplished, woman, some idea will be had of the tremendous conflict in which Charles O'Connor was engaged as the champion of his weak client. But while on the one hand she was without influence, she was powerful in the justice of her cause, in her virtues, in her innocence, in her splendid talents. She married Forrest in the bloom of young womanhood. She loved with all the intensity of her affectionate nature. He was the hero of her worship, the idol of her heart. The great actor, who commanded the admiration of the multitude, inspired her with an affection that became idolatry. It was returned, but with something of the affection he gave to heroines on the stage. He was false to her. She forgave his faults and continued her affection for him though her heart was breaking

over the dreadful certainty that he was no longer her husband except in name. She was, in fact, no more in his house than a kind of upper servant. A separation took place, followed by an action against her husband for adultery, and Charles O'Connor was her champion in the stupendous contest that followed. He had in John Van Buren, counsel for Forrest, a powerful opponent. Van Buren was then in the plenitude of his popularity at the bar, surrounded by many circumstances that gave him influence and power as an advocate. Among these was his argumentative skill, his eloquence, capacity for arranging and balancing contradictory evidence, his acuteness in disposing of the sophistical and bringing forward the essential. His arguments were admirable, his language fluent, select, elegant and glowing, and his logic was conceived with a cogency that bore itself along in a continuous stream of reasoning. He had at his command satire, ridicule and invective, which he wielded, when occasion required, with tremendous power. In the examination and cross-examination of witnesses he had no superior. He conducted the case of Forrest with admirable ability and learning, and with an eloquence that lost nothing in comparison with the powerful effort of Mr. O'Connor, to whom he was in every sense a "foe-man worthy of his steel." The Forrest divorce case to both of these distinguished lawyers was an important crisis in their professional careers. The case has a striking parallel in English legal history in that of Queen Caroline, whose champion was Lord Brougham. The position of O'Connor and Brougham in these trials was so similar that in reading one we read very much of the other. George III, in 1761, soon after ascending the throne of England, married the Princess Charlotte of Mecklenberg-Strelitz. A few years after the marriage, as she stood in the way, he determined to rid himself of her, and he finally compelled her to leave England. She remained abroad several years; but in June, 1820, through intercession of her adherents, she returned to England and there demanded her rightful position as queen consort of the realm. This produced great excitement throughout the kingdom. The king at once set in motion every engine of annoyance to render her life wretched. He charged her with repeated acts of infidelity while on the continent, and swift witnesses to prove these acts were found. She was brought before the house of lords, charged with adultery. But when it was known that the king was determined to vent upon his consort the consequences of his own offenses; that he, whose whole life since his marriage had been in violation of his marriage vow, was determined to obtain a release from the nuptial ties which he had never held sacred, and that, as was generally believed, his charges against his queen were without founda-

tion, the interest in the trial deepened. But he was the king of England; he could, like Hotspur, raise spirits from the vasty deep. And he did. The trial shows the same course of manufacturing witnesses was taken as was adopted in the Forrest case. The points of resemblance between the two trials in this regard are astonishing. The readers of the Forrest trial will remember Ann Flowers, who testified positively to the adultery of Mrs. Forrest, but whose perjury was unmasked by the powerful and searching cross-examination of O'Connor. The Ann Flowers of the Queen Charlotte case was Mlle. Dumont, who testified positively to the queen's acts of adultery. Under the terrible cross-examination of Brougham her false testimony was overthrown, though, like Ann Flowers, she was one of the deepest and most adroit perjurers that ever faced a jury. But the similitude between the arguments of O'Connor and Brougham is, if possible, more striking than was the evidence; and finally the result of the trials was alike. The felicity with which conspiracies for false accusation may be formed, kept together and used with destructive effect, was exposed by both the great lawyers with remarkable power. O'Connor's argument has been characterized as one of the greatest ever made at the bar of the city of New York. He surprised even those who were the most intimately acquainted with him by the facility with which he poured at once upon the points in the case a steady and luminous stream of argument, moulding them with masterly power, and closing with an impregnable array of logic. A long series of triumphs at the bar was crowned by his magnificent victory, won almost single-handed, against an imposing array of influence, power, learning and eloquence in the case of Forrest v. Forrest. The triumph of Brougham in the case of Queen Caroline was not greater than O'Connor's.

L. B. PROCTOR.

### Notes of Cases.

A recent decision in an ejectment action has been handed down in the Second Department of the New York Supreme Court, Appellate Division. Frederick S. Cremore, a colored man, brought an action against George H. Huber and Christian F. Gebhardt to recover damages for an alleged assault, consisting in his having been forcibly ejected from and denied the privilege of a place of amusement in Brooklyn, known as the Casino, because of his color. The plaintiff entered the place, and after having remained there a short time, was ordered to leave, and on his refusal to do so, was forcibly thrown out. Cremore testified that when he entered he took the only vacant chair at a table about which four white persons were seated; that they commenced moving their chairs; that some one said, "What is this nigger doing here?"

and then the contents of a glass were thrown in his face. The Second Appellate Division, in affirming judgment for the plaintiff, held that he might properly prove, as a part of the *res gestæ*, that he was insulted by the patrons of the entertainment before he was ejected by the servants of the proprietors, the defendants — although the defendants cannot be held liable for the acts of the patrons of the entertainment. If he had paid his entrance fee, and was behaving himself properly, it was not his duty to leave the place because he was requested to do so by the proprietors.

In *Jones v. Merrill*, decided by the Supreme Court of Michigan, in June, 1897 (71 N. W. R. 838), it was held that jurisdiction is conferred over one outside the territorial jurisdiction of a court by the acceptance of "due personal service" of a subpoena. The court said in part: "In the present case it is unnecessary to determine the effect of a mere acceptance of a service shown upon its face to be beyond the jurisdiction of the court. In this case the acceptance purports to be an acceptance of due personal service, which means a service which will confer jurisdiction upon the court. The case of *Cheney v. Harding* ([Neb.], 31 N. W. 255) goes further than is necessary to sustain the holding of the circuit judge in this case. In that case the admission of service showed upon its face that the service was made at the residence of the party, in another State. Yet the court held that the defendant was bound by such acknowledgment or acceptance of service, even though outside the territorial jurisdiction of the court to which it is returnable. In the early case of *Dunn v. Dunn* (4 Paige, 430), Chancellor Walworth said: "In all cases where the court has jurisdiction over the subject-matter of the suit, if the defendant who is beyond the limits of the State thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him at the place where he resides or is found, he cannot afterwards object to the regularity of the proceedings against him, founded on such service." In the case of *Machine Co. v. Marble* (20 Fed. 217) it appeared that the defendant accepted service of the subpoena, "to have the same effect as if duly served on him by a proper officer." It was held that in so accepting service the defendant subjected himself to the jurisdiction of a court sitting in a district of which he was not a resident (see also *Ex parte Schollenberger*, 96 U. S. 369; *Laramore v. Chastian*, 25 Ga. 592; *Shaw v. Bank*, 49 Iowa, 179). The case of *Weatherbee v. Weatherbee* (20 Wis. 526) distinctly holds the opposite doctrine. But that case is in conflict with our own holding in *Allured v. Voller*, and an attempt was made to distinguish it in *Keeler v. Keeler* (24 Wis. 522). We think it an entirely safe rule that a party may waive service of process by any act

clearly evidencing an intention to do so. The bare admission of the fact of service beyond the territorial jurisdiction of the court should not be deemed a waiver. But an admission of service so worded as to clearly evidence an intent to waive further service should be held to amount to a waiver. Such intent is clear in the present case."

In *City of Indianapolis v. Navin*, decided by the Supreme Court of Indiana in June, 1897 (47 N. E. R. 525), it was held that a statutory provision of that State, limiting fares of street railway companies to three cents in cities having a population of 100,000 or more, does not violate a provision of the Constitution of Indiana providing that corporations, other than banking corporations, shall not be "created" by special act. It was further held that the statute in question, limiting fares of street railway companies to three cents in cities having a population of 100,000 or more, does not, as being local or special, violate a constitutional provision of Indiana which provides that all laws shall be general when a general law can be made applicable, with certain exceptions, since the passage of such statute, if local or special, constitutes a determination of the legislature that no general law will apply, which determination the court cannot review.

In a proceeding entitled *In re Shipowners' & Merchants' Tugboat Co.*, decided by the United States District Court, N. D., California, in May, 1897 (81 Fed. R. 218), it was held that the master of a tug plying in a busy harbor is not justified in relying absolutely upon the presumption that a buoy, placed by the government to indicate a dangerous obstruction to navigation in such harbor, is in its proper position, but is bound, especially in towing a large ship past the obstruction, to observe the bearing of such buoy, and watch for any change in its position, and to be so familiar with the actual location of the obstruction as to be put on his guard by a displacement of the buoy amounting to 200 feet in distance and making a difference of a point and a half in its bearing.

In an action brought by Charles H. Keep and others, owners of a store in the city of Lockport, N. Y., against Maurice G. Walsh and others, to recover the value of a plate-glass window, broken by one of the defendants' clerks with a hand cart, which he had borrowed, without the authority or knowledge of the defendants, for the purpose of moving some of the latter's goods, the court charged the jury that it was necessary to a recovery by the plaintiffs that they should find that the clerk was acting under the instructions of the defendants, or that he was acting independently of any directions previously given, but that his acts became known to the defendants and were approved during the time that he was engaged in the

service, and before he attempted to return the cart. The Fourth Appellate Division has reversed judgment given for the defendants, holding, by Justice Green, that the charge was erroneous. The court says the test of the liability of a master for a negligent act of his servant depends upon the question whether the servant is acting within the scope of his employment, and in the business of the master, and that if the motive which prompted the act and the purpose sought by it are within the scope of the servant's employment and in the business of the master, and are not independent of or outside of his employment, or disconnected with the master's business, the master is liable for the act.

Georgie Petrie, suing by guardian, brought an action against Frederick Williams and others to recover the amount of five promissory notes aggregating \$3,000 belonging to her, which had been delivered to her attorney in settlement of a suit brought on her behalf to recover damages for breach of promise of marriage. She charged that these notes had been converted by Williams and Thomas H. Breen to their own use. Williams, in answer, set up that under an agreement between her and Breen, the latter was to receive as compensation for his services as her attorney in the breach of promise suit one-half the recovery; that Breen was authorized to make sales of the notes in question, and that Williams had purchased certain of the notes in good faith, and for value before maturity, and that before the commencement of the action Breen had paid plaintiff the full sum to which she was entitled. The plaintiff had expended all the money which she had thus received, and then disaffirmed the contract. The New York Court of Appeals has affirmed judgment in favor of the plaintiff, on the opinion below, holding that an executory contract relating to the purchase of property of an infant may be avoided by the infant during her infancy; that if Williams did not act in good faith in obtaining the money on such notes, by means of their discount, he was not entitled by way of equitable offset to more than the attorney had a right to hand over to the infant, or more than the attorney would have a right to be allowed were he the general guardian of the infant. On the first trial of the case judgment for the plaintiff was affirmed as to Breen and reversed as to Williams. Pending the second appeal Breen died.

The case of *City of St. Louis v. F. Meyrose Lamp Manuf. Co.* (41 S. W. Rep. 244), recently decided by the Supreme Court of Missouri, illustrates the power of municipalities in the matter of passage of ordinances regulating avocations. The holding of the court was that an ordinance prohibiting the owners of steam boilers from employing as engineer any person who has not first

obtained a permit from the boiler inspector, or a license from the board of engineers, and providing for the appointment of such officers and for the punishment of violations thereof, are regulations for the public safety, which the city has a right to pass under a charter giving it power to regulate the carrying on of any dangerous business, to make provision for the inspection of steam boilers, to license engineers using such boilers, and to provide for the election or appointment of officers required by the charter or authorized by ordinance.

#### EXAMINATION BEFORE TRIAL.

##### BUSINESS OF CORPORATION AFFECTED BY A PUBLIC USE.

NEW YORK SUPREME COURT — APPELLATE DIVISION — FIRST DEPARTMENT.

June, 1897.

Present: Hons. Charles H. Van Brunt, P. J.; William Rumsey, Pardon C. Williams, George L. Ingraham, Alton B. Parker, JJ.

SIMON STERN, Appellant, v. THE METROPOLITAN TELEPHONE & TELEGRAPH COMPANY, Respondent.

In an action against a telephone and telegraph company to enjoin it from removing the telephone instrument in plaintiff's office, and require it to perform customary telephone service for \$150 a year, or for such sum as constitutes a reasonable compensation, the complaint alleged that plaintiff being a subscriber of defendant, the latter, under pretense of furnishing a new instrument, demanded that plaintiff pay a higher rate per annum than theretofore, and threatened to discontinue telephone service unless he would make such new contract; that defendant's business is affected by a public use, and that the sum of \$150 per annum adequately remunerates defendant; and that any additional charge would be extortionate, unreasonable and illegal. The answer put in issue, among other allegations of the complaint, the alleged unjust, unreasonable and unlawful character of the proposed increased charges. A temporary injunction was granted, and, after argument, continued, the court holding that defendant's business was governed by the same rule which obtains in the case of a common carrier which is bound to furnish transportation service to the public for a reasonable charge. *Held*, that plaintiff was entitled to an order to examine officers and books of the defendant before trial, it appearing that such examination is necessary and material in order to enable plaintiff to show upon the trial

whether said amount of \$150 per annum would be a reasonable charge for the defendant's service.

Appeal from an order vacating an order for examination of defendant before trial.

William B. Hornblower for Appellant; James C. Carter and Melville Egleston for Respondent.

PARKER, J. — The order vacated by the order appealed from directed the president, secretary and treasurer of the defendant to appear before a referee, appointed to take their testimony for use upon the trial of this action, and required them at the same time to produce before such referee for inspection certain of defendant's books.

The statute expressly authorizes the court to make such an order. Subdivision 7, section 872, of the Code of Civil Procedure is in part as follows: "And if the party sought to be examined is a corporation, the affidavit shall state the name of the officers or directors thereof, or any of them, whose testimony is necessary and material; or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers."

The purpose of the statute is not to require an examination merely because a party to the action desires it. It will not be ordered where the object aimed at is the annoyance of the opposite party; or where the design is to ascertain what evidence the other party intends to produce on the trial, nor will what is termed a fishing excursion be tolerated. It must appear in the first place that the party in good faith intends to use the testimony which he asks to take upon the trial of the action, and the test which must be applied in determining whether he is entitled to the examination and the production of books and papers is furnished by the statute, which provides that the testimony must be "necessary and material."

We must inquire, therefore, whether the affidavits used on the motion, if subjected to this test, will support the order vacated. The action was commenced on the 31st of January, 1895, and was brought to enjoin the defendant from removing the telephone instrument in plaintiff's office, and to require the defendant to perform telephone services to the plaintiff in the customary manner in which it had performed such services for others, for the sum of \$150 a year, or for such sum as constitutes a reasonable, just and adequate compensation for this service.

It is alleged in the complaint, in substance, that plaintiff was a subscriber of the defendant, and of its predecessor, from some time prior to the year 1891 down to about the time of the commencement of the action; that during such time the plaintiff paid per year for such service sums

varying from \$120 to \$180 per year; that under the pretense of furnishing a new instrument, the defendant demanded that the plaintiff pay the sum of \$240 per year, and threatened that unless he would make a new contract for that sum it would discontinue the service and deprive him entirely of the means of communication by telephone.

The complaint also alleged that defendant's business is affected by a public use in its nature and essence, a monopoly, and in prosecuting the same it uses public highways and public and private buildings, and occupies and uses public streets. That it is a common carrier for hire of oral and written messages, and as such common carrier is under contract, implied by law, to furnish its service at a fair and reasonable price; that the sum of \$150 adequately remunerates the defendant, the price demanded in excess of such sum, to wit, \$90 per year, constituting an extortionate and unreasonable exaction.

The answer puts in issue many of the allegations of the complaint, including the one which charges in effect that the compensation demanded for the use of the telephone is unlawful, unjust and illegal; and alleges that the increased charges made are reasonable, just and legal. Upon the complaint and affidavits, a temporary injunction was granted prohibiting the defendant from removing the telephone from the plaintiff's office. Subsequently the motion to continue the injunction was argued upon the moving papers and affidavits submitted in opposition thereto by the defendant, and it resulted in an order continuing the injunction. The court holding that the defendant's business is in itself a public business, affected with a public interest, to be exercised under public control, and governed by the same rule which obtains in the case of a common carrier, which is bound to furnish transportation to the public for a reasonable charge, and that where a proper allegation is made, the court may compel the corporation to furnish transportation upon the payment of the sum which shall be adjudged to constitute reasonable compensation.

While that order has been appealed from, it stands unreversed, and, therefore, in the disposition of this motion, it was the duty of the court at Special Term, as it is the duty of this court, to assume, for the purposes of this motion, that it is the law of the case that the defendant is bound to furnish telephone service to the plaintiff upon the payment of a reasonable compensation therefor. Starting with such assumption, we have no difficulty in reaching the conclusion that the testimony is material which the plaintiff insists he expects to obtain from the officers and books of the company.

Evidence which tends to show the extent of the profit resulting annually from defendant's business is certainly material in an action, the

principal object of which is to determine what constitutes a reasonable compensation for each of the defendant subscribers. The defendant urges that it does not appear that it is necessary that the examination be had before, rather than at the trial, and that such an examination is never held to be necessary after issue joined where it appears that the examination can be had at the trial, except in those cases where fraud is alleged, or some relation of trust or confidence between the parties confers a present right to know the facts to be elicited by the examination.

If the accuracy of defendant's proposition be conceded, and it may be said in passing that it is challenged by several decisions, including *Presbrey v. Public Opinion Company* (6 App. Div. 600), still it would not operate to prevent an examination in this case, for the reason that it does not appear that an examination of the officers of defendant can with certainty be had at the trial. It is shown by the affidavits of the plaintiff that the president of the defendant, Charles F. Cutler, resides at Morristown, in the State of New Jersey, and that William R. Driver, the treasurer, is a resident of Boston, Mass., while the books of the company are located at 18 Cortlandt street, in the city of New York. These principal officers, whose testimony the plaintiff desires to take, may choose not to be present at the trial, and they will not be subject to subpoena if they stay at their several homes. Their examination on commission would not accomplish the plaintiff's purpose, who desires to take their testimony in connection with the books which are in the city of New York.

The plaintiff alleged in his complaint, and attempted to show by his affidavit, that when the defendant charged him and its other customers \$150 per annum, that it received a reasonable compensation for the service, resulting in a fair and liberal profit to the defendant. To this the defendant made answer that the expenses of operation increased in greater proportion than the number of subscribers, and that the expense of putting the company's wires under ground and establishing a metallic circuit had increased the company's outlay, and therefore justified the increase in the charges. The defendant did not attempt to give the figures showing the actual receipts and disbursements of the company, or the amount of these extraordinary expenses, or whether they were charged to construction account and capital account, as distinguished from expense account.

Those facts must have an important bearing upon the issues presented by the pleadings, and, therefore, it is but just that the plaintiff should have an opportunity of presenting the whole truth of the matter upon the trial. No method of accomplishing this result, with certainty, can be

discovered except by an examination before trial, and it was for such a situation that the statute was intended to provide.

Our conclusion is that the order directing the examination of certain of the defendant's offices should not have been vacated.

The order should be reversed, with \$10 costs, and the motion denied, with \$10 costs.

All concur.

#### THE COURT OF APPEALS CHIEF JUDGESHIP.

IN its column, "Everyday Gossip in Politics," the New York Mail and Express, discussing the New York Court of Appeals chief judgeship, has this to say, which will undoubtedly be of interest to lawyers:

"It begins to look as if Dave Hill is to have his own way after all in nominating Court of Appeals Judge Gray for the chief justiceship of that court this fall, and having him indorsed by the Republican State Committee. The fact that Hill was maneuvering for Judge Gray's promotion was first made public in this column about two months ago. For a year past the Democratic leaders have been most bitterly opposed to any suggestion that might come from Hill regarding Democratic affairs, and the plan to have Judge Gray as the candidate of both parties, therefore, was loudly condemned. It was quoted that Senator Ed. Murphy led the opposition and wanted Judge Charles E. Patterson, of Troy, nominated. The friends of Judge Alton B. Parker, of Kingston, insisted that he, too, had been kept 'in hopes' long enough to warrant having the honor bestowed upon him.

"There the matter rested for a couple of weeks, but some influential wires in legal and political circles were put to work in Judge Gray's behalf. The strongest plea that was urged was that the Democrats are in no shape for a State campaign this fall, with its inevitable discussion of the free silver issue. Judge Gray, it was said, was the one Democratic candidate whom Senator Platt would indorse, and to nominate him, therefore, meant to keep a Democrat on the bench for another fourteen years, besides making him chief justice. It was argued and reiterated at the Long Branch conference last Sunday that the Democrats cannot carry the State this fall, and hence to refuse to name Judge Gray would mean to lose the chance of having a chief justice as well as to demoralize the party forces for next year's more important battle. In addition to these political considerations, the advocates of Judge Gray rallied some of the important legal firms in this city to their cause, and I understand now that the situation is far more favorable for Gray, if, indeed, it has not been definitely arranged that he should be nominated.

"Just as the Democratic end of the matter approaches a settlement, there is said to be some difficulty in bringing the Republican State Committee into line for giving this important place away to a Democrat. Public Works Superintendent Aldridge wants Judge Werner, of Rochester, nominated for the walk-over, as he regards it, and the Central New York Republicans want Judge Coxe. County Clerk Jacob Worth, over in Brooklyn, I hear, is also anxious to bring forward a candidate, believing that the Republicans should hold the chief justiceship, and also that nothing should be done by Republicans to help the Democratic policy of silence on the Chicago platform in this State this year.

"Senator Platt, however, as I understand it, is committed to the policy of indorsing Judge Gray, but I am told that instead of waiting until the new year for Judge Gray to vacate his present place, it is urged by several leaders that he resign in time to permit of the nomination and election of his successor this fall. In that event Judge Werner or Judge Coxe could be named. Judge Gray's resignation, however, would have to be filed by August 4, as the Constitution states that the vacancy shall be filled by appointment by the governor unless created at least ninety days before the next general election."

#### PERSONAL PECULIARITIES OF NOTED ADVOCATES.

**C**ELEBRATED advocates at the bar have often been distinguished by some remarkable peculiarity, trait or habit. Thus, Thomas Addis Emmet, in his exordium, always held a quill pen in one hand and slowly tore the feathers from its sides till all were torn away; he would then drop the pen and enter ardently into his argument, with graceful gestures and an eloquence that enchained all hearts.

Webster was accustomed to place his left hand on a table or desk before him, slightly moving his fingers like a person playing on a musical instrument, until, warmed with his subject, he launched forth his commanding, powerful rhetoric, logic and fascinating arguments.

Reverdy Johnson always began his arguments with his left arm across the small of his back. William Wirt always began his address to the court or jury with his right hand holding a partly opened law book: one end resting on the table before him. Alexander Hamilton's exordiums were always delivered with his left hand inserted in the opening of his vest, standing in an erect, graceful pose, which he changed in happy unison with the changes in his subject. Aaron Burr was perhaps the most graceful, natural and attractive legal orator of his time. He opened his address in a position of great ease and unaffected dignity. As he proceeded there were impressive sweeps of

his left arm and a movement of his head that gave intensity and force to his language. The manner of Rufus Choate was described as follows by one who often saw him at the bar: "He stood erect and quiet, making no gestures, except a slight movement of the right hand from his wrist. This position was unchanged, except when it became necessary to take up a book, consult authority or a legal document. He gradually advanced in warmth of feeling until his gestures became more and more vehement; then the sweep of his arm, the motion of his tremulous hand, the fascination of his eyes and the charm of his language seemed to come spontaneous and irresistible. He was a perfect legal orator."

#### Legal Laughs.

"Here," roared the old judge to the son studying law with him, "you told me you had read this work on evidence and the leaves are not cut."

"Used X-rays," yawned the versatile son, and the judge chuckled with delight as he thought what a lawyer the boy would make.

Attorney (sternly) — "The witness will please state if the prisoner was in the habit of whistling when alone?"

Witness — "I don't know. I was never with the prisoner when he was alone."

"Why do so few women seek admission to the bar, judge?"

"Because they would rather lay down the law than practice it."

First Countryman — "Who be th' gentleman wot's taken the squire's 'ouse, Jim?"

Second Countryman — "'E bean't no gentleman; 'e be a lawyer."

Smith — "Is young Flywedge practicing law?"

William — "I think not. He was called to the bar, but I think he is practicing economy."

Timid Traveler — "Is this a law-abiding community, my friend?"

Reckless Resident — "Why, say, podner, there's more law abidin' in this community than you've any idee of. There's fourteen lawyers, five judges an' six prosecutin' attorneys, ter say nuthin' uv deputy sheriffs and bill collectors, all planted over in that cemetery."

An old lawyer in Paris had instructed his client to weep every time he struck the desk with his hand, but forgot and struck the desk at the wrong moment. She promptly fell to sobbing and crying. "What is the matter with you?" asked the judge. "Well, he told me to cry as often as he struck the table." "Gentlemen of the jury," cried the unabashed lawyer, "let me ask you how you can reconcile the idea of crime in conjunction with such candor and simplicity?"

The judge looked serious and the judge's daughter was properly demure. If there is any one



who knows when to look very quiet and demure it is the judge's daughter.

"Young Bilkins was here last evening," said the judge, and the judge's scowl was something awful to behold as he said it.

"Was he, papa?" asked the judge's daughter.

"Was he?" roared the judge. "Don't you know that he was?"

"Oh, of course I know that he was," admitted the judge's daughter cheerfully, "but you were making a statement and not asking a question, and I have often heard you say that in a trial it wasn't policy to admit anything. 'It is time enough to admit a thing,' I have heard you say, 'after the other side has proved it.' I have entered no denial, you know."

The judge mumbled something about the new woman being a little too smart at times, but finally waived the point and suggested that he had personally seen young Bilkins on the front porch the previous evening.

"Very likely," admitted the judge's daughter calmly. "I am prepared to concede the fact that he was there, so that it is unnecessary for you to introduce the evidence."

The judge himself admits that no one can be more provoking than his daughter at times.

"I not only saw him there," continued the judge with some impressiveness, "but I actually saw him kiss you."

"Yes," said the judge's daughter pleasantly; "George is an awful tease."

"A tease!" cried the judge.

"Oh, he just delights in bothering me," explained the judge's daughter.

"Oh, he does, does he?" inquired the judge sarcastically. "Well, it so happens that I saw you return his kiss."

The judge's daughter laughed merrily.

"The idea of a man who has devoted his life to law not knowing any better than that," she said. "Why, I wasn't returning the kiss he gave me. I was simply replevining the one he had stolen."

Then it was that the judge gave up the unequal strife and retired to his library, talking to himself in italics. — Chicago Post.

### English Notes.

New rules with respect to prison offenses and punishments have been issued. The following offenses committed by male prisoners convicted of felony or sentenced to hard labor will render them liable to corporal punishment: (a) Mutiny or incitement to mutiny; (b) personal violence to any officer or servant of the prison; (c) any act of gross insubordination requiring to be suppressed by extraordinary means. The visiting committee of a prison, or any two of them, may, after inquiry on oath, order corporal punishment to be

inflicted upon a prisoner convicted of felony or sentenced to imprisonment with hard labor or penal servitude who is guilty of any of the offenses mentioned.

A practical victory for the advocates of the system of codifying the statutes is won in New York State, through the action of the body known as the Statutory Revision Commission, says the Law Times. Under the power given to the commission to report revisions of all statutes on various subjects, the commissioners have gone over almost the whole field of statute and common law, and have framed general statutes having short titles, covering all important branches of the law. David Dudley Field and others, who were strongly in favor of the system of codification, prepared an elaborate statute embracing almost every subject of general importance in the law. The code thus prepared was never adopted, although important parts of it were favorably acted upon by one or the other branch of the New York State legislature. Governors vetoed the only measures for general codification which passed both houses of the legislature, and it seemed improbable that codification could become a guiding principle in general legislation in New York State. The Statutory Revision Commission has, however, through a succession of years, reported general statutes which take the place of scattered acts of the legislature, and the whole general body of the law may soon be in such a form that it will be contained in one or two printed volumes. The work has been so quietly done that its importance has been understood by comparatively few lawyers.

A most extraordinary system of blackmail in the Paris courts has just come to light, says the Globe. When it was known to the clerks that a prisoner was not going to be sent for trial their agent would interview him and promise to procure his release for a bribe, which was, of course, supposed to go to the *juge d'instruction*. It seems to have been exceedingly successful, and is a pretty strong example of the great danger of allowing a judicial decision to be known to any one before the prisoner himself.

It is reported that the czar of Russia is going to reform the present judicial system of Siberia. The reform may roughly be described as the transference of the judicial system from the ministry of the interior to the ministry of justice. The superior courts are now held in the capital of each province. Under the new arrangement Siberia will be divided into eight sections, and in each section a permanent assize court will sit, the judges and officials of which will be appointed directly by the minister of justice, and be responsible to him alone. To those who have studied the bureaucratic system now in use in Siberia, the importance of these beneficent changes will be evident.

The Morning Post's Paris correspondent says that the Paris Tribunal has had an unusual case before it recently. In the Champs Elysées Quarter a young woman, Mlle. X., was summarily evicted from her sumptuous apartments by an order of the court. There were charges against her of (1) having kept a parrot that talked too much, (2) having shut her window down with too much noise, and (3) having received ladies whose toilettes were too loud. On the above charges her curtains were torn down and her furniture was ruthlessly thrown out of the flat. A Court of Appeal has ordered her re-establishment in her flat, and an expert has estimated the actual damage to her furniture at about 4,000 francs. This the proprietor has offered to pay, but the young woman is suing for 10,000 francs "*de dommage et intérêt*."

The Times announces the death of Prof. Goldschmidt, of the Berlin University, an eminent authority on commercial law. On the constitution in 1870 of the Supreme Tribunal of Commerce for the North German Confederation, Herr Goldschmidt was appointed one of its members, and continued to occupy that post until his appointment as professor at the Berlin University. Most of his works dealt solely with commercial law, but he was also intrusted by the French Institute with the task of preparing a set of rules for international arbitration.

### Legal Notes of Pertinence.

A Chicago lawyer, according to the Post, of that city, recently had a curious partnership case. A and B were associated in business. They became insolvent, but before any proceedings for winding up the partnership had been begun C, a creditor of A on an individual account, got judgment and sent a constable with an execution. The constable levied on the entire stock, though B was not a debtor to C at all. Under advice from C's lawyer, the constable advertised the partnership interest, the undivided half, and sold it. C bought and then went into a court of equity, secured an accounting, found the assets were insufficient to meet the liabilities, and also that his action had satisfied his own claim against A. Furthermore, he was compelled to occupy A's place in the firm pending a legal winding up of the firm's affairs.

Ben Butler, in a case in the Massachusetts Supreme Court, involving damages for fatal injury—Senator Hoar being on the other side—quoted Job: "All that a man hath he will give for his life." "That," said Mr. Hoar, "was a plea of the devil in a motion for a new trial, and I don't think the court will be more impressed by it on account of its modern indorsement."

In North Carolina it has been decided that a private citizen who personates an ordained minister, and, with the consent of the parties, solemnizes a marriage, is not guilty of any criminal offense either at common law or under the statutes. (State v. Brown, 119 N. Car. 825.)

Judge Hanna, of the Orphans' Court, in Philadelphia, has decided that the new Pennsylvania statute imposing a direct inheritance tax of two per cent. upon personal property in excess of \$5,000 was unconstitutional and void. The Constitution of Pennsylvania provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; that the general assembly may exempt public property, places of religious worship, places of burial, and institutions of purely public charity; and that all laws exempting property from taxation other than the property above enumerated, shall be void." The court holds that this last provision is violated by the direct inheritance tax law in so far as it assumes to exempt property from taxation thereunder to the extent of \$5,000 in the case of each decedent.

An important patent litigation, involving the right of the British government to manufacture the explosive compound known as cordite, has just been terminated by a decision of the Court of Appeals in favor of the government. The principal complainant in the suit was the well-known inventor, Hiram Stevens Maxim, while the defendant was Sir William Anderson, director-general of the ordnance factories at Woolwich. Mr. Maxim has a patent, taken out in 1889, for an explosive powder consisting of 2 to 5 per cent. of castor oil, 10 to 16 per cent. of nitro-glycerine, and the remainder of gun cotton. He claimed that this patent was infringed by the defendant in making cordite for the army. Cordite was discovered and made first by Sir Frederick Abel and Prof. Dewar, wholly independent of Mr. Maxim's invention, and is composed of vaseline 5 per cent.; gun cotton, 37 per cent.; and nitro-glycerine, 58 per cent. It will be observed that gun cotton is the principal ingredient of Mr. Maxim's explosive, while nitro-glycerine is the principal ingredient of cordite. Mr. Maxim insisted that the proportions specified in his patent were not an essential or substantial part of his invention, and that he was entitled to protection against the manufacture by others of any explosive compound made up of the same substances; and he claimed that the vaseline in cordite was substantially the same thing as the castor oil in his explosive. The Court of Appeals, however, was against him on both propositions, holding that the proportionate quantities of the ingredients constituted an essential feature of his patent, and that vaseline, being a mineral oil, was chemically different from castor oil, a vegetable product.

### Notes of Recent American Decisions.

**Accident Insurance — Policy — Application — Disability Benefits — "Average Weekly Earnings."** — The application for accident insurance, which was made a part of the policy, provided: "I am aware and agree that I shall not be entitled, from my aggregate insurance, to a sum for disabling injuries or sickness during disability in excess of my ordinary salary or wages, or average weekly earnings during the year immediately preceding the beginning of disability." Plaintiff testified that his income had averaged \$20 per week for the year preceding the date of the accident in question, derived from his occupation as insurance agent. The whole contention of the company was that the general statement of plaintiff's income was not sufficient as proof to call for a submission of the case to the jury. Under the terms of the policy plaintiff would have been entitled to \$25 per week if his income had been as much or more. *Held*, that the policy not prescribing the form of proof as to insured's income, which must needs be resorted to in support of the cause of action, it would have been error to withhold the case from the jury upon the ground of insufficiency of evidence in this respect, when the plaintiff's testimony directly supported the fact at issue — that testimony, if in any way objectionable, having been admitted to the record without challenge. (Judgment for plaintiff below. Here affirmed against company.) (*Howard v. St. Lawrence Life Ass'n of City of New York* [N. Y. S. C., App. Div.], 45 New York Supplement [May 27, 1897], 110.)

**Attachment — Jurisdiction — Service.** — It is indispensable, to give a court jurisdiction in attachment proceedings, that there should be personal service of the summons in the action upon the defendant, or that the order of attachment be levied upon property of the defendant, or that an order of garnishment should be served upon a garnishee having property in his possession belonging to the defendant, or who is indebted to such defendant. Where there has been no personal service in an action, and no property of the defendant seized under an attachment, and no property or credits belonging to the defendant reached by an order of garnishment, the court has acquired no jurisdiction, there being neither a service upon the defendant nor any seizure of his property, there is nothing for the jurisdiction to rest upon, and any proceedings taken in the cause are *coram non judice* and void, and the cause must be dismissed. (*Central Loan & Trust Co. v. Campbell Commission Co.* [Okla.], 49 Pac. Rep. 48.)

**Benevolent Associations — Action by Members.** — The general laws of a mutual benefit society, which, by the use of permissive words, only

allow an appeal from the decision of an officer of the order, before whom the claimant of a death or disability benefit is required in the first instance to prosecute his claim, but which do not obligate him to appeal from an adverse decision as a condition precedent to an action upon his certificate or policy of insurance, may, in the event of such decision, maintain an action in the courts for the recovery of his loss. (*Supreme Lodge of Order of Select Friends v. Dey* [Kan.], 49 Pac. Rep. 74.)

**Contracts — Interpretation — Receivers.** — The defendant appointed the plaintiff its agent for the State of Massachusetts for the term of five years, for which he was to receive a specified percentage of the business he procured in that State. The company, on the 23d of August, 1894, was declared to be insolvent by a decree of the Court of Chancery of this State, a receiver appointed, and the charter of the company declared to be forfeited and void. *Held*, that an action cannot be maintained by the plaintiff to recover damages from the receiver, because the plaintiff was not continued after the date in such employment as agent under the contract. (*United States Credit System Co. v. Rosenbaum* [N. J.], 37 Atl. Rep. 595.)

**Fire Insurance — Policy — Limitation of Action — Forfeiture.** — An insurance company duly insured certain property, which was afterwards damaged by fire, and the extent of such damage was adjusted by it and the insured, but there was no adjustment by the parties of any liability on the part of the company, and no promise to pay the damage. The policy provided that no suit or action thereon should be sustained unless commenced within twelve months next after the fire. More than a year elapsed before an action was brought by the insured. *Held*, that the mere adjustment of the amount of the loss by the parties was not of itself an admission on the part of the company that any liability existed against it on such policy, or raised an implied promise to pay it, and that the action was barred by the provision of the policy that no suit should be maintained unless commenced within twelve months next after the fire. *Canty, J.*, dissenting. (Judgment in favor of the stockholders of the insolvent company below. Here affirmed against the insured, who intervened and took the appeal.) (*Wilmington et al. v. St. Paul German Ins. Co. et al.; Steffen, Intervener* [Minn. S. C.], 71 Northwestern Reporter [June 12, 1897], 271.)

**Mortgage — Subrogation.** — One who held title to land under a recorded deed, in trust for a wife, with power of disposal on her appointment during the life of her husband only, after the husband's death executed to B a deed of the land, in which the wife joined. As part consideration for the land, B paid a mortgage thereon. B and his grantees held peaceable and undisturbed possession over 20 years. *Held*, that such grantees, on

discovering the defect in the title resulting from the trustee's want of power to convey, were not entitled to be subrogated to the rights of the mortgagee, or other equitable relief. (*McDonald v. Quick* [Mo.], 41 S. W. Rep. 208.)

**Vendor's Liens — Substitution to Rights of Vendor by Agreement.** — Appellant having paid for the vendee a certain part of the purchase-price of a tract of land by conveying other land to the vendor, under an agreement between all the parties that appellant, in order to secure the repayment of that amount, was to have the same lien upon the land conveyed to the vendee that the vendor would have had if that part of the purchase-price had not been paid, that agreement is binding, and appellant is entitled to enforce the lien, the transaction being in effect an assignment by the vendor to appellant of a certain part of his claim against the vendee. (*Reinert v. Reinert* [Ky. Ct. of App.], Ky. L. Rep., Vol. xix, No. 1, p. 40.)

#### AN INCIDENT IN THE CAREER OF WM. H. SEWARD.

WHEN William H. Seward retired from the executive chair of the State, December 31, 1842, he resumed the practice of the law, forming a copartnership with Christopher Morgan, a lawyer of high standing, ex-member of congress and ex-secretary of state, and the late Justice Samuel Blatchford, of the United States Supreme Court, then a brilliant young lawyer, who had been a student in Seward's office and his private secretary when governor. The firm at once took a high position. Seward conducted its business in the Federal and State courts, ranking among the most distinguished lawyers of his time. His career was marked by many interesting and amusing incidents, among which was the following, related to us by a distinguished lawyer, who was then in his boyhood, and himself witnessed it:

Not far from Auburn there lived a wealthy farmer named Moses Dixon. He was not only rich in lands, but his bank account was plethoric, and he was in the habit of loaning money, becoming famous for his successful artifices in avoiding the pains and penalties of his frequent infractions of the laws governing the rates of interest in those days. He was often involved in lawsuits growing out of disputes in regard to the collection of obligations tainted with usury.

On one occasion he brought an action on a bond calling for the payment of \$3,000 and interest. The defense of usury was interposed. Mr. Seward was his counsel. The trial took place at Auburn. It was exciting, turbulent and protracted. The jury gave Dixon a verdict for the amount of the bond and interest. He was greatly elated, for his love of money was a passion with him. The moment the verdict was recorded he

hastily approached Mr. Seward, thanking him in the warmest terms.

"Now," he said, "you want your pay, and you shall have it."

"Not now," Mr. Dixon. "Call at my office some time hereafter, and we will arrange matters there," said Seward.

"I want to pay you now, and I shall; so name your charge and take your money. Short accounts make long friendships," said Dixon.

Mr. Seward again objected to taking payment then. But Dixon would not listen to him, and asked him peremptorily to name his charge. Seeing there was no escape from the demands of his client, after reflecting a short time he named his charge. The amount took Dixon by surprise. It was almost double what he had expected. It touched his cupidity as with a hot iron; and yet the charge was far from being exorbitant; indeed, it was a reasonable charge under all the circumstances.

"Mr. Seward, you have done well, very well, by me; now, don't kick it all over by such an enormous charge as that is," said Dixon.

"My charge is very reasonable, indeed. I have had much trouble with the case, and have not charged what my services were really worth."

"Won't you take any less?"

"No, sir; not a farthing less."

"Well, sir, you shall have it; but it's too much, too much. Yes, you shall have it."

Taking out a large pocketbook, well loaded with bank notes, Dixon counted out the amount and handed it to Seward. As he did this he turned from the table at which he sat, leaving his pocketbook on it.

"Send me a receipt by mail, and that will end this matter," he said, as he reached for his pocketbook; but to his consternation it was gone. Court adjourned for the day after the conclusion of the Dixon trial. The room was crowded with people, among whom was a sneak thief, who successfully made his escape with the well-filled wallet. The robbery, of course, created great excitement in the court-room, and efforts were made to detect the thief, but they were fruitless.

As for Dixon, his excitement at first was intense. He called on the sheriff to arrest the scoundrel at once. "He has got over five hundred dollars of my money. I must have it back!" he exclaimed; but at length being convinced that his money was hopelessly gone, he took the matter more philosophically. "I am a victim of unlucky circumstances to-day," he remarked. "I have been caught between a lawyer and a thief, and between them they have got all my money. I am sorry now I didn't give it all to Mr. Seward."

This shows that the best way to deal with a lawyer in settling his bills is to give him all the money you have, and stop the fellow that practices without a license from taking a share of it.

### Notes of Recent English Decisions.

Shipping — Charter-Party — Exceptions — Excepted Perils — Causes Operating Before Time of Shipment. — Commercial action tried by Mathew, J. The action was brought by the owners of the ship "Cundall" against the defendants, the charterers, for not supplying cargo in accordance with the terms of the charter-party. The charter-party was entered into on the 22nd of January, 1896, and clause 4 provided: " \* \* \* Floods, stoppages of trains, miners and workmen, accidents to railways, and to mines or piers from which the ore is to be shipped, bad weather, quarantine, and all and every other dangers of the seas, rivers, and navigation of whatever nature or kind so ever, and all unavoidable accidents and all causes beyond the control of the shippers, consignees, or charterer, which may prevent or delay the loading or discharging during the said voyage always mutually excepted." Clause 9 (as to demurrage) provided that the "cargo was to be supplied at the rate of 350 tons per working day;" and the last clause was: "Charterers guarantee a berth at Poti on arrival, otherwise lay days to count." By the charter-party the vessel was to proceed to Poti, in the Black Sea, and load there a cargo for Middlesbrough or Rotterdam. The vessel arrived at Poti on the 6th of February, and on the 7th of February she was placed in her berth. Her berth was alongside the quay, upon which there were rails, by which the cargo was intended to be brought to the ship's side, and the operation of loading would simply be from the trucks and the rails into the vessel's hold. In consequence of a storm, a portion of the pier and the rails upon it had been carried away, and there was a gap cutting off all communication with that part of the pier where the ship was berthed and the place where the ore was ordinarily stored, and until the 23d of February, when the pier and the rails were repaired, it was not disputed that the charterers were exonerated from shipping cargo, as the exceptions applied. After the 24th of February, and down to the 8th of March, when the vessel left, no cargo was supplied to her, and the learned judge held that no cargo could be supplied by reason of the difficulty of railway communication with the ship. By the ordinary course of business, which the judge found was well known to the plaintiffs and the defendants when they entered into the charter-party, the ore was brought down to Poti from the mines by lines of railway when it was intended for shipment, and not before, and was placed in a convenient place for the subsequent loading of the ship. Means of communication with the mines by these lines was, during the time in question, stopped by storms and floods and subsequent subsidence of part of the lines. The vessel waited until the 8th of March, when she left, having no reasonable prospect of getting any cargo. The present action was then brought.

It was contended by the defendants, the charterers, that they were protected under clause 4 by reason of the communication with the mines being cut off. It was contended for the plaintiffs that the exceptions did not refer to anything prior to the date of shipment, and that the charterers would only be exonerated by the existence of any one of the causes at the time when the cargo was to be delivered on board. The question now was, whether the exceptions covered causes -- in this case the breakdown of the railway communication with the mines -- operating before the cargo was brought to the place of shipment, or was to be confined to causes at the place of shipment. *Held* (giving judgment for defendants), that the exceptions in clause 4 covered and extended to the interruption of the railway communication between the mines and the place of shipment, and that the exceptions therefore protected the charterers. (*Furness v. Forwood* [Q. B. Div.], *Law Times Adv. Rep.*, July 24, 1897.)

### New Books and New Editions.

Crawford's Annotated Negotiable Instruments Law, edited by John J. Crawford, of the New York Bar, by whom the statute was drawn. Published by Baker, Voorhis & Co., New York. 1897.

This work on negotiable instruments is from the pen of Mr. Crawford, who, by reason of his prominence in the drafting of the late statutes on this branch of commercial law, is peculiarly qualified to edit such a book. These laws, annotated in this work, have, in addition to the laws of New York State, also been adopted into those of Connecticut, Florida and Colorado, and it is very likely that before long will be generally adopted by the other States of the Union. These laws are the result of a conference of the commissioners on uniformity of laws held in 1895. Their work was further enhanced in value by the suggestions of many jurists and scholars on both sides of the Atlantic, to whom the laws, together with notes, were submitted. The bar of this country, and particularly of New York State, is indebted to Mr. Crawford for the masterly way in which he has edited a work long desired by lawyers. At last order has been brought out of the chaos of that uncertain law known as the law of bills and notes. The author, by his citation of apt cases and decisions up to date, has made it possible for client and counsel to know their status as regards negotiable paper. The sections have been collated and the notes systematically and concisely appended. The treatment of the subject indicates great knowledge of the work in hand. It is a book which should not only be found on the shelf of the legal practitioner, but as well in the hands of every business man who would know the existing law of bills and notes.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, AUGUST 21, 1897.

### Current Topics.

A UNIQUE and decidedly spectacular feature of the Luetgert murder case, which is giving Chicagoans something to talk about, was the experiment made a few days ago, under the direction of the State's prosecuting attorney, in the melting of a human body. The theory of the prosecution was that Luetgert, who was a manufacturer of sausages, placed the body of his wife in a solution of crude potash and cold water, raised the solution to the boiling point, and thus destroyed all traces of his alleged crime. A few small remnants of human bone were said to have been found in a vat in the sausage factory. The prosecution had succeeded in weaving a very strong net of circumstantial evidence about the accused, but the fact that human remains could be thus destroyed was, in some quarters, disputed. In order to demonstrate such possibility, and thus clinch its case, the prosecution obtained a cadaver and, after cutting it up, subjected it to the action of the potash solution. In a short time the flesh had completely disappeared, and while the osseous tissue did not, of course, melt so quickly, at the end of two hours, according to the newspaper reports of the experiment, nothing solid remained in the fluid except a few portions of bone. The attorneys for the State regard the experiment as entirely successful, believing that the result will go far toward removing the last loophole of escape for the prisoner. The incident seems

to afford another proof that the law is nothing if not progressive. The grewsome nature of this particular experiment, while it may cause a great many good people to shudder as they read of it, was undoubtedly justified from the standpoint of the prosecution's theory of the case, which, if it be true, stamps the perpetrator as one of the coolest and most calculating villains in the records of crime.

At the June term of the New Jersey Court of Errors and Appeals, decisions were announced on the 28th of June last in fifty-one cases. There were thirty-eight decrees of affirmance, eleven reversals, and two were interlocutory orders of the court in cases before it. In these thirty-eight cases of affirmance, opinions were delivered in seventeen cases. In twenty-one the announcement was: "Affirmed for the reasons given by the court below." The 10th section of the act relative to the Court of Errors and Appeals is in the following words: "On pronouncing any judgment, order or decree, either of affirmance or reversal, the opinion of this court, containing the reasons for such affirmance or reversal, shall be delivered in writing." On this state of facts a writer in the New Jersey Law Journal asks the question whether the intent of this statute is obeyed when the court says, or even when it writes, "for the reasons given by the court below?" and goes on to say: "The object of the act would seem to be that all suitors and all men might know that the court had studied and carefully considered the case. There might have been another motive for the act, to wit, that the law as a science would be benefited by the publication of the opinions of the highest court. There seems to be no statute requiring opinions to be delivered in writing by any other court than the Court of Appeals and the Court of Chancery. If this be so, then the effect of the practice now becoming so frequent is to make opinions not required the adjudicated law of the land, while they are given by inferior jurisdictions. Necessity might excuse occasional departure from the statute. But there is no necessity for a habit

Observe how little work, excepting hearing causes, may have been done by the judges deciding these fifty causes. Two motives should govern judges: first and foremost, to adjudicate rightly; next, to satisfy the community that they have used their best effort to do so." This criticism, we think, is altogether unwarranted. The Court of Errors and Appeals, in ordering affirmance or reversal "for the reasons given by the court below," it seems to us, fully complies with the spirit of the statute referred to. In assigning as the reasons for its action those of the lower court, it, in effect, adopts those reasons as its own. Just what would be gained by a repetition of them by the highest court is difficult to see, except perhaps the swelling of the volumes of State Reports; and in view of the unmistakable demand throughout the country for more condensation and less verbiage in legal reporting, the course of the New Jersey tribunal in that direction is likely to meet with general approval rather than criticism or condemnation.

A new law regulating admissions to the bar in the State of West Virginia has just gone into effect. According to the testimony of those who ought to know, the statute goes into force none too soon; indeed, the lack of reasonable statutory restrictions seems to have caused or permitted a lowering of the standard of the profession, which is to be regretted from every point of view except that of the shyster. The West Virginia Bar, a monthly legal periodical, published at Morgantown, is authority for the statement that the profession in West Virginia has been disgraced by a class of interlopers who could not obtain a standing at any first-class bar in the country. Among these in West Virginia as well as in some adjoining States, the new law has naturally created consternation and stirred up lively opposition, but, thanks to an enlightened public sentiment, to no purpose. The main, if not the only object of the new law is to raise the standard of the profession and thereby protect the public from the imposition of the trickster and pretender, while also protect-

ing the reputable and competent members of the profession from the influx of shysters who are shut out of other States, by higher standards of admission. Of course the aforesaid shysters who don't want any higher standard have had a good deal to say about the hardships of the new law; but the public will take no stock in their prejudiced assertions. It may be added that the new statute is patterned after those in successful operation in other States. It provides for conscientious, thorough and impartial examinations, uniform in their character, and without favoritism to anybody. It puts the responsibility of regulating these examinations upon the Supreme Court, requiring that court to conduct all examinations themselves or appoint a commission of lawyers to do it. The court, for the present, has appointed the law faculty of the University to do it. Happily the question whether the shyster shall supersede the lawyer in West Virginia has been answered in the negative.

In certain parts of the south both public officials and private citizens have a very plain way of speaking. For example, Governor Atkinson, of West Virginia, in remitting a fine which, in addition to an imprisonment of one day, had been imposed upon a man who shot another for alienating the affections of his wife, said, among other things of a similar sort: "The only regret in the matter is that Kimes did not kill Hall. I remit this fine and costs with more pleasure than any word in the English language furnishes me to express. Kimes did what every man would have done under the same circumstances." The expression of such sentiments by an ordinary individual would be bad enough; when uttered by the chief executive of the State, in his official capacity, they become deeply and doubly deplorable. Making all due allowance for the detestable nature of the offense of which this man Kimes was the victim, it would still be difficult to contemplate the attitude and utterances of Governor Atkinson without a feeling that he has disgraced himself and the commonwealth of which he happens to be the

executive head. His language, above quoted, not merely excuses and condones murder, but actually advises it. Crimes such as that to which the governor refers, as well as the other dastardly ones, the prevalence of which in certain sections of the country has led to numerous lynchings, may have no adequate remedy at law, but surely the taking of the law into one's own hands could not possibly prove to be an improvement over the methods and procedure provided by statute. If Governor Atkinson is right, then it follows that we need no courts or statutes. Let every man who has been wronged be his own judge, jury and executioner. Away with such silly farces as courts and trials. The ready revolver, a steady hand and a true aim will do the business with neatness and dispatch, and with practically no expense, for powder and ball are cheap. Civilization is a sham and society a misnomer. These may not be Governor Atkinson's sentiments, but that is the condition of affairs to which his public utterances would logically, if not inevitably, lead. West Virginia needs a new governor, and needs one badly.

New Jersey is now added to the list of States which propose to do something in the matter of codifying laws. The last legislature passed an act which authorized the governor to appoint six commissions, of three each, for that purpose, and Governor Griggs has made the designations as follows:

To codify district court, mechanics and lien laws: William I. Lewis, Edward A. Atwater and James S. Erwin, Jersey City.

To codify statutes relating to crimes and criminal procedure: J. Frank Fort, Newark; Frederick C. Marsh, James S. Erwin, Jersey City.

To codify acts relating to relief of creditors and absconding debtors and all amendments thereto: William H. Corbin, Elizabeth; James E. Howell, Newark, and Frank Bergen, Elizabeth.

To codify statutes concerning conveyances, partition of lands and sale of lands under public statutes or by virtue of any judicial proceedings and statutes regulating

assignments for the benefit of creditors: Frederic Adams, Newark; William Pennington and Eugene Stevenson, Paterson.

To codify statutes relating to townships: Alfred Skinner, Newark; William M. Lanning, Trenton; James J. Bergen, Somerville.

To codify statutes relating to infants, orphan's courts, powers and duties of the ordinary and surrogates and statutes concerning executors and administrators: George T. Parrot, Francis J. Swayze, Paterson, and Flavel McGee, Jersey City.

Each is an individual commission, the respective members of which have, presumably, been chosen with reference to their special fitness for the work to be performed. According to the provisions of the law, each commission shall codify such part of the statutes as the governor shall direct. The several commissions may employ such clerical assistance as they consider necessary, at a moderate compensation, but are to receive no remuneration themselves. On the opening day of the next session their report will be filed and submitted to the legislature for approval. The feature which provides for the gratuitous service of the commissioners seems to be of doubtful propriety, inasmuch as work which is worth doing at all is worth paying for, and it is hardly the fair thing to expect such lawyers as are competent to perform the difficult work of codification to sacrifice so much of their time and income as is necessary for that purpose. However, the results will demonstrate the wisdom or unwisdom of the plan.

The ordinance passed by the Common Council of the city of Chicago, imposing a tax upon owners of bicycles has been, in effect, declared null and void by the decision of Judge Tuley, granting the injunction asked for against the enforcement of the ordinance. Two principal questions were involved, viz.: Was the city attempting to collect a tax or a license fee? and, if the former, was the tax imposed in accordance with the constitutional provisions regulating taxation. Judge Tuley found that in no proper sense did the ordinance provide for a license; the power to license being limited



by the city's charter to "occupations," there was clearly no warrant for extending it by implication to the imposing of licenses on personal property, not used as a means of livelihood. In Judge Tuley's view, the exaction was an attempt to raise revenue for street improvement by imposing a tax in the guise of a license fee, and so far as it concerned vehicles used simply for pleasure, could not be sustained. The court said, in effect, that the streets are controlled by the State, the city being merely given by legislation the privilege to regulate their use under strict limitations. Again, regarding the exaction as a tax, Judge Tuley found it repugnant to every principle which the Constitution lays down with reference to taxation. It was not imposed according to assessed valuation; it was not uniform in its operation; it violated the rule of equality of burdens; and, finally, it provided for double taxation, because all pleasure vehicles are required to be assessed for general taxation, and if the officials did their duty the bicycles of the residents of the city had been duly assessed. These reasons seem to be conclusive, though it is probable the city authorities will insist that the higher courts pass upon the ordinance in question. Meanwhile Chicago's army of wheelmen, who fought the proposed tax with great vigor, are rejoicing in the victory they have won.

Has a railway company the right to exclude from its stations all persons who are not there for the purpose of traveling? This question has just been decided in the affirmative by the English House of Lords in *The Perth General Station Committee v. Ross*. The respondent, a hotel keeper at Perth, claimed the right to send his "boots" to the station to speed the parting and welcome the coming guests. To this the station authorities objected, except under certain conditions prescribed by them, and when the respondent persisted in sending "boots," the committee applied for an interdict. According to the *Solicitor's Journal*, it was not a question of "touting" for guests, for the Court of Session found that "boots"

only visited the station for the purpose of accompanying passengers who were leaving the hotel, or of meeting passengers who had intimated that they were to arrive at the hotel, and they found, further, that the practice had never caused any obstruction or inconvenience at the station. In the result the interdict was refused. The *Journal* adds that the question of obstruction does not appear to be relevant, and although hotels may be a necessary adjunct to railway traveling, yet a hotel-keeper's business is quite distinct from that of the railway company, and neither the hotel-keeper nor his servants can, as such, have any claim to admission to the station for the purpose of their business. The House of Lords, accordingly, reversed the decision of the Court of Session and declared that the respondent and his servants had no right to use the station except with the leave of the appellants and under such conditions as they might prescribe.

### Notes of Cases.

In *West Jersey R. R. Co. v. Abbott*, the New Jersey Court of Errors and Appeals, in an opinion by Magie, C. J., handed down July 1, 1897, decided that when the legislature has authorized railroad companies to use the dangerous element, fire, for engendering steam for the propulsion of trains, and has enacted regulations in respect to the precautions to be taken to prevent the escape of fire from the smokestacks of their engines, *held*, that such legislative regulations define and limit the duty of the companies in respect to the precautions required against such escape of fire. It was held further that it is error to permit a jury to determine whether or not, on account of excessive drought rendering the communication of fire more easy, it was the duty of such companies to take such care as would be sufficient to prevent the escape of any fire from the smokestacks of their engines.

The Supreme Court of Appeals of Virginia recently had the following case before it for consideration: Mr. Rosenbaum, who was a dry goods dealer, and Mr. Seddon, who was a broker, were traveling together on a train between New York and Richmond, when the stocks of the Richmond and Danville Railway became the topic of conversation. The conversation led to a discussion, and the discussion to a deal involving 256 shares of the stock of the road, which Mr. Rosenbaum

agreed to deliver to Mr. Seddon. A written agreement was made, but no consideration passed. The stock took a sudden jump upward, and Mr. Seddon asked Mr. Rosenbaum to live up to his contract. The latter said it was all a joke, and refused to deliver the stock. Mr. Seddon brought suit in the Circuit Court, and was beaten under the ruling of the court sustaining the contention of Mr. Rosenbaum that the debt was a gambling debt, and the contract was without consideration and void. The Supreme Court reversed the decision of the lower court, and ordered a new trial, in which Mr. Seddon was victorious. The Supreme Court of Appeals has just affirmed the decision.

In *Manchester Fire Assur. Co. v. Redfield*, decided by the Supreme Court of Minnesota in June, 1897 (71 N. W. R. 709), an action on a bond conditioned, among other things, that the principal, as agent for the plaintiff, would pay over all moneys received by him as such agent monthly, the court had charged the jury, in substance, that if the agent failed at any time to comply with the conditions of the bond, in paying over monthly the moneys which he had collected, and the plaintiff had notice, actual or constructive, of the fact, it was its duty to revoke the agent's authority, and if it permitted him to make further collections after such notice, the sureties on the bond would not be liable therefor. It was held that this did not correctly state the measure of plaintiff's duties to the sureties, because it would apply to any default, whether the result of dishonesty or of mere negligence, oversight or accident. It was further held that in a case of a continuing suretyship for the faithful discharge of duties by his servant, the master owes the sureties no absolute and active duty, upon the discovery of mere breaches of contract obligations by the servant, to notify the sureties of the breach.

Arthur A. Hodges employed Lyman Bloomingdale to obtain a contract from F. F. Proctor to do certain decorating work upon the *café* and passages of the theatre known as Proctor's Pleasure Palace, in New York city, and agreed to pay him \$600 if he procured it. Bloomingdale introduced Hodges, and got the contract for him. When Bloomingdale sued for the brokerage, Hodges claimed that the relations of the plaintiff to Proctor were of a confidential character, and that exacting \$600 brokerage was a fraud on him. The Appellate Term of the Supreme Court, First Department, has affirmed judgment given below for the plaintiff, holding, by Justice McAdam, that such defense was not available to the defendant; that fraud was an individual and personal thing, and it was for Proctor to determine whether he would avail himself of his right of action.

"The defendant saw no impropriety," Justice McAdam said, "in the arrangement with the Bloomingdale Brothers until they had received their \$6,000 for the work, and then they determined that it would be doing a wrong to Proctor to pay the brokerage promised. If they had followed up this determination by paying the \$600 demanded to Proctor, and justified it by the plea that it of right belonged to him, there might be some degree of candor partaking of equity, if nothing more, in the defense. They did not do that, but concluded to keep the \$600 to themselves, and use the alleged fraud on Proctor as the only feasible mode open to them for a justification of that course. This will not do."

In *Chesapeake & Ohio Ry. Co. v. Lang's Adm'r*, decided by the Kentucky Court of Appeals (Ky. L. Rep. July 15, 1897), it was held that a passenger on a crowded excursion train is not guilty of contributory negligence in standing on the platform, there being only standing room inside the cars, and, therefore, there may be a recovery for his death resulting from a collision caused by the negligence of the railroad company, although he might not have been killed if he had been inside the car. The court said, in part: "While the doctrine is that where a passenger voluntarily and unnecessarily places himself in a position of danger, and his own neglect causes the injury, and but for his folly the injury would not have happened, no recovery can be had, it has but little, if any, application to the facts of this case. It is not *per se* negligence to be upon the platform, says Mr. Beach in his work on Contributory Neglect, and in cases where by cheap rates persons are invited upon and their passage accepted to travel on these excursion trains, it is no defense on the part of company to say that you might have stood in the car and not on the platform and, therefore, no responsibility exists. The tender was in front of the engine, and the view of the approach to the switch obstructed by it, and if not it is manifest that with any sort of care this danger could have been avoided. The jury, however, was told that if from the testimony there was room in any car for the intestate, and that he could have entered the same, and that he remained on the platform where he was injured without the knowledge of the conductor, or against his objections, or that of any agent of the company, the verdict should be for the defendant. This instruction was more favorable to the defense than it should have been upon the facts of the record. The entire testimony shows the cars were greatly crowded, young ladies seated upon the coal box, with the platform filled with passengers, so much so as to prevent those on the ground from entering the cars, and where such inducements are given by which cars

are filled inside and out with passengers, it is doubtful whether the position of the passenger on the train, unless so reckless as to knowingly place himself in imminent peril, should be held to be contributory neglect."

Mrs. Blanche Haul de Logerot, who, in 1891, was the owner of the building at Eighteenth street and Fifth avenue, New York city, known as "Hotel de Logerot," jointly with her husband, Richard de Logerot, entered into an agreement with Ludwig Baumann to pay him \$4,500 for furnishing the three upper floors of 124 Fifth avenue, as annexed to Hotel de Logerot, the title to the furniture to remain in the seller until paid for. In August, 1893, Richard de Logerot made a general assignment for creditors to George G. Guion of all his property, including the furniture referred to. This furniture was afterward fully paid for, but Mr. Baumann subsequently recovered judgments aggregating about \$7,000 against Mrs. de Logerot, upon promissory notes given by her for other furniture, and executions were levied upon this furniture at 124 Fifth avenue. Sidney J. Baumann became the purchaser at the execution sale. Subsequently, under an agreement between the parties to an action by Sidney J. Baumann against Assignee Guion, to have it adjudged to whom the property belonged, it was actually sold, and the proceeds, amounting to \$3,652, were deposited in a trust company. Justice Chase, before whom the action was tried, has now decided that Mr. and Mrs. de Logerot owned this property as tenants in common; that the husband had no right to sell the wife's interest by virtue of his being an owner with her, and his possession and that of his assignee after the assignment did not create any presumption of exclusive ownership in them. The sale under the execution vested in the plaintiff the right, title and interest of Mrs. de Logerot, and the plaintiff and defendant thus became equal owners thereof as tenants in common. As the property was not in its nature separable, Justice Chase held that this action in equity was the proper remedy, and the fact that the property at the beginning of the action was in the exclusive possession of defendant would not defeat the action. Judgment was given for the plaintiff that the property and its proceeds belonged to the parties to the action in equal shares, and the fund was to be divided between them.

How the Mix-Up Began. — "It was thisa way, jedge. Ye see, I doled de cards, and Jib Brown he had a pah of aces and a pah o' kings." "What did you have?" "Three aces, jedge, and ——" "What did Jib do?" "Jib, he drew." "What did he draw?" "He drew a razzar, jedge!" — *Cleveland Plain Dealer*.

#### DUTY AND LIABILITY OF ATTORNEY TO CLIENT.

THE relation of attorney and client is one of mutual trust, confidence and good will, and the fidelity of the attorney to the client involves the most difficult questions in the consideration of this subject. That he is responsible for the want of ordinary skill, care and reasonable diligence is well understood, (1) as is also the fact that the skill required has reference to the character of the business undertaken, (2) but it is extremely difficult to fix upon any rule which shall define negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the average degree of skill and diligence could be determined, it would furnish the true rule. (3) "God for bid that it should be imagined that an attorney or counsel, or even a judge, is bound to know all the law," said Lord Tenterden. (4) Naturally, the scope of moral responsibility of the attorney to the client goes further than mere legal liability, and embraces the entire devotion to the client's interests, zealousness in the maintenance of his rights, and the exertion to the utmost of his learning and ability, and by the use of these attributes alone can the conscientious attorney be satisfied. It is possible that an attorney will maintain, with great warmth and earnestness, the side which he must know to be unjust, and the success of which will be a wrong to the opposing party, and the attorney might be considered a participator in the injustice, but he cannot be held morally responsible for the act of his client in maintaining an unjust cause. The lawyer who would refuse to lend his professional assistance to a cause on the ground that, in his judgment, the case was unjust, would usurp the functions of both the judge and the jury. It might be well to quote here the words of Lord Brougham in his celebrated defense of the queen: "An advocate," said he, "in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion." But an attorney owes the duty of

1. Weeks on Aftys., Sec. 259.

2. Holmes v. Peck, 1 R. S. 242; Pennington v. Yell, 6 Eng. (Ark.) 212; Cox v. Sullivan, 7 Ga. 144.

3. Pitt v. Yalden, 4 Burr. 2060.

4. Montrion v. Jeffery, 2 Carr. & P. 113.

good faith and honorable dealing to the court before whom he practices; he is an officer of the court, and it is his high vocation to correctly inform it as to the law and facts of the case, and to aid it in doing justice. He is not bound to suffer false and perjured testimony to be presented with the possible result of inducing the court to take jurisdiction where there would be otherwise no power to act, and to grant a judgment or decree which the law would prohibit were the real character of the testimony known. In resorting to deception or permitting his client to do so the attorney violates his oath of office. (5) An attorney cannot disobey the express lawful instructions of his client, (6) and he is liable if he negligently fails to bring suit, (7) also if, through his negligence, the papers or securities of the client are lost; (8) but where such papers are stolen from his office, he cannot be held responsible, unless through negligence on his part. (9)

The attorney can only undertake to avoid errors and mistakes which any prudent practitioner would avoid; (10) and where there is a reasonable doubt as to want of skill and diligence, he cannot be held liable, (11) and the error being such as a cautious man might fall into, he cannot, on that account, be deprived of his fee. (12) If, however, the attorney disregards well-established and clearly defined rules of law, or ignores the ordinary rules of court and practice, pleading and evidence, sometimes even the right construction on cases free from doubt, such as bringing an action of assumpsit on a deed under the common-law system; (13) if his papers are defective through lack of diligence on his part or the part of his clerks, he will be liable; (14) and the failure

to deliver a *fi. fa.* to the sheriff, whereby a levy is lost, renders him liable. (15) Where an attorney undertaking to search the records overlooks prior liens he is liable to his client who loaned money on a mortgage of property. (16) It is not required that the attorney insure a client as to the result of the proceedings which he has advised, and in an action for attorney's fees it is no defense that some other course than that advised by him would have been more advantageous to the client, it appearing that the attorney acted in good faith. (17) An attorney who is employed to draw a will is not liable to a person who, through the former's negligence and ignorance in the discharge of his professional duties, was deprived of the portion of the estate which testator instructed the attorney should be given such person by will. (18) Where the attorney allows a cause to be called for trial without previously inquiring whether a material witness was absent, and his client was non-suited, he is liable; (19) also where he allows judgment to be taken for want of an answer, (20) or where he fails to appear in court when the cause is regularly reached on the docket. (21) Where money has been collected for the client, the attorney is bound to notify him of the fact within a reasonable time; and if he does so, the client has no cause of action against him until after a demand and a refusal to turn it over. (22) An attorney for a decedent's estate who has collected money on a claim due the estate while acting in the employ of the administrator cannot be compelled by the Probate Court to turn over such collections under the statutory clause providing for commitment to jail of any person who refuses to surrender property belonging to a decedent after the administrator has on oath sworn before such court that the attorney

5. *People v. Beattie*, 137 Ill. 553.

6. *Gilbert v. Williams*, 8 Mass. 57; *Cox v. Livingston*, 2 W. & S. (Pa.) 103; *Wilcox v. Plummer*, 4 Pet. (U. S.) 172.

7. *Moore v. Juvenal*, 92 Pa. St. 484.

8. *Northwestern Co. v. Sharp*, 28 Eng. L. & E. 555.

9. *Hill v. Barney*, 18 N. H. 607.

10. *Bowman v. Talman*, 27 How. Pr. (N. Y.) 212; *Citizens' Loan, etc., Asso. v. Friedly*, 123 Ind. 143; 7 L. R. A. 619; *Eggleston v. Boardman*, 37 Mich. 14.

11. *Morrison v. Burnett*, 56 Ill. App. 129; *Watson v. Muirhead*, 57 Pa. St. 161; 1 *Parsons' Contracts*, 114, and cases cited; *Gilbert v. Williams*, 8 Mass. 51.

12. *Pitt v. Yalden*, 4 Burr. 2060; *Godefroy v. Dalton*, 6 Bing. 467; 4 *Moore & P.* 149.

13. *Cliffe v. Prosser*, 2 Dowl. O. S. 21; *Hopling v. Quinn*, 12 Wend. (N. Y.) 519.

14. *Weeks on Attys.*, Sec. 284; *Goodman v. Walker*, 30 Ala. 482; *Marsh v. Whitman*, 21 Wall. (U. S.) 178; *Wharton on Agency*, 598; *In re Spencer*, 18 W. R. Ch. 240; *Dearborn v. Dear-*

*born*, 15 Mass. 316; *Reiley v. Cavanaugh*, 29 Ind. 435; *McWilliams v. Hopkins*, 4 Rawle (Pa.) 392; *Newman v. Schneek*, 58 Ill. App. 328; *Davis v. Jenkins*, 11 Mees. & W. 745.

15. *Phillips v. Bridge*, 11 Mass. 246.

16. *Lawall v. Groman* (Pa.), 37 Atl. Rep. 98.

17. *Harriman v. Baird* (Sup.), 39 N. Y. S. 592; *Kirkey v. Jones*, 7 Ala. 622; *Meyer v. Sage*, 65 Iowa, 606.

18. *Roddy v. Railway Co.*, 104 Mo. 234; *Shear & R. Neg.*, Sec. 215; *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Robertson v. Fleming*, 4 Macq. H. L. Cas. 167, 209; *Longmerd v. Holliday*, 6 Exch. 761; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Buckley v. Gray* (Cal.), 42 Pac. Rep. 900.

19. *Reece v. Rigby*, 4 Barn. & Ald. 202.

20. *Godefroy v. Jay*, 7 Bing. 413.

21. *Mix v. Chandler*, 44 Ill. 174.

22. *Denton v. Embury*, 5 Eng. 228; *Voss v. Bachop*, 5 Kan. 67; *Taylor v. Bates*, 6 Cow. (N. Y.) 596; *McDowell v. Potter*, 8 Pa. St. 189. *Contra: Tinkham v. Heyworth*, 31 Ill. 519.

has such property in his possession. The suspension of the attorney is the proper remedy. (23) The usual remedy of a client against an attorney for neglect or misconduct is by an action on the case; (24) sometimes, however, the courts have interfered summarily, especially where the transaction appears tainted with fraud, (25) or where the attorney having been paid fails to perform his duty, (26) in which event he may be proceeded against by attachment. (27) But without some showing of fraud the court will generally leave the client to his remedy by action. (28) In equity a distinction is drawn between fraud and negligence, and only where the former is shown will a court of equity interfere. (29) In all actions against attorneys for negligence, or for want of skill, when the facts are ascertained the question of negligence or want of skill is for the jury. (30) The actual loss sustained and not the nominal amount directly involved is the measure of damages. (31) In showing negligence the burden of proof rests primarily upon the plaintiff, (32) and when established, it is for the attorney to prove that the client was not injured by it. (33) Where the acts of the attorney, in the prosecution of his client's case, are *bona fide*, an action on the case will not lie; to sustain such an action it must be shown that the acts were malicious and without foundation. (34) If an attorney commences a suit, knowing that there is no cause of action, "dishonesty and for some sinister view, for some ill-purpose, or for some purpose of his own which the law calls malicious," and causes a party to be arrested and imprisoned, he will be liable therefor. (35) The cases herein cited may, to some extent, show the legal liability of the attorney to the

23. *Dinsmoor v. Bressler* (Ill.), 45 N. E. Rep. 1086.

24. *Russell v. Palmer*, 2 Wils. 235.

25. 4 Johns. Ch. (N. Y.) 118; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344.

26. *Garner v. Lawson*, 1 Barn. 101.

27. *Floyd v. Hangle*, 3 Atk. 568.

28. *Barker v. Butler*, 2 W. Black, 780.

29. *Wharton on Agency*, Sec. 605; *Brooks v. Day*, 2 Dick. 572. For *dicta* to contrary, see *Dixon v. Williamson*, 4 De Gex & J. 208; *Chapman v. Chapman*. L. R. 9 Eq. 276.

30. *Rhines v. Evans*, 66 St. 192; *Walpole v. Carlisle*, 32 Ind. 415; *Reece v. Rigby*, 4 Barn. & Ald. 202.

31. *Godefroy v. Jay*, 7 Bing. 413; *Governor v. Raley*, 34 Ga. 173.

32. *Wharton on Negligence*, Sec. 752.

33. *Godefroy v. Jay*, 7 Bing. 413; *Harter v. Morris*, 18 Ohio St. 419.

34. *Wigg v. Simonton*, 12 Richardson (Law.) 583.

35. *Caton. J., Burnap v. Marsh*, 13 Ill. 535; *Stockley v. Harnidge*, 34 Eng. C. L. 276.

client. Every consideration should induce an honest attorney to regard himself, as far as the cause is concerned, as completely identified with his client; all selfish interests should be sunk by him in respect to his one great duty to his client, that of immovable fidelity.

MORTON JOHN STEVENSON,  
in the Central Law Journal.

CHICAGO, ILL.

### THE CONTINGENT FEE.

[By J. A. Murphy, of the West Superior (Wis.) Bar.]

THE contingent fee as defined by Webster is remuneration that is dependent on an uncertainty. The Irishman, when asked his definition, said: "If you lose your case, the lawyer don't get anything; if you win, you don't get anything."

The contingent fee has been defined by P. H. O'Brien as the anticipated and conspired result of industry, conscience and intrigue; by Heber McHugh as the *ne-plus-ultra* of the lawyer in desperation.

The contingent fee is difficult in discussion, analysis or definition; although nothing is better known, realized and comprehended in its practical phase among the profession. The contingent contract is necessarily somewhat shrouded and an object of concealment and suspicion, being an essential ingredient in and descendant of the champerty of the olden days. The bar for generations was hampered, annoyed and terrorized by this champertous vision ever recurring in practice—this barrier to progress, this embargo on the exercise of thrift, this menace to the only speculation within the compass of the lawyer's life. The culmination of this was the enactment of chapter 204, Laws of Wisconsin, 1891, with the singular title, "An act to aid impecunious litigants." As usual, the client appears in this enactment the beneficiary and the lawyer the philanthropist. By the terms of this statute the client may in effect contract to place uncontrollably his destiny, his support, his hope, his conscience and his future in the hands of the thrifty lawyer.

When the plaintiff in the prospective damage suit signs the contingent contract and delegates to the lawyer one-half of the recovery, he fancies and assumes that in consideration thereof he and all his kin will be supported by the contracting barrister. In most cases he lays down all his burdens, his moral and legal duty to support himself and his family is merged, buried, absorbed in the solemnity and compass of this contingent contract. He no longer is concerned with the petty, drastic details which burden life, but his vision rests in serenity on the spectacle of numberless easy thousands. Though not his

good fortune to sustain injury in defense of his country and draw stipends therefor, he yet mentally readily reconciles himself to the role of a manufacturing or railway company pensioner. To his creditors he will say: "I have a damage suit and a lawyer." To his lawyer he says: "I am looking to you." This contingent client upon making of his contract almost invariably renounces toil and adopts ease and simulation.

"He limps along the streets,  
And he looks at all he meets —  
So forlorn;  
And he shakes his weary head,  
And it seems as if he said:  
'I am done.'  
He says that in his prime,  
Before the box car hit his spine,  
And cut him down,  
Not a better man was found  
By the crier on his round  
Through the town.  
But now his nose is thin  
And it rests upon his chin  
Like a staff;  
And a crook is in his back,  
And a melancholy crack  
In his laugh."

His mission on earth during the months pending trial is to court sympathy, to develop a malady and to feed in comfort on his contingent contract. His lawyer may grumble at his exactions, but what can he do? Will not the client say: "You explicitly agreed with me, in terms all under the contract, that you would pay all costs and expenses, and all you would expect of me was to keep my mouth closed on that subject. Now, don't kick, or I will talk." So, in mute, inglorious anguish, the poor contingent fee lawyer struggles on, and multitudinous are his struggles, and adept, subtle, varied must be his methods.

To make this contingency a reality, to convert theory and speculation into money, three things must exist. An accident has happened: the facts must fit the law, and a malady must exist primarily or by development. He and his client have contracted and in terms conspired to wreck the fortunes of their corporation foe. How shall this be done? There must first be conducted an examination of the client's conscience, and if one is found to exist, here is the first impediment. There is molding to be done. Client may have had a Christian education; hence the necessity of adroitness. Singularly the easiest conscience to subdue is the one that is in the best state of preservation; the reason being that it was never used. But vital spots may be touched even in the moral composition of the personal injury litigant; for conscience is the place wherein there

may dwell a few holy emotions. It is the battlefield of contending passions, but it is also the pandemonium of sophistry. And the lawyer whom the populace pronounces a success comprehends this.

The successful plaintiff's attorney in a personal injury case to-day must be an actor, lawyer, physician, surgeon, machinist, oculist, aurist and an intense metaphysician. The essentials of the knowledge of these various professions must be crystalized in the brain of the myriad-minded lawyer. All the depths and shallows, all the chimerical mysteries of these learned callings must be luminous and kaleidoscopic in the cometary sweep of this lawyer's illimitable mind. He must be an actor; must study and must know the manifestations of pain. When his client takes the witness-stand, fresh from the hand of his lawyer, the result of his training and coaching for the ordeal is almost equivalent to a second birth. When this client mounts the witness-chair, if he acts wisely, he will but reflect the training of his actor-lawyer. He should have that tired feeling in his face; the tremor of sadly impending dissolution in his frame; the deep, painful sigh as he places his crutches by the side of his chair. And then he should turn upon the jury an eye in whose melancholy recesses lurk the shadow of God's eternal frown—a hopeless gaze conveying to the jury by unvarying intuition the thought, "There is nothing left for me but heaven and prayer." And a composite facial picture such as to leave no doubt of the truth and the application of Gray's epic:

"Lone dweller by the dusty way,  
Fair saint within a mossy shrine,  
The tribute of a heart to-day,  
Weary and worn, is thine."

His gaze should be hopeful, radiant, celestial; suggestive to the jury that, "I am not long for the toils of earth—I need but little here below, nor need that little long—but be bountiful, merciful to my loved ones at home."

If your client with whom you have contracted, and on whose words and actions hang the destiny of your contingent fee, happens to be a Finlander with a teaspoonful of brains your task will be more difficult—but this is your task.

This Finlander's husky, piping voice must be reduced and trained down to the utterance of a low, sweet, wailing speech, as if he had never in his life heard a harsher tone than a flute note. If client is kept on the stand for a long time he should manifest paroxysms of pain; and in this his work should never be coarse, for jurors sometimes possess a terrific prescience and probity of insight. He should never lose sight of his infirmity.

Theodore Thorson once said to a man with a small limp in his gait, "You have ankolosis,"

and the Swede said, "Yes, by Gad, I tank so." Surgery, anatomy and physiology should be mastered. Pat O'Brien was questioning a badly injured man with whom he contemplated entering into contractual relations of a contingent character, and every question Pat asked the man contained by way of innuendo a suggestion of the disarrangement of almost all of this poor man's functional organs. This man was tough; there seemed to be no limitations on his conscience; his language was sometimes shocking, but the liability was certain, and if a malady could be established the defendant corporation would have to jump.

No such physiological blunders as this should be made.

The lawyer should only be oratorical on the question of damages. And at this time he must, if possible, lead his mind away from a contemplation of his contingent fee. This is the only time when this should occur. The actor and the orator in the man should conspire to moisten a few jurors' eyes, and here consummate tact should be used by both lawyer and client. A quietly, softly sobbing female client is usually adequate, but if this condition is not present, then slight throat gastritis and short emotional choking, with plenty of handkerchief application, will do the business. But your client should weep at the proper time. I once knew a lady who burst into violent sobbing when her attorney read the Northampton tables.

It is better to have the contingent fee than no fee at all. It is inciting to ambition, it suggests and develops generalship and strategy, it reveals all the moral freaks and the mental acrobats. When the lawyer serves notice of his attorney's lien on the corporation, that imports that he is his brother's keeper. He is the sole repository of his client's mental and moral being. All things are by the compact referred to him. I knew a discharged brakeman who made a contingent contract with an attorney to develop an ordinary spine into a railway spine and institute a resulting damage suit. During the period of the spinal incubation and the pendency of the suit, the railway superintendent met the brakeman on the street and said: "Good morning, James; it's a fine morning." James, a trifle overtrained, replied: "I neither deny it or affirm it, sir."

Clients' conception of contingent fee vary wonderfully. Some of them struggle for a compound contingent—a reversion in fee—a remainder over.

A tax-title shark once consulted me about foreclosing a mortgage. After informing me that by reason of long practical experience he was amply competent to foreclose it himself, the only countervailing consideration with him being a desire not to rob the profession, and after remarking

parenthetically—falsetto like—that, of course, I would be willing to foreclose it for the taxable costs, he wound up with the stupendous proposition that, in the event that Judge Downer did not return in a certain time, in which event the judge was to foreclose the mortgage, and in the event that should I foreclose the mortgage by any accident, and if it should happen that the real estate should be bid in to him—then, in that event, he desired me to guarantee him that I would, within six months after the vesting of the title in him, and without additional compensation, sell the property for him at a sum in cash far in advance of the mortgage value of the premises. Then my heart sank and "hope for a season bade the world farewell."

If they will only give a man a fairly robust contingency to operate on, well and good; but when they present to you as their ultimatum the ghostly remnant of a frayed-out possibility, then the heart falters and one thinks of the ministry.

Many are the pitfalls in the way of the contingent fee lawyer. He may get past the court and get to the jury with a well-developed comminuted fracture, and this fratricidal jury by its verdict may pronounce it a comminuted fraud. He may be struggling boldly up the stony path carrying with him as a collision product a well-degenerated spinal cord, with the attendant dullness on percussion on the abdominal wall, and have with apparent safety reached the goal, and is about to place his burden tenderly, confidently in the sympathetic lap of the jury, this time dead sure—when he will hear from the bench the metallic, dirge-like intonation, "*The doctrine resipsa loquitor* applies not here; the defendant's motion is granted."

Then comes the leaving the court-room with heavy heart, the task of convincing your client that the court is an idiot, that the court's finding and decision in his case is the confirmation of the court's paresis, to gradually observe client's admiration for you wane and fade, to read in client's disappointed look a settled doubt as to your probity and merit, and the struggle to land an appeal, to stand off clerks, stenographer's fees, the wearisome brief, and on the eve of the argument to learn by a terse notice from the defendant corporation that your client, being in distress, had applied to said corporation for relief; that said corporation had taken on an eleemosynary function and extended relief; in fact, had settled (of course without the knowledge or acquiescence of said corporation's local and trial counsel). In short, you are informed that should you wish to take a justice court fee for a wrecked *medulla oblongata* valued at \$40,000, then, indeed, the said corporation will freeze over its eleemosynary donation pond and you must seek fees from your absconded client, or solace in the mysteries and

charms of contemplation. 'Tis then in this purgatorial ordeal the contingent lawyer can console himself with the benign reflection: "I should not give way to these trifling things. My mind to me a kingdom is; I am an honored member of a learned and liberal profession; this is but an incident; my client is but a man. My profession's mission spreads out into the illimitable field of righting all humanity's wrongs. My comfort is that my principle was right, and it is for the principle I struggle. My client was false, but the individual is nothing. Men are but agencies of to-day and to-morrow cast into the oven, but within the scope and limitations of the grand principles which my profession are gradually advancing, the struggle I am making with its contingent success or failure is involved the weal or woe of generations yet to come."

There is some consolation in the fact that the profession is ever liberal in its award as to the sum to be paid when the contingency is removed — when the case is won.

And so time runs on in sunshine and in shadow, and the aggregated years have garnered up a heavy load of disappointment for the contingent lawyer as he treads the shadowy afternoon of life, still struggling. The disappointments, wrongs, misfortunes of a stormy, toiling past have placed him within the walls and limitations of a life of poverty. For him there is no resting place near life's drear close. No thoughtful, prayerful contemplation of the eternity beyond, no serenity of mind and conscience wherein faint dreams, like cool and shadowy vales, divide the billowy hours of love. The contingent lawyer must die in the harness.

And so with ambition buried away for years, with only the regrets of life remaining, with the darkening pall of gloom of old age pressing down upon him, he struggles and journeys on to where the dusk is waiting for the night, and mutters in his last expiring accents: "Life and all its problems are contingent. I tried it through the medium and instrumentality of the law. I failed."

#### BEFORE THE FINAL BAR.

JUDGE W. L. FOSTER, of Concord, N. H., died Friday, August 13, at his summer home, Rye Beach, on the New Hampshire coast. The deceased was born in Vermont in 1823. In 1844 he entered the Harvard Law School, attending that institution for two years, after which he began the practice of law in Keene, N. H. Mr. Foster's life has been a very busy one, both in his own profession and in politics. He has been post-master of Keene, clerk of the State senate, State law reporter, State representative, judge of the Circuit and Supreme Courts, and United States commissioner. Judge Foster is survived by a

widow and four children. The deceased leaves behind him a large number of mourners, many in the ranks of the profession in which he has been so long an ornament and a leading light. The JOURNAL unites with the bar of New England in lamenting the loss of one of New Hampshire's best-known sons, whose life has been so fruitful in results.

#### GENERAL AVERAGE — CONTRIBUTION AGAINST STEAM TUGS.

1. A contribution in general average cannot be had against a steam tug for the casting off and abandonment by her master of her tow of barges, with the intention and with the effect of saving the tug; the tug and barges do not constitute a single maritime adventure.
2. The fact that the sum to be paid to a tug for towing each barge is measured by a certain proportion of the freight to be earned by that barge does not have the effect of combining the tug and barges into a single maritime adventure, within the law of general average.

#### UNITED STATES SUPREME COURT.

Decided May 24, 1897.

On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit seeking the instruction of this court as to the right of the owners of barges to recover against the propeller, J. P. Donaldson, about the principles of general average contribution. *Question answered in the negative.*

See same case below, 19 Fed. Rep. 264, 21 Fed. Rep. 671.

The facts are stated in the opinion.

Messrs. F. S. Masten, Francis J. Wing, S. H. Holding and Harvey D. Goulder for appellant.

Messrs. Frank H. Canfield and George L. Canfield for appellees.

Mr. Justice GRAY delivered the opinion of the court:

Two libels in admiralty in the District Court of the United States for the eastern district of Michigan, against the propeller J. P. Donaldson, by the owners of the barges Eldorado and George W. Wesley, for the loss of the barges, having been consolidated and dismissed in that court; and its decree having been reversed by the Circuit Court upon the ground that the libellants were entitled to recover against the propeller for the loss of the barges as a general average contribution, and a decree accordingly having been rendered for the libellants; and the causes having been taken by appeal from the Circuit Court to the Circuit Court of Appeals; that court, desiring the instruction of



this court, as to the right of the owners of the barges to recover against the propeller upon the principles of general average contribution, certified to this court the question whether they could so recover upon the following facts:

"The J. P. Donaldson was towing the said barges Eldorado and George W. Wesley from Buffalo, N. Y., to Bay City, Mich., having no other connection with them than that she was to tow them and to receive for her services a portion of freight which the said barges would earn on the trip, according to the custom and usage which prevails upon the Great Lakes. By a violent storm, and without negligence on the part of the J. P. Donaldson, she, with her tow, were driven on a lee shore, and all were in imminent, if not certain, peril of being blown ashore and lost. The J. P. Donaldson struggled against the storm to the last moment she could with safety to herself; and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so, and without negligence on his part, cut the tow-line connecting said barges to her, and the said barges were driven on shore and were wrecked and lost, and the J. P. Donaldson, by reason of being thus disencumbered of her tow, was enabled to reach a port of safety."

By the order of that court there were transmitted to this court, together with the above certificate, copies of the pleadings and decrees, and of the opinions of the District and Circuit Courts, reported in 19 Fed. Rep. 264, and 21 Fed. Rep. 671.

This case presents a novel question in the law of general average, which, briefly stated, is whether a contribution in general average can be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention, and with the effect, of saving the tug.

The decision of this court in the recent case of *Ralli v. Troop* (157 U. S. 386 [39: 742]), and the reasons upon which that decision was based, go far towards determining this question.

In that case, upon full review of the authorities, it was held that the right of contribution in general average, whether considered as resting upon natural justice, or upon implied contract, or upon a rule of the maritime law known to and binding upon all owners of ships and cargoes, could only arise out of the exercise of the power of the master, or of one occupying his place, as the agent by necessity of the owners of ship and cargo, and charged by law with the duty, in case of emergency, of sacrificing part of the property for the safety of the rest. This court there said: "Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as

exercising a power and duty imposed upon him by the law as incident to his office—whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, *magister navis*, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority." (157 U. S. 400 [39: 749]). "There can be no general average unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them. The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice, nor a subject of the contribution." (157 U. S. 403 [39: 750]). It was likewise shown that by the general law, unless modified by local statute or custom, the right of contribution is limited to the particular ship and cargo, and the sacrifice of one ship for the safety of another does not give rise to any claim of general average. (157 U. S. 404, 406, 408 [39: 750, 752]).

The question, then, is whether the steam tug and her tow of barges were so connected by the contract of towage as to make the tug and the tow, while navigated under and in accordance with that contract, a single maritime adventure; to entrust the master of the tug with the authority, in case of unforeseen emergency, of sacrificing any of the barges, or the whole or part of the cargo of any of them, for the safety of the rest of the barges and their cargoes, or of the tug, or of her cargo, if any; and, if such safety is thereby secured, to give the owners of the interest sacrificed a right of contribution in general average against the interests saved, or their owners.

While the tug is performing her contract of towing the barges, they may indeed be regarded as part of herself, in the sense that her master is bound to use due care to provide for their safety as well as her own, and to avoid collision, either of them or of herself, with other vessels. (*Hancox v. The Syracuse* ["The Syracuse"], 76 U. S. 9 Wall. 672, 675, 676 [19: 783, 784]; *The Civilta v. Perry* ["The Civilta"], 103 U. S. 699, 701 [26: 599, 600].)

But the barges in tow are by no means put under the control of the master of the tug to the same extent as the tug herself and the cargo, if any, on board of her.

A general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign

commerce, is a common carrier; and the ship and her owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies. (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437 [32: 788, 790]). But a tug and her owners are subject to no such liability to the owners of the vessels towed, or of the cargoes on board of them. The owners of those vessels or cargoes cannot maintain any action for the loss of either against the tug or her owners, without proving negligence on her part. As was said by Mr. Justice Strong, and repeated by the present chief justice, "An engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." (*The Webb v. Barling* ["*The Webb*"], 81 U. S. 14 Wall. 406, 414 [20: 774, 775]; *The Burlington v. Ford* ["*The Burlington*"], 137 U. S. 386, 391 [34: 731, 733]. See also *McNally v. The L. P. Dayton* ["*The L. P. Dayton*"], 120 U. S. 337, 351 [30: 669, 675].)

The master of a vessel is appointed by her owners, and is their agent, and they are responsible for injuries caused to third persons by his negligence in navigating the vessel. The master of the tug is appointed by and is the agent of the owners of the tug; he is not appointed by the owners of the vessel towed; and if, by mismanagement of the tug, without any negligence on the part of the tow, the tow is brought into collision with another vessel, the tug, and not the tow, is responsible. (*The John Fraser*, 62 U. S. 21 How. 184 [16: 106]; *Sturgis v. Boyer*, 65 U. S. 24 How. 110 [16: 591].) As was said by this court in *Sturgis v. Boyer*: "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, nor ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible

for his acts in her navigation." (65 U. S. 24 How. 123 [16: 595].)

In *Eastern Transp. Line v. Hope* (95 U. S. 297 [24: 477]), in which the owner of a barge maintained an action against the owner of a tug for negligence of the master of the tug, by which the barge was totally lost, this court, while holding that the tug "had the supreme control of the barge, so far as it was necessary to enable it to fulfil its contract to tow the barge," recognized that the tug "did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply; it did not employ or pay the master and the men in charge of her; nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee." (95 U. S. 300 [24: 478].)

It is solely for the purpose of performing the contract of towage, that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo. If the question arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that question ultimately belongs to her own master, and not to the master of the tug. And if the question presented is either whether the barge should be run ashore for the purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo or the barge herself, the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and, in either case, any right of contribution in general average cannot extend beyond that barge and her cargo.

The suggestion of the counsel for the libellants, that the barges had no means of self-propulsion and were powerless for any purpose of navigation, is unsupported by the statement of facts in the certificate of the Circuit Court of Appeals, and is inconsistent with the allegations of the libellants themselves. Each of the libels alleged that the barge was "in every respect well manned, tackled, appareled and appointed." One of the libels alleged that the *George W. Wesley* was a schooner barge, and on the night before the loss "carried her mainsail, foresail and staysail," and that early in the morning "said sails were taken in" because "the sails would not draw in the course that they were then running." And the other libel alleged that on the day after the loss the master and crew of the *Eldorado* returned on board of

her, and proceeded to strip the wreck "and save from it all that could be saved of her sails, rigging, etc." And each answer alleged that after the storm began the master of the tug signaled the barges "to make sail and get their anchors ready."

The master of the tug, having no authority to decide, as between a barge and her cargo, what part shall be sacrificed for the safety of the rest, and thereby to subject what is saved to contribute in general average for what is lost, can surely have no greater authority, by abandoning all the barges with their cargoes, to subject the tug to a general average contribution.

The fact that the sum to be paid to the tug for towing each barge was measured by a certain proportion of the freight to be earned by that barge is immaterial. It did not create a partnership between the owners of the tug and the owners of the barges. (*Meehan v. Valentine*, 145 U. S. 611 [36: 835].) Nor could it have the effect of combining the tug and the barges into a single maritime adventure, within the scope of the law of general average.

For the reasons above stated, this court concurs in the opinion expressed in this case by Mr. Justice Brown, when district judge, that "the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage." (19 Fed. Rep. 272.)

*Question certified answered in the negative.*

Mr. Justice BROWN took no part in this decision.

### Legal Laughs.

Counselor Quibble — "Law, my boy? Why, this whole universe is an example of the reign of law."

Young Gibby — "Maybe; but there are no fool legislatures assembled every now and then in the realm of nature!" — Truth.

"Do you say that you received a college education?" asked the court of the would-be juror.

"Yes, your honor."

"Challenged for cause," promptly interrupted the counsel for the prisoner. — *Detroit Free Press*.

"I thought you said your old horse was not worth \$10."

"Well, mebbe I did; but that was before he'd been killed by a railroad train."

Edward Everett Hale tells in the *Youth's Companion* of James Russell Lowell's first client when he started in law. After Lowell had nervously given the client a chair, taken his hat, and sat

down with his note-book to take notes on the case, he found that his visitor was a painter come to collect a bill.

### Legal Notes of Pertinence.

The annual meeting of the West Virginia Bar Association will be held at Morgantown, November 3d and 4th.

Austria is the country most lenient to murderers. In ten years over 800 persons were found guilty of murder, of whom only 23 were put to death.

For thefts by hotel employes from guests while asleep in rooms assigned them at a hotel, even if they are intoxicated, it is held, in *Cunningham v. Buckey* ([W. Va.], 35 L. R. A. 850) that the innkeeper is liable.

An obligation to maintain a street railway is held, in *San Antonio St. R. Co. v. State, ex rel. Elmendorf* ([Tex.], 35 L. R. A. 662) not to be imposed by the grant of a mere privilege to construct and maintain.

The population of the New York State prisons on August 1, according to the reports received at the office of the superintendent of State prisons, was 3,380, divided as follows: At Sing Sing, 1,268; Auburn, 1,079; Clinton, 950, and woman's prison at Auburn, 83.

A statute making it unlawful to manufacture or offer for sale any oleomargarine, artificial or adulterated butter, whether manufactured in or out of the State, unless it is colored pink, is held, in *State v. Myers* ([W. Va.], 35 L. R. A. 844) to be constitutional.

The treasury department has ruled that calfskins are hides, and must pay duty as such, under the Dingley Tariff act. But the importers protest that skins are not hides, and cite Shakespeare's "King John" as an authority for the distinction:

"Thou wear a lion's hide! Doff it for shame,  
And hang a calf's skin on those recreant limbs."

The Standard Dictionary defines a skin as "the pelt or integument of a small animal removed from its body, whether raw or dressed, as distinguished from a hide, which is the skin of a large animal." The courts will probably have to decide the question. — *Albany Argus*.

At Charleston, S. C., Judge Simonton, of the United States Court, recently filed his decision defining an original package, and thereby settling a disputed feature of the Dispensary law. He

holds that the original package is the form in which the liquor is delivered to the initial carrier at the point of shipment. If a box of liquor is imported the whole box must be sold, and not a single bottle from the box. It will require all dealers to import liquor in single packages.

Moneys paid into court and deposited in a bank or trust company are held, in *Jones v. Merchants' Nat. Bank* ([C. C. App. 1st C.], 35 L. R. A. 698) to be exempt from the process of a litigant without first obtaining consent of the court, and cannot be reached without leave of the court by bills filed against the depositors, the clerk, or other persons who have been decreed to have an interest in the funds.

One Buehler recovered judgment in the First District Court, New York, before Justice Lynn, against Louisa Weiffenbach, in an action to recover brokerage upon the sale of defendant's property, No. 524 East Eighty-third street, for \$20,500. The judgment has been affirmed by the Appellate Term, which holds, by Presiding Justice Daly, that when a real estate broker is engaged to sell property, no price being specified, and produces a customer who makes an offer that is not then accepted by the owner, but is subsequently accepted, he is entitled to his commissions, it appearing that his agency had not been terminated and that he had not abandoned his efforts.

The case of James Thornton, confined in Auburn prison, is, if what is confessed and by those acquainted with the facts quite generally believed is true, a reproach to our civilization, says the *Utica Herald*. Thornton was convicted of burglary, committed at Vernon, this county, and sentenced to State prison. His innocence of the crime, and of any knowledge or connection with it, has been declared by the man who committed the burglary. The confession and statements of the confessor have been investigated and found truthful, so far as proofs were available. The court, prosecuting attorney and jury believe Thornton an innocent man and recommend his release from prison. The governor, in order to act intelligently and regularly, must have the minutes of the trial. These are in the hands of the stenographer. There is no money to pay him for transcribing the minutes. There the matter stands. An innocent man is held in prison, the legal way to his release blocked by the want of some dollars—we do not know how many, probably not one hundred. It is easy to look heavenward and exclaim: "Poor Thornton! He is innocent." 'Twere better to start a fund for means to secure his release.

## Notes of Recent American Decisions.

**Accident Insurance — Modification — When Complete.**—Where one carrying accident insurance notifies the insurer of a change in occupation, and the company, in a written reply thereto, states that under such occupation his indemnity will be \$2,000, and no notice of dissatisfaction was given to the company as to the classification mentioned in such communication, the contract was as effectually modified as if the change had actually been written on the certificate which was then in possession of the insured. (Judgment for plaintiff below for \$3,000. Here reversed unless plaintiff elects to take judgment for \$2,000.) (*Fox v. Masons' Fraternal Acc. Ass'n* [Wis. S. C.], 71 Northwestern Reporter [June 12, 1897], 363.)

**Accident Insurance — "Wholly Disabled."**—The defendant insured the plaintiff against loss of time effected through external, violent and accidental injuries "wholly and continuously disabling him from transacting any and every kind of business pertaining to his occupation of merchant." **Held:** 1. That the evidence justified the jury in finding that he was "wholly disabled" within the meaning of the policy. 2. Total disability does not mean absolute physical inability to transact any kind of business pertaining to the occupation of merchant. It is sufficient if his injuries were such that common care and prudence required him to desist from transacting any such business in order to effectuate a cure. 3. Inability to transact some kinds or branches of business pertaining to his occupation as merchant would not constitute total disability within the meaning of the policy, provided he was able to transact other kinds or branches of business pertaining to such occupation. 4. But ability to occasionally perform some trivial or unimportant act connected with some kind of business pertaining to such occupation would not render his disability partial, instead of total, provided he was unable to substantially, or to some material extent, transact any kind of business pertaining to such occupation. 5. The fact that he occasionally performed some act connected with his business as a merchant would not necessarily prove that he was not totally disabled within the meaning of the policy. The frequency and nature of these acts would ordinarily be for the consideration of the jury in determining whether he was totally disabled as above defined. (*Lobdill v. Laboring Men's Mut. Aid Asso. of Chatfield, Minn.*, 71 N. W. R. 696.)

**Criminal Law — Robbery.**—Robbery in the first degree may be committed by taking property from the possession of a servant or agent of the owner,

as well as from the owner himself; and in the information the ownership of the property may be alleged as in the person robbed, or the true owner. (*State v. Adams* [Kan.], 49 Pac. Rep. 81.)

**Foreign Corporations — Jurisdiction — Internal Management.** — A corporation created by another State is subject to the corporation laws of that State; and its organization, and corporate functions, and who shall become members, and what are their rights, as members, are all questions for its courts, because questions of local law. Courts of equity in Pennsylvania have, under our act of assembly, jurisdiction to enjoin unlawful acts by such corporations; to enforce performance of contracts in this State with third parties, and have general jurisdiction as to their internal management. In that case the existence of the wrong must be ascertained, and the remedy applied according to the laws of the domicil. (*Madden et al. v. Penn. Electric Light Co. et al.* [Pa. Sup. Court], *Weekly Notes of Cases*, Vol. xl., No. 21, p. 432.)

**Forged Check Given in Payment of Goods — Recovery of Goods.** — B. & J., a firm of merchants, sold to C. a bill of goods and accepted in payment thereof a check drawn in favor of C. for the amount of the bill by K. upon the Hopkins County Bank, the check being endorsed by C. and subsequently paid by the bank. C., having another check purporting to be drawn in his favor by K., secured from A. a loan thereon, and delivered him the check without endorsing it. Upon presentation of the check for payment by A. it was charged that the check was a forgery, and A., who had obtained possession of the bill of goods sold to C. by appellants, B. & J., sold them to D. for a sum far below the price charged C., for the purpose of saving himself whole on the advancement made on the check, D. having full knowledge of the circumstances of the transaction, and A. having notice that the check given by C. for the goods was also pronounced a forgery by K. In this action instituted by B. & J., the bank and K. to recover of A., C. and D. the value of the goods so disposed of by A. the only issue is as to whether the check for the goods was a forgery, and if such was the case, then the plaintiffs are entitled to recover the value of the goods, since the defendant A. had no right to sell the goods at all. *Same* — In event the check was a forgery the recovery of the value of the goods is subject to be credited by the amount of the advancement, with interest, made by A. to C., provided it was agreed between the two that A. was to hold the goods in addition to the check upon which the loan was made. *Same* — **Fraud** — Although A. might have had the legal right to sell the goods, his action in disposing of them at such

an inadequate price and in appropriating the balance remaining after the payment of his claim established a degree of bad faith amounting to fraud, and the sale should be treated as passing no title to the goods. *In the event the check was not forged, the bank and B. & J. cannot recover from the defendants the value of the goods, but must look to K., the drawer of the check.* (*Johnson, Etc., v. Boyd, Etc.* [Ky. Sup. Court], Ky. Law Rep., July 15, 1897.)

**Interest — Mortgage — Redemption — Costs** — R. S., c. 90, § 22. — In this State the law does not allow a creditor to recover interest upon interest that becomes due after the maturity of the principal. And if compound interest is required by a mortgagee, and paid under protest by one claiming under the mortgagor in order to prevent the expiration of the right of redemption, the mortgage having been foreclosed, it may be recovered by the person who paid it under such circumstances. The fact that a demand is made for the interest when it becomes due does not affect the question. Upon an indebtedness without interest, payable at no particular time but upon demand, a demand is necessary to make the indebtedness due, and interest only begins to run from the time of maturity; but a demand does not affect the matter of interest where the debt is payable at a definite time. The general rule is, that whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay. The only reason why this rule does not apply in the case of interest due at a stipulated time and unpaid, is because the law regards it as against public policy to allow a creditor to recover compound interest. When a mortgage is foreclosed by publication, one who is entitled to redeem must, before he can do so, pay the necessary expense of such foreclosure. This includes the amount paid for publishing the notice of foreclosure in a newspaper, and the recorder's fee for recording the same. But the amount paid an attorney for professional services in such matters, however wise such employment may be and sometimes almost absolutely necessary, is legally a necessary expenditure; therefore the person entitled to redeem is not obliged to pay it. (*Whitcomb & Others v. Harris*, 90 Me.

**Mortgage — Fixtures — Trover** — Fixtures actually or constructively attached to the realty after the execution of a mortgage become a part of the real estate, and while the mortgage is in force cannot be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee. If the mortgagor, while in possession cannot remove the fixtures, the mortgagee, give a third

buildings on the mortgaged property, so that such third party can hold the buildings against the mortgagee or his assignee. In an action of trover the question is not, who has the better title as between the plaintiff and defendant. It is incumbent upon the plaintiff to prove property in the articles sued for. This is because the measure of damages in an action of trover is the value of the article at the time of the conversion, and also because the recovery of a judgment and its satisfaction transfers the title to the defendant. When by reason of erroneous instructions, made for the purpose of giving progress to the case, the plaintiff recovers a verdict covering several items which he is not entitled to, but the amounts are made certain in special findings by the jury, exceptions will be overruled, if the plaintiff will remit the aggregate of such amounts. (*Ekstrom v. Hall & Others*, 90 Maine, 186.)

**Master and Servant — Fellow-Servants.**—Where the engineer of a freight train has no authority to superintend, control or direct the head brakeman of the train, but such authority is in the conductor, such brakeman and the engineer are fellow-servants, and there is no liability on the part of the railroad company for any injuries the brakeman sustains through the negligence of the engineer. (*International & G. N. R. Co. v. Moore* [Tex.], 41 S. W. Rep. 70.)

**Negligence — Landlord and Tenant. — Corporations — Leases.** — Where a lease of hotel property imposed the obligation on the lessee to keep an elevator in the building in repair, and operate it by a competent person, the lessor was not liable to an employee of the lessee for injuries resulting from a failure to discharge such obligation, but was liable only for defects in the elevator existing at the time the premises were leased, and then only unless he practiced fraud on the lessee as to such defects. (*Oriental Inv. Co. v. Sline* [Tex.], 41 S. W. Rep. 130.)

**Public Officers — De Facto — Mayor's Approval — Compensation.** — 1. When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon such office and performs its duties, his official acts will be valid with respect to the public and to third persons with whom he deals officially, and he will be an officer *de facto* notwithstanding there was want of power to appoint in the body or person who professed to do so. 2. Under the provisions of section 19 of "An act for the government of the cities of the State," approved April 6, 1889 (Laws 1889, p. 187) the approval of the mayor is not required to validate an appointment to office

by a board. 3. One who becomes a public officer *de facto*, without dishonesty or fraud on his part, and who renders the services required of such public officer, may recover the compensation provided by law for such services during the period of their rendition. (*Erwin v. Jersey City*, N. J. Ct. Errors and Appeals. Opinion by Magie, C. J., July 1, 1897.)

**Way — Towns — Notice.** — R. S., c. 18, § 80. — It is settled law in this State (Maine) that the twenty-four hours' actual notice by the municipal officers of a town or road commissioner of defect in the highway, whereby a traveler may recover damages for an injury received, must be of the identical injury itself. Notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient. The words "actual notice" in the statute (R. S., c. 18, § 80) signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that the officers must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice. The plaintiff obtained a verdict against the defendant town for a personal injury sustained by reason of a defective plank in the sidewalk. The written notice served on the town, after the injury, stated that the "defect and want of repair consisted of a board or plank in a sidewalk which had become rotten and decayed on the under side thereof, and unsafe for public travel." *Held*, that the verdict must be set aside, there being no evidence to show that the municipal officers or road commissioner of the town had twenty-four hours' actual notice of such defect. (*Hurley v. Bowdoinham*, 88 Maine, 293, affirmed; *Littlefield v. Inhabitants of Webster*, 90 Maine, 213.)

**Wills — Promise by One of Three Devisees — Contribution.** — A father *in extremis*, being about to execute a will making his three children his residuary devisees, stayed such execution in order to add a bequest to another person. One of the children, without the knowledge of the others, assured him that if he should execute the will without change, his wish with regard to the intended bequest would be fulfilled. On this assurance he did so execute the document. *Held*, that the share in the estate of the child giving the assurance must contribute a third only towards making good the intended bequest. *Quere*, can like contribution be compelled from the shares of the other children? (*Yearance v. Powell*, N. J. Ct. Errors and Appeals. Opinion by Collins, J., July, 1897.)

### Notes of Recent English Decisions.

Thames — Conservators — Bed of River — Raising Sand or Gravel — Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii), s. 87. — By section 87 of the Thames Conservancy Act, 1894, it is provided that any person with the license of the conservators may dredge and raise gravel, sand, ballast, and other substances from the bed of the Thames, but subject to the provisions of the act it shall not be lawful for any person, other than the conservators, their agents, servants and workmen, to dredge or raise any gravel, sand, ballast or other substance from the bed of the Thames. The defendants had dredged and raised sand at Hadleigh Ray, below Gravesend, within the district of the Thames Conservancy, but without the license of the conservators. The piece of ground from which the defendants had taken the sand was between high and low water-mark, and was private property, and the defendants had obtained the license of the owner to act in the way that they had done. The conservators commenced this action for an injunction to restrain the defendants from dredging and raising sand at the place in question without previously obtaining a license from the conservators. The action was tried before Bruce, J., without a jury. The learned judge was of opinion that he was bound by the decision of the Queen's Bench Division in *Pearce v. Bunting* (75 L. T. Rep. 184; [1896] 2 Q. B. 360), to hold that the ground between high and low water-marks was not a part of "the bed of the Thames" within section 87, and that therefore the defendants were not bound to obtain the conservators' license for raising sand from the place in question. He therefore gave judgment for the defendants. The conservators appealed. *Held*, that the bed of the Thames in section 87 includes the soil from ordinary high water-mark on one side of the river to ordinary high water-mark on the other side. The court therefore allowed the appeal, and granted the injunction. (*The Conservators of the River Thames v. Smeed, Dean & Co. and Another* [Ct. of App.], *Law Times Adv. Rep.*, July 24, 1897.)

### Communications.

*To the Editor of the Albany Law Journal:*

In looking over my paper on Charles O'Connor, published in the *ALBANY LAW JOURNAL* of August 14th, I notice two errors which, in the haste I was obliged to review the proof-sheets, I overlooked. The errors consist in making George III the complainant in the case referred to in the article instead of George IV, and in naming Queen Charlotte the respondent in the case instead of Queen Caroline. These errors, I may be pardoned in saying, in no way affect the historical

importance of the paper, the striking similitude between the case of Queen Caroline and that of Mrs. Forrest, nor the details of the trial and the analogous position of Lord Brougham and Charles O'Connor in the respective cases. While those errors to which I have referred are of slight importance, in no way affecting, as I have said, the singular analogy of the legal historical events related, I deem it proper to call your attention to them explanatory of their existence in the article.

L. B. PROCTOR.

ALBANY, August 18, 1897.

### New Books and New Editions.

*Taxable Transfers*, by H. Noyes Greene, of the Troy Bar. Matthew Bender, Albany, N. Y. 1897.

In something less than one hundred pages Mr. Greene has compressed much knowledge that will be of great service to the lawyer who would know the law of *Taxable Transfers* as applied in New York State. The varied and numerous citations of cases bearing on the subject give evidence of the work of the student on the not too perspicuous question of taxation.

The book is thoroughly up to date, giving the law as revised by the legislature of 1897. In addition to the subject-matter, the editor has appended different forms found necessary in the appraisal of taxable estates.

*The Negotiable Instruments Law Annotated*, by Jas. W. Eaton, of the Albany Bar, and H. Noyes Greene, of the Troy Bar. Matthew Bender, Albany, N. Y. 1897.

In the above-named work the law of negotiable instruments annotated has been concisely set forth by the gentlemen whose names appear as editors of the work. The book has been brought up to date, many of the notes referring to the laws of 1897. Many apt cases bearing on the different sections of the work have been cited, and the whole subject of bills and notes has been presented to the reader with the greatest perspicacity and conciseness. No vagaries of the theorist have been indulged, nor is the work weighed down with verbosity. The editors have written to the point and stated the law as it is, adding valuable notes to aid the student and practitioner in comprehending and applying this uncertain branch of the law.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.  
Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, AUGUST 28, 1897.

### Current Topics.

THE venerable Justice Stephen J. Field, of the Supreme Court of the United States, on Monday, the 16th inst., achieved the record of the longest service on the bench of that august tribunal, having been appointed by President Lincoln, in March, 1863. Chief Justice Marshall ranks next in length of service, having sat as a member of the court for thirty-four years. Justice Field was admitted to the bar in 1841, at which time all of his present associates were in their teens, save Justice White, who was not born. His increasing feebleness justifies the belief that this distinguished jurist will soon seek the retirement to which his long and distinguished service so eminently entitles him. At the same time, the fact that he has been enabled to serve for more than thirty-four years as an exceptionally useful member of the court, and is still in the harness at the age of 81 years, is a significant commentary on the enforced retirement provided for by the Constitution of New York with respect to members of the Court of Appeals. The case of Chief Judge Charles Andrews, who retires from the court with the close of the present year, having reached the constitutional age limit of 70 years, is one directly in point. Judge Andrews, as is well known to litigants and to the profession, is in the very prime of his powers. His extensive experience as a member of this court, as well as his thorough equipment in all respects for the arduous duties it imposes, render him

more than ever valuable. Under the inexorable mandate of the Constitution he must retire, though there is every indication that, in the natural course of events, he would have been able to serve the State for many years to come, with the same degree of acceptability which has characterized his past service.

Expedition in the trial of causes, both civil and criminal, is, from all points of view, desirable; nevertheless there is a possibility of overdoing it. A case in point comes from Key West, Fla., where the negro Johnson, for whose protection from violence troops had been ordered out, was tried for the assault he was believed to have committed. Of course, he was found guilty, and he also had one of the speediest trials on record. This began at 2 P. M., and in twenty-one minutes thereafter the jury came in with its verdict, while within the hour the culprit had been sentenced to death. With the result of this particular trial, perhaps, no fault can be found, but the method of reaching it is certainly open to serious objection. It is easily conceivable how such railroading of a prisoner to the gallows might work fully as much injury and as greatly outrage the rights of an accused person as a case of lynching. The mere technical observance of the forms of law with such unseemly and indecent haste, and without giving the prisoner any opportunity to produce his witnesses, make up his case, and establish his innocence, if possible, is very small improvement upon the system of summary vengeance which has so long disgraced portions of the South.

Hypnotism, like a great many other more or less modern "isms," is finding its way into the law courts and the law reports. Readers are doubtless familiar with the recent cases in which mesmerism or hypnotism played a part, and in some of which witnesses claimed to have been under the spell sufficiently to invalidate their testimony. Just what weight should be given to such statements in felony and civil cases is hardly yet settled. The place of hypnotism,



however, in modern jurisprudence is neither large nor important, and the same may be said of it with reference to the practice of medicine and surgery. Its most prominent latter-day manifestations have been in connection with entertainments, the leading features of which are the antics indulged in by youthful "subjects" previously operated upon by the professors of mesmerism. It has been conclusively proven, both by public and private experiments, that the effect upon subjects is often permanently deleterious, in some cases those who have afforded amusement to the public while in the hypnotic state finding their way into sanitariums or insane asylums. For this reason statutory laws have been enacted in numerous countries, including France, Holland, Belgium and Germany, looking to the prohibition of these public exhibitions. It is probable that New York State will before long be in line in this respect. A bill to prohibit performances of the kind referred to has been drafted by Dr. Henry Lilienthal, of Albany, and at the last annual session of the New York State Medical Society the bill was given in charge of the committee on legislation. It is probable that at the coming session of the legislature the bill will be introduced. The following is a copy of the proposed law:

An Act to prohibit the public or private exhibitions of hypnotism, otherwise known as mesmerism or Braidism, including catalepsy.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. Any person who gives public or private performances or in any way whatever practices upon or causes any person to enter into any hypnotic or cataleptic state or condition, with or without the latter's consent, is guilty of a misdemeanor. This section shall not be extended to apply to duly authorized physicians and surgeons engaging in hypnotism at the bedside or in a duly incorporated institution, for the relief of pain, the cure of disease or for experimental or scientific purposes, provided that the person to be operated upon be over the age of 21 years, or if under that age, the consent of his parent or guardian, or other person having legal custody of him, be first obtained.

§ 2. This act shall take effect immediately.

The bill, which, by the way, appears to be a model of conciseness, ought to be put on the statute-book without delay.

Our sprightly contemporary, the Chicago Post, does well in calling attention to a flagrant case of what it terms bad form at the bar, wherein an attorney named Ingram audibly commented on Assistant State Attorney Pearson's address during the Moran and Healy trial in Chicago recently. The offending lawyer had had his opportunity to present his case to the jury, and there was no possible excuse for the side remarks he was alleged to have made in the hearing of the jurors. The only possible explanation is that he was endeavoring to take an unfair advantage of the State. The Post adds: "Unfortunately such methods are becoming too common in the practice of our courts, and there will be no end to it until some offender has been properly punished. It is a much more serious matter than the ordinary case of contempt of court, which may be the result of ignorance, for it is done deliberately and with a full knowledge of its impropriety. There is no possible plea in extenuation of such an offense that a lawyer can make without confessing himself ignorant of the very first requirements of his profession or so lacking in self-control that he is not a proper person to plead a cause. A reprimand by the court is not a sufficient punishment for an offense of this nature, and until the judges adopt more drastic measures there are lawyers who will continue to resort to such tricks in their court work."

An interesting decision as to what constitutes champerty was rendered by the Supreme Court of the United States in *Peck v. Heurich* (17 Sup. Ct. R. 927), wherein it was held that an agreement by an attorney-at-law to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the thing recovered, is champertous and void. It was further held that the intention that all costs and expenses of obtaining title and

possession of lands conveyed to an attorney and another in trust for that purpose shall be borne by the attorney, and in no part by the grantors, is shown by the stipulation that he shall receive one-third of the proceeds "after paying all expenses, costs and expenditures of" the trustee in the execution of the trust "out of the same" — evidently meaning out of his third part. The court holds that, according to the common law, as generally recognized in the United States, wherever it has been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void, as tending to stir up baseless litigation (4 Kent Comm. 447, note; *McPherson v. Cox*, 96 U. S. 404, 416; *Stanton v. Haskin*, 1 MacArthur, 558; *Johnson v. Van Wyck*, 4 App. D. C. 294; *Brown v. Beauchamp*, 5 T. B. Mon. 413; *Belding v. Smythe*, 138 Mass. 530; *Stanley v. Jones*, 7 Bing. 369, 377; *Id.*, 5 Moore & P. 193, 206). Upon the nature and effect of the agreement made by the attorney with the grantors in the deed, the court concurs in the opinion expressed by the Court of Appeals of the District of Columbia, as follows: "He agreed to pay the costs of the litigation. He agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing. And his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered, or of the money that might be received by way of settlement or compromise; and the character of the enterprise, on the part of the attorney, was so plainly a speculative one that in the deed the net results to him are mentioned as 'profits.' If this be not champerty we fail to see wherein there can be champerty." "We must regard an agreement by any attorney to undertake the conduct of a litigation on his own ac-

count, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty; and that this was the character of the arrangement in the present case we are entirely satisfied. The very thing in dispute was conveyed, or sought to be conveyed, in advance, to the attorney and an associate, for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense, and in consideration of this he was to retain at the end of the litigation one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land, when recovered, was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise" (6 App. D. C. 283, 284). The deed, as appears upon its face, having been made to carry out the champertous agreement, was unlawful, and passed no title, and the joinder of Peck as co-trustee in the deed could not give it validity. The result is that this action cannot be maintained by the trustees claiming under the deed, although a similar action might have been maintained by the grantors in their own names (*Burnes v. Scott*, 117 U. S. 582, 590; 6 Sup. Ct. 865, and *Hilton v. Woods*, L. R., 4 Eq. 432, 439, there cited).

The Superior Court of Philadelphia county, Pa., recently decided, in *Donoghue's Appeal*, reported in *Weekly Notes of Cases*, vol. xl, No. 21, p. 440, that it is not a statutory requirement that an applicant for a liquor license shall agree not to apply a second time. The court holds that the right to make successive applications from year to year is without legal restriction; that the right to ask at any time for a license rests on the ground of compliance with the legal requirements, and each application should be decided solely with reference to the conditions existing when it is heard. Incidentally, the interesting question whether there

is any element of moral turpitude in the non-observance of a promise exacted without warrant of law, or evidence of a lack of the good moral character which the statute requires of an applicant for a license, was passed upon. It appears that in March, 1896, Donoghue applied for a license to sell liquors at the southeast corner of Eighth and Vine streets, Philadelphia, where it had been granted to him for several successive years. A remonstrance having been filed, the License Court, after taking evidence, on April 4, 1896, entered its decree refusing the license. On May 12 following Donoghue presented his petition for a rehearing, and on the 19th of the same month the court filed an opinion granting the applicant a license for one year, on his filing a stipulation that he would not again apply for a license in the same locality. To this the applicant agreed, and the license was accordingly issued. Donoghue, notwithstanding his pledge, presented a petition to the License Court, at the March term, 1897, praying for a license in the same locality. A remonstrance was filed, and after a hearing the petition was indorsed: "License refused. C. B. M. M. S. March 24, 1897." The Superior Court reversed this order and directed that a license be issued by the court below, as prayed for, upon payment by the applicant of the license fees fixed by law. In doing so it took occasion to severely rebuke the License Court for its action in thus "bargaining with a suitor," declaring it to be a proceeding wholly unwarranted by law. Such a practice, it was well pointed out, introduces matters never contemplated by the statute. The court added: "If there is such a compliance with the statutory provisions that a license should be granted, neither an apprehension that it might become improper to grant a license a year later, nor a promise by the applicant on a former hearing not to make another application, can be recognized as a legal reason for refusing it. Nor can we concur in the view of the dissenting license judge, growing out of the reason given for rejecting the present application, that the applicant's disregard of the promise referred to stamps his moral character as

bad. Had the promise been purely voluntary, it would have been in effect only an expression of his intention, with no legal ground for holding him to its observance; and such declaration of intention not being required by law, there is as little ground for holding him to it when imposed by the court. The distinguished counsel for the appellant has logically demonstrated that there is an aspect of duress in the action of the court requiring the applicant to give such a promise; and duress by the court imposes no greater obligation than duress by a private person (*Horstman v. Kaufman*, 97 Pa. 147). We are unable to perceive any element of moral turpitude in the non-observance of a promise exacted without warrant of law, or to regard it as exhibiting a lack of the good moral character which the statute requires of an applicant for a license. Aside from this promise, there was no evidence before the court as to the applicant's moral character, and there is no assertion that the dissenting license judge acted on personal knowledge of it. We must regard the reason given for refusing the license as insufficient under the statute, and as showing the exercise of an arbitrary instead of a judicial discretion. The dissenting judge having based his refusal solely on this reason, it must be assumed that no other exists; and as the reason given for rejecting the application is without validity in law, it follows that the license should have been granted."

The development of the law with respect to bicycles is marked by incidents which, in some cases, closely border on the ludicrous. A case in point is mentioned by the Solicitors' Journal, that of *Treeby v. Hatton*, which was decided recently by a Divisional Court. The appellant, it appears, was riding a bicycle at night, without a light, and was called upon by a constable to stop. This he did not do, and the officer, in order to obtain his name and address, caught hold of the machine and caused the rider to fall off. The question for the court was whether, under the circumstances, the constable was guilty of an assault upon the appellant. The

court decided that he was guilty of an assault, the law giving him no authority to arrest or detain a person riding without a light, although so riding during certain hours is a punishable offense. Section 85 of the Local Government Act, 1888, declares bicycles to be carriages within the meaning of the Highway Acts. Accordingly, a bicyclist may be punished for a number of offenses set out in section 78 of the Highway Act, 1835, the most important being that of riding at excessive speed. Section 79 of the same act provides that in case of offenses "committed against this act" by persons whose names are unknown, any person witnessing the commission of the offense may "seize and detain such unknown person." Now, driving without a light is no offense under any of the Highway Acts, and so section 79 cannot give authority to seize or detain an unknown person for such offense. It is, however, an offence under section 85 of the Local Government Act, 1888, for a person to ride a bicycle during certain hours without a light, and the person guilty of such offense may be fined forty shillings on summary conviction. The last-mentioned act, however, contains no sort of authority to any person to stop or arrest an offender such as is contained in the act of 1835 in the case of offenders against that act. At common law a constable can only arrest without a warrant in order to prevent a breach of the peace, or on reasonable suspicion that the person arrested has committed a felony. In all other cases a constable can arrest only under authority given him by statute, and if he arrests a person without authority, he is clearly guilty of an assault. As no authority so to do exists, it is therefore illegal to arrest or stop a bicyclist who is riding without a light. This state of things seems due to an omission of any such authority by mistake from the act of 1888. Such omission practically renders useless the provisions of the act with regard to the carrying of lights and the ringing of bells by bicyclists. Of course, if a policeman sees a man whom he knows, and whom he can follow and identify, riding without a light, he may take out a summons against him. This, however, can only be

possible in very few cases, and it is certain that if the constable has no authority to stop the rider, the latter will in most cases refuse to obey any call to stop.

### Notes of Cases.

In *Freedman v. The Providence Washington Ins. Co.*, decided by the Supreme Court of Pennsylvania, March 16, 1897, the court held that an insurance broker, acting in the line of his business, is the agent of the insured by whom he is employed, and not of the insurer, and representations made by him in the placing of the insurance bind the insured. It was further held that a principal is bound by untrue representations of his agent, irrespective of the knowledge of the agent as to their truth or untruth. The court, by Mitchell, J., said: "The learned judge below directed a verdict for defendant on the ground that the misrepresentation upon which the policy was procured was a fraud which avoided the contract. In this he followed the law as settled in *Freedman v. Fire Association* (168 Pa. 249). The fact of such misrepresentation is undisputed, though as to whether Sturdivant knew it was untrue at the time he made it, the evidence is conflicting. The correctness of the instruction therefore depends on the relation of Sturdivant to the parties. If he was the agent of defendant, then there was a question for the jury whether he had been informed, or had notice, that R. Freedman was a married woman. But if he was the agent of plaintiff then his knowledge was immaterial; the plaintiff cannot avoid the responsibility of a misrepresentation by her own agent, whether made knowingly or not, and at the same time claim a benefit arising from such misrepresentation. An examination of the evidence shows that the learned judge was clearly right in holding Sturdivant to be the plaintiff's agent. His own testimony, which is contradicted on this point, shows that Sturdivant was an insurance broker, having no special relation to the defendant company, but occasionally taking out policies in it through its regular agent, for his customers when he could not or did not wish to place their risks in the other companies which he personally represented. He was not at the time he procured this insurance, and had never been, an agent for the defendant, nor was he acting on this occasion in behalf or at the suggestion of the regular agent, Dart. On the contrary, in soliciting this insurance he was pursuing his own business as a broker, and, as he says, using his own judgment where to place the insurance his customers authorized him to procure for them. The case is clearly in line with *Pottsville Ins. Co. v. Minnequa Co.* (100 Pa. 137). It is argued by appellant that the judge, in taking the case away from the jury, overlooked the decision of this

court when the case was here before (175 Pa. 350). But what was said there in regard to the knowledge of defendant that the insured was a married woman being a question for the jury, was merely narrative in distinguishing the case from one of the same name in 168 Pa. 249, and was based on the evidence as it then appeared to be." The opinion then proceeds to the subject of waiver, and states explicitly that that is the only question to be considered. Judgment affirmed.

In *Brewster v. Miller*, decided by the Court of Appeals of Kentucky in June, 1897 (41 S. W. R. 301), it was held that the fact that an association was formed for the purpose of controlling or fixing the price of merchandise or property, in violation of Kentucky statutes, section 3915, gives no right of action against the association to one to whom it has refused to sell such merchandise or property. It was further held that an article of a funeral directors' association providing that the members are not to render services for or furnish burial material to any person who fails or refuses to discharge an existing indebtedness to any member of the association is not unlawful; that one has no right of action against a merchant for refusing to sell him goods, and that a conspiracy to compel one to pay a debt he does not owe gives him no right of action unless he pays the money demanded.

The Court of Appeals of the District of Columbia held, in the recent case of *Robinson et al. v. Parker*, reported in the *Washington Law Reporter*, that where parties without a special or express agreement to form a partnership contribute a fund to be invested as occasion offers in notes, etc., and agree to share the gains and losses thereof between them, they thereby become partners in the view of the law, and that subsequent declarations of one or all the parties that they were not partners cannot operate to alter or destroy that relation. The court said: "What may constitute the legal relation of partnership between two or more persons in a given matter is a question of both fact and law. Persons may become co-partners without a special agreement for the purpose, by virtue of the effect which the law gives to an undertaking for the use of a common capital with division of profits and losses, in continuous transactions, though carried on in an incidental manner. Therefore, if the plaintiffs, without a special or express agreement to form a partnership, contributed a fund to be invested as occasion offered, in notes, stocks and the like, and agreed to share the gains and losses thereof between them, they thereby became partners in the view of the law, and the court properly instructed the jury to that effect, as requested by the plaintiffs."

A noteworthy case is that of *Evey v. Mexican Central Ry. Co.*, decided by the United States

Court of Appeal, Fifth Circuit (Texas), reported in 81 Fed. Rep. 294. The official syllabus is as follows: The right of an employe of a railroad company, injured in the Republic of Mexico by the negligence of the company, to recover in a civil action damages for such injury, under the law of that republic, may be enforced in a Federal court of the State of Texas, having jurisdiction of the parties and of the subject-matter; that law being neither so vague and uncertain nor so dissimilar to the law of the State of Texas as to prevent it from being so enforced, and both parties being citizens of the United States. A dissimilarity between the law of another country and the law of a State, in the Federal court of which it is sought to be enforced, will not prevent such enforcement, unless the dissimilarity is so great as to conflict with the settled public policy of that State. The fact that a person injured by the negligence of a railroad company in another country might sue in that country is not sufficient to prevent him from suing in a United States court, particularly where the company owns and operates part of the same line of railroad in the State in which the suit is brought. The provision of the Penal Code of Mexico (art. 306) that the required condition that the damages and injuries shall be actual "shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit when they shall have accrued," has reference only to damages for injuries that develop after the first suit. The fact that the law of another country provides for the recovery in a second suit of damages for injuries which develop after the first suit does not prevent the person injured from suing in a court of this country, in which all damages must be recovered in one suit, as that provision of the foreign law relates merely to the remedy, and cannot govern here. The provision of the Penal Code of Mexico (art. 313) that the judges "shall endeavor that the amount and terms of payment be fixed by agreement of the parties," relates merely to procedure, and not even to the remedy, and therefore does not control in an action in a United States court arising under the law of Mexico. The fact that acts of negligence for which the laws of Mexico give a civil remedy constitute also a crime under the laws of that country does not prevent the person injured from maintaining a civil suit therefor in a United States court, the liability not depending on the criminal prosecution or conviction of the defendant. The fact that the provision of the Penal Code of Mexico (art. 323), that the judge may award, as "extraordinary indemnity," any sum that he may determine, considering the "social position" of the person injured, is against the policy of our law, is no obstacle to a suit in a United States court to enforce a right given by the law of Mexico, there being no prayer for such extraordinary indemnity. The fact that the Mexican courts are not governed by precedent, and have no reports

of adjudicated cases, is not an obstacle to an action in a United States court to enforce a right given by the laws of Mexico. The decisions of a State court that a law of another country is opposed to the policy of the State, and cannot be enforced there, are not controlling in the Federal courts, the question of international comity being controlled by international law and custom.

A similar question, mentioned by the Ohio Law Journal, was recently before the Supreme Court of Michigan, in the case of *Turner v. St. Clair Tunnel Co.* In that case the defendant was engaged in constructing a tunnel under the St. Clair river between the State of Michigan and the Province of Ontario, in the Dominion of Canada. So engaged, the agent of the defendant sent the plaintiff, who was in its employ, on the American side, to the Canadian side to work at that entrance of the tunnel, and while so working there the plaintiff was injured. It is held that, whether or not the defendant is liable in damages for the injury on the ground of negligence in putting the defendant upon dangerous work, was to be determined in accordance with the law of Canada.

An interesting legal controversy over a conditional gift of money has just been decided in New York. In the spring of 1885 Miss Helena Flint answered an advertisement of Miss Eleanor M. Ruthrauff's, which offered her services as professor of music for a home through the summer months. An arrangement was then made by which Miss Ruthrauff taught Miss Flint's little cousins during the summer. After that she continued to live with Miss Flint as companion, and kept house for her. Miss Ruthrauff first got an allowance of \$10 a month, which was soon increased to \$50 a month. Their relations became more and more intimate, and in the spring of 1889 Miss Flint made her will, in which she gave to Miss Ruthrauff a legacy of \$25,000 absolutely. Miss Ruthrauff made her will about the same time, giving all her property to Miss Flint. There were talks between the two afterward regarding possible objections to the will by Miss Flint's relatives, and in December, 1890, Miss Flint took from her box at a safe deposit vault \$10,000 in bonds and gave them to Miss Ruthrauff to put in her box, saying: "These bonds are provisionally for you in case of my death; you may have the coupons and deposit them to your credit at the bank; I shall cease paying you the allowance and the coupons will take the place of those payments." The following December she took \$15,000 in bonds from her box, and they were put in Miss Ruthrauff's box, Miss Flint saying that "the bonds were provisionally for Miss Ruthrauff in case of my death; that she could not have the coupons, as I needed them for household expenses; I shall now change my will and leave out the provision I made for you of \$25,000." Shortly afterward Miss Flint gave to Miss Ruthrauff a paper signed by her,

stating that she gave her \$25,000 in bonds and had placed them in her box. Justice Chase, before whom Miss Flint's suit to recover the bonds was tried, holds that Miss Flint intended to and did make to Miss Ruthrauff a valid gift of the bonds, subject to the income on \$15,000 being retained by her during her life, and subject to the gift being entirely defeated if Miss Ruthrauff died before her; and that a trust was created to carry out such intention. The money is directed to be turned over to the Union Trust Company as trustee, Miss Ruthrauff to have the income on \$10,000 during her life and Miss Flint to have the income of \$15,000 for life. Miss Flint is to have the principal if she outlives Miss Ruthrauff, otherwise the principal is to go to the latter.

The Supreme Court of Michigan held, in the recent case of *Murfin v. Detroit and Erie Plank Road Company*, reported in the *Detroit Legal News*, that a statute providing that tollroad companies may exact toll from "persons traveling on their road \* \* \* for any vehicle, sled, sleigh or carriage drawn by one or two animals," \* \* \* etc., does not authorize such company to charge toll for the use of its road by persons riding bicycles. The court said: "There is nothing in this act that gives the right to charge toll against pedestrians, and we have never heard it claimed that such charges were made. Nor have we known of toll being charged for wheelbarrows or cars or handsleds or baby carriages propelled by human agency, though a good road is as essential to these as to bicycles. \* \* \* The bicycle is not subject to the payment of toll by the strict letter of the act. Neither is the motor-cycle, yet we incline to the opinion that payment of toll by the driver of the latter is within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used. The views seem to receive significant support in the fact that we find few cases where the question has arisen. The bicycle has been used as a road machine for a quarter of a century, and we cannot conceive of the users submitting to a general practice of charging toll without protest that would have led to an adjudication of the question. Furthermore, we have never heard that it was the practice of the companies to charge toll, and we have reason to believe that this company is no exception, but that the cause is here to ascertain whether the company may safely provide exceptional facilities for wheelmen with the expectation of collecting toll."

#### INTERNATIONAL ARBITRATION.

IN the defeat of the general arbitration terms between this country and England, after an entirely satisfactory preliminary settlement of the

same by the representatives of both contracting parties, and after obtaining every reasonable concession claimed in the interest of this country, the senate of the United States shows to the world that the spirit of jingoism has a strong hold on that august body, and the popular cartoon representing Uncle Sam in his usual dress, and with his usual grin, strutting about with a chip on his shoulder, is emblematical of the action of those supposedly grave and dignified senators who so belligerently opposed the treaty.

It is now some time since the adverse action of the senate upon this international matter, and perhaps the whole subject may now be considered as somewhat out of date. But it is not out of date at all. The only thing out of date is the action of the senate. It is the opinion held by many men of public character and life, that the United States senate has made no greater mistake than when it deliberately refused to join hands with the foremost nation in Europe in the friendly grasp of complete understanding; and thus to show to the nations of the world the attitude of the great English-speaking nations, foremost in civilization, upon all future matters of difference.

From out of the dark ages of history have come the civilizing influences of Christianity, and foremost among the nations to uphold the cause of Christianity was the Anglo-Saxon. The principle that a nation's honor could only be upheld by a resort to war, so long the rule of action among the nations of the world, was inimical to the beautiful precepts of the religion founded by the Christ, and must inevitably give way, as other like rules of action have given away, to those rules of action more consonant with the teachings of Him who commanded that we should love our neighbors.

With the progress of civilization, war has now come to be regarded, except in extreme cases, and where nations of a less degree of civilization are concerned, as a relic of the barbaric ages, and to be avoided, unless attacked and a nation's honor is at stake. But there are governments of the peoples of the nations of the world which do not at all times represent the intelligent, Christian character of the people governed. Political scheming and trickery, and the ambition of those who rule, with, perhaps, internal dissensions and licentiousness, are a menace to the peace of nations, especially of the old world at all times. But with the two foremost nations in civilizing influences standing together advocating and practicing this new and better scheme for the arbitrament of international difficulties, the influence upon other nations of the world would have been incalculable.

Both nations have proved in many battles the soldierly quality of their people. There are now no reasonable grounds for any feeling of antagonism between these two nations; none at all, ex-

cept it may be that feeling which naturally arises in the course of business competition between individuals. These nations have the broad waters of the Atlantic rolling between them. They occupy such relative places upon the map of the world as to peculiarly fit them for the practice as between themselves, and the promulgation among all the other nations of the earth of the great doctrine of arbitration of international disputes.

Besides this, both nations are founded upon the religion taught by the life and works of Christ, and are the recognized exponents of the same.

What might have been saved to at least one nation interested in the Franco-Prussian war had France listened to the friendly interposition of Great Britain! Nothing but a feeling of jealousy and unrest divided these two nations into hostile camps. There was no injury to redress, at least upon the part of France. Why should these hosts come together in deadly strife, sacrificing precious life and laying waste beautiful country? To satisfy a mere whim of offering sacrifice to a nation's honor, or better, perhaps, as no one had been really dishonored in the interchange of civilities between the countries interested, the strife was rather to determine the relative merits of the German needle gun or the French chassepot, as the historian has reported that in one battle between French and German soldiers armed as aforesaid there were forty thousand brave men, about an equal number on both sides, the flower of two great countries, killed in one summer's day by the use of these excellent arms. It would seem as if the only party really satisfied by this display of a nation's honor was the devil himself. It was an even thing, so far as the guns were concerned. But what thought the people of France and Germany when they heard these tidings from the frontier? Did they not ask themselves why this awful sacrifice upon the imaginary altar of a nation's honor was required? Was there no other and better method to uphold a nation's honor? Did they count the cost in precious human lives? Did they wonder at the reasoning of those in official authority, whose orders plunged into bloody strife two great peoples, a large portion of whom profess the religion of Christ, to satisfy a mere whim of outraged honor? The Franco-Prussian war is referred to here because it serves so well to illustrate the utter absurdity, we would say, were it not so terrible in consequences, for two great nations in this age of civilizing influences, professing the religion of Christ, and making use of the most destructive armament which the ingenuity of man can devise for the very purpose of rendering a resort to war unnecessary, to deliberately go about doing that which at all other times the laws of these self-same nations regard as the most indefensible. The Franco-Prussian war was the most causeless

and destructive war of modern times. The few wars that have been fought since the world began which have resulted in any permanent good to mankind, were to settle principles now no longer questioned among civilized nations, and even these came with the order of evolution from the dark ages.

The war of secession in this country should have been avoided. But its causes were deep-rooted in tradition and sectional jealousy. The seed that produced the fruit of sectional strife had been sown many years before the terrible harvest which followed.

Deep-seated in human nature is the warlike instinct. And in any community, society or nation where the recognized rule of settlement of disputes is a resort to this method, all better counsel and all peaceful efforts are swept aside by the violence of brutality.

One need only to study the faces and actions of a mob intent upon doing violence to life to acquire a feeling of fear, and at the same time a feeling of contempt, for this brutal instinct of his fellow-man. This same brutal instinct cries for war. War is the manifestation of the brute part of man's nature. And all of the philosophy of Hogel, De Maistre and Von Moltke cannot make it otherwise.

We have grown wiser with the advance of time, and to-day know that there are other means of settling international difficulties than to emulate other nations in systematic homicide. It has been the policy of the American government to avoid war. The people of this country are a peace-loving people, although they have taught the world to respect them in arms. It has been demonstrated by the American Republic that a great democracy may be governed by law alone. We have fostered free speech and a free press until the world gazes at us in amazement. We have introduced other amazing features into "a government by the people" which other nations are at last learning to respect. Unconsciously the nations of the world are looking to us with favor and following in the lead of the young Republic. To-day we have no cause to fear any army or navy of the world. We have shown our strength in war. But that which has rather impressed the nations of the world has been our devotion to peace. And a remarkable fact of our country's history is that we have always advocated arbitration as the only reasonable method of adjusting disputes between nations. It may well be inquired of the present senate of the United States if they gave due consideration to the historical position of this country upon the propositions submitted to them in the proposed treaty of general arbitration between this country and Great Britain. Over one hundred years ago the young Republic adopted the method of arbitration in settling disputed questions with Great Britain.

And this policy has been followed ever since, and through it all the good sense of the Anglo-Saxon and his descendants has shown as a beacon light to other nations.

To the honor of Great Britain be it said that she, too, has consistently kept her agreements and supported the policy of arbitration established between the two governments.

These two great English-speaking nations have, upon all occasions of disputes between themselves, adopted this method of settlement, and have endeavored, so far as was consistent with national dignity, to impress other nations with the importance of adopting a like system.

Through the united efforts of the two nations the principles of international law have become well settled. And now, at the close of the present century of the world's history, no more important work, as affecting the intercourse of nations, could have been accomplished than for these kindred nations to have clasped hands in a union of sentiment upon these principles forever.

The lesson taught in the matter of the Geneva award, it seems to us, should have had more influence with those members of the American senate who opposed the treaty with such bitterness. That arbitration settled some very grave questions, and at a time when this country was in no condition to enforce her demands from Great Britain. It was certainly not the fear of war which led Great Britain to acquiesce in and accept the terms of that court of arbitration. But in justice to them, be it said again, the English government, upon being advised of the injury and her liability under treaty provisions, gracefully and justly accepted the findings of the court, and paid the award—one of the most conspicuous instances of the working of international arbitration on record.

Were our senators mindful of the lessons taught in the settlement of this Geneva award? Had the senators from the rotten-borough and sage-brush States of Montana, Kansas, North and South Dakota, Nevada, Utah and Idaho, whose combined population by the last census returns was less than two and one-half millions, a just appreciation of the services they were rendering the people of this country, and their constituents, when they opposed action of the American senate in adopting a measure so fraught with consequences to humanity, and the adopting of which would have reflected credit and honor upon themselves?

Nothing different, perhaps, could be expected from the senators from the Bourbon States, whose attitude of hostility towards President Cleveland furnished them with ample reason for a betrayal of the trust reposed in them by the people. In justice to the senate as a body, be it remembered that a large majority favored the treaty, though in amended form. It required a



two-thirds vote to pass the measure. The vote showed the defeat of the treaty by a few votes, although the session of the senate at which the vote was taken was held in secret. Press reports have it that twelve Democrats, nine Republicans and five Populists voted to defeat the measure. With the action of these senators was mixed up a good deal of the myth of Jack the Giant Killer, and smelling the blood of an Englishman turned their heads completely. This sort of patriotism is but little above that manifested by the inhabitants of the South Sea Islands of cannibalistic tastes.

It is safe to say that the action of the senate is not an expression of the will of the people of this country. Both great political parties were in substantial accord as to the advisability of this country agreeing to such treaty relations with England. The moral and patriotic sentiment of the people, as expressed in different ways, approved of such a course. But the Cleveland administration seemed, as it were, destined to pass into history without the accomplishment of any great fact. In this instance, at least, the result is a shame to those who accomplished it, and the quickening of the consciences of those responsible for the defeat of arbitration between these countries will not add anything to their feeling of self-respect. The conglomerated opposition of the silver sentiment, resentment towards the Cleveland administration, and jingoism have defeated the popular will and at the same time destroyed faith in the United States senate.

To urge the plea that it is for other nations rather than ours to give pledges of peace is begging the question. The proposed measure was not a mere pledge of peace. It was a policy of international government intended to be recommended to the world of nations—a policy demanded by the progress of civilizing influences.

In the meantime the art of war has reached a high state of perfection. And the ingenuity of man is nowhere more manifest than where he devises means for dealing death to his fellow-men. The rapid-fire gun and the gun with the explosive bullet insure a speedy means of offering sacrifices on the altar of a nation's honor. The Canet gun of the French army will throw a shell loaded with 300 bullets five times a minute, and is warranted to make angels of those opposed at 7,000 yards. Herr Krupp has offered this gun of the Frenchman odds as against a recent and secret invention of his own, adopted by the German government, as a substitute for any needed arbitration between the two nations. What does all this mean? France and Germany, with vast armies, ready to fall upon each other with the deadly contrivances of modern times to blot out life. What a commentary upon the claims made of the spread of the gospel of Christ.

To-day the United States and Great Britain are

striving to crown the glorious achievements of the closing century with a compact among nations which will bind them in a brotherhood, with ties more consonant with the doctrine of the Christian religion and in better harmony with the progress of intelligent thought. Homicide between nations, such as that witnessed in the Franco-Prussian struggle, is opposed to all right conception of how a nation's honor should be upheld and of international comity.

PERCY L. EDWARDS.

OWOSSO, MICH., August, 1897.

### RIGHT OR LEFT-HANDEDNESS IN THE DETECTION OF CRIME.

BY CLARK BELL OF THE NEW YORK BAR.

IN studying a wound, from which death results, where the facts are not proven, and deductions must be made from the wound itself, the state of the body, the environment at death, and the character of the fatal act—every circumstance, every fact and minutest details considered—the silent language of the cadaver, the wound, its minute description and careful study, may lead to the detection of crime, in obscure and doubtful cases.

If the blow was inflicted by a weapon, how was it struck? what was the position of the body at the time the blow was struck? is not infrequently of great importance and interest.

It sometimes becomes of importance to establish whether right or left-handedness existed, or whether both hands could be used equally well in handling a weapon, pen, or for other purposes. Dr. J. N. Hall, of Denver, one of our best authorities, in treating of this subject says:

"The matter has generally been settled by the production of witnesses, who have testified freely in many cases to a given condition, when an equal number of witnesses has been brought forward who have testified to an opposite condition. In many cases the question could be better settled by an examination of the prisoner, if such an examination could be obtained, or of the corpse, in case this became desirable, by a study of the cicatrices upon the hands, such as are inflicted by every man who handles tools of every kind, but especially the pocket-knife. Although most left-handed boys are taught to write with the right hand, I believe the knife is commonly handled with the left hand in such cases by the left-handed, and many tools are used in a similar manner in various trades. In women the study could not be expected to be of so much value, and still it has proved to be fairly conclusive in many cases. I should say further, that in the cases of professional and other men, not much given to the handling of tools, cicatrices may not be found, although in America, as long as the Yankee retains his reputation for whittling upon every possible opportunity, they will be present in most cases, and furnish more conclusive testimony than can be given orally. I have found

these knife-cuts, as one would expect to find them, upon the radial side and dorsum of the forefinger, upon the ulnar side of the thumb, and to a less extent upon the dorsum, particularly about the knuckle, and in many cases upon the radial side and dorsum of the middle finger. It should be stated that, because of the fact that both hands present scars upon some parts of their surface, a decided preponderance of linear cicatrices upon one side should be necessary to justify a conclusion that implements were constantly used in the other hand, and such a preponderance we have found in most of the cases examined.

"The proposition that we should find, in most cases, scars upon the hand not holding the implement, seems so reasonable that it should require but little proof; but, more in order to learn in what proportion of cases we should be able to form an opinion, I have collected the following one hundred successive cases, with the assistance of Drs. Will F. Hassenplug and S. D. Hopkins, who have done very careful work in the examination of the fifty cases which they have contributed to my list, many of which cases they have shown to me. In the cases in which the cicatrices greatly predominated upon the left hand, generally in a ratio of from four to twelve or fifteen upon this hand to one to four on the right hand, we have simply stated the case to be right-handed, as they have invariably been, while in case the opposite condition existed, the great majority existing upon the right hand, we have called the person left-handed, without error, excepting as is hereinafter stated in connection with ambidexterity.

"The 100 cases were divided as follows: Males, 88; females, 12. (a) Right-handed, that is, with such a preponderance of scars upon the left hand that no doubt could exist, 78. (b) Left-handed, where the opposite condition existed, 7. (c) Cases without scars enough upon either hand to make a decision possible, 8. (d) Cases in which the comparatively even distribution of the scars between the right and left hands made the question doubtful, and in which it was correctly assumed, nevertheless, that the person had originally been left-handed, and had since tried to use the right hand, 6. (e) Case in which many scars were found upon both hands, and yet the patient was right-handed (our assumption of left-handedness in this case being erroneous), 1.

"Thus, of the 100 patients, we may at once throw out eight who had no marks to guide us; and one whose scars were equally distributed, who was right-handed, and six similar cases who were left-handed, leaving 85 cases in which a positive decision was arrived at, in every case the decision having been correct. Further, of the seven cases in which the scars were nearly evenly distributed between the two hands, and which were presumed to be left-handed, six were actually so, so that the seventh subject in this group was the only one in whose case error really existed.

"It must be noted further that many men claim to be right-handed who still use the knife with the left hand, which would presumably indicate that such subjects would use a weapon in attacking another person with the left hand, and especially so as, in times of excitement, it is well known that artificial habits give way to those natural to one in his earliest years. In a very large percentage of cases, one may with great certainty affirm that natural right or left-handedness exists, and in most of the cases presenting scars upon both hands in approximately equal numbers, is safe in stating that the person was probably originally left-handed, but learned to use the right hand only after having inflicted many cuts upon it through the use of the left, or possibly continues to use the left at times. It may prove that, in some occupations, the habitual use of edge-tools in the left hand may call for a modification in these statements."

Dr. J. N. Hall also cites approvingly Dr. Catharine F. Hayden, who says that in women the forefinger of the hand in which the needle is not held shows the marks of the needle, although these would wear away in a short time if sewing were suspended, not being true cicatrices. "Dr. J. N. Thomas has also mentioned that he has seen, in the hands of wood-carvers and engravers, in which the tool was not held, the scars of pricks made by the implement in question. Obviously the occupation of the person would have an important bearing in this connection."

— From *Advance Sheets Clark Bell's 12th Ann. Edition Taylor's Medical Jurisprudence.*

#### CONSTRUCTION OF SECTION 2555, CODE CIVIL PROCEDURE.

A SURROGATE'S DECREE DIRECTING THE PAYMENT OF COSTS MAY BE ENFORCED BY CONTEMPT PROCEEDINGS.

NEW YORK SUPREME COURT — APPELLATE DIVISION — FIRST DEPARTMENT.

June, 1897.

Present: Hons. Charles H. Van Brunt, P. J.; Pardon C. Williams, Edward Patterson, Morgan J. O'Brien and George L. Ingraham, JJ.

In the matter of the application for the removal of J. Lee Humfreville, as executor, etc., of Mary J. Havemeyer, deceased.

Appeal from order of the surrogate adjudging J. Lee Humfreville guilty as of a contempt of court, and directing that he be committed by the sheriff of the city and county of New York to the common jail, and there be detained in close custody until he pay certain moneys.

Abram Kling (of counsel) for appellant; Henry H. Whitman (of counsel) for respondent.

O'BRIEN, J. — The single question presented on this appeal is whether a decree of the surrogate

directing the payment of costs may be enforced by contempt proceedings. As a matter of first impression, we should be inclined to answer this in the negative; and this impression is strengthened by our recollection that, prior to the adoption of the present Code, and pursuant to the provisions of the Revised Statutes, no person could be arrested or imprisoned for the non-payment of costs awarded in an action or special proceeding; and by section 15 of the Code of Civil Procedure it is provided: "But a person shall not be arrested or imprisoned for the non-payment of costs awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by State writ, except where an attorney, counselor or other officer of the court is ordered to pay costs for misconduct as such or a witness is ordered to pay costs on an attachment for non-attendance."

The proceedings for the removal of Mr. Humfrville as executor cannot be brought within any of the clauses of this section so as to authorize, under it, his imprisonment, because the moneys directed to be paid were the interlocutory costs and disbursements arising upon an appeal from an order of the surrogate in proceedings pending in the Surrogate's Court; and there are many cases which hold that, under the Revised Statutes and before the enactment of the second part of the Code, there was no authority to punish as for a contempt for the non-payment of costs, even though such costs were provided for by an order or a decree. By the provisions, however, of the second part of the Code, enacted in 1880, and under section 2555, the courts have recognized in every case, so far as we have had our attention called to it, the power of the Surrogate's Court to enforce a decree, including a direction as to the payment of costs, by a contempt proceeding. In the Matter of Kurtzman (2 St. Rep. 655), where the question was presented as to the power of the surrogate to punish an administrator for contempt for failure to pay an allowance to a special guardian under a decree, the late General Term in this department said: "Whatever doubt there may have been before the Code as to the power of the surrogate to punish an administrator for contempt in proceedings of this character, there can no longer be any doubt as to such power and its extent." And Mr. Redfield, in his work on Surrogate's Court, says (p. 876): "But payment of the costs awarded against a party by a final decree, *e. g.*, a decree granting probate, may be enforced by attachment." While the Matter of Dissosway (91 N. Y. 235) is not an authority, it furnishes a strong argument for the construction given to the section by the surrogate. That was a contest between Dissosway, a creditor, and one Hayward, as to the qualifications of the latter to receive letters testamentary. The proceeding terminated in a decree awarding letters to Hayward, and directing Dissosway to pay \$715.60 costs and disbursements. A motion was then made to punish him

as for a contempt for his failure to pay such costs, which was granted. The matter came before the Supreme Court on *habeas corpus*. The Court of Appeals, referring to the various sections of the Code, intimated no doubt, but, on the contrary, seemingly recognized the power of the surrogate to enforce such a decree by contempt proceedings, but held that, as no proper foundation in that instance for the proceeding had been laid by the issuance of an execution, as provided in section 2555, the order discharging Dissosway from arrest was proper.

Although the power exercised by surrogates is only that conferred by statute, and is limited thereby, we think that the language of the sections relied upon will justify the construction placed upon it by the surrogate in this proceeding. By section 2554 of the Code it is provided that a decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the parties directed to make the same. By section 2555 it is provided that a decree of the Surrogate's Court directing the payment of moneys may be enforced by serving a certified copy upon the party against whom it is rendered, and if he refuses or wilfully neglects to pay it, by punishing him for a contempt of court; first, where it cannot be enforced by execution; second, where part of it cannot be so enforced by execution; and third, where an execution issued has been returned wholly or partly unsatisfied.

It is insisted, however, by the appellant that the payment of money as provided by this section of the Code has reference only to moneys belonging to an estate of which the party was either executor or trustee, which moneys he holds in trust for the benefit of some third party, and has no application to a case in which there has been a non-payment of interlocutory costs in a proceeding pending in the Surrogate's Court. This view is sought to be upheld by the case of *Watson v. Nelson* (69 N. Y. 537), and many other cases that might be referred to, relating to the statutory powers of surrogates as they existed under the Revised Statutes, which as before stated, have been superseded by the enactment of the second part of the Code in 1880. We do not find in the language used any limitation as to the kind or nature of the money to be paid. It is in the broadest terms and would include costs or any sum of money which by a final decree was directed to be paid. We do not understand that there is any contention, but that the direction to pay the money was by a final decree. Therefore it comes expressly within the terms of the sections; and we fail to find any language that could be construed into a limitation of the general power thus conferred, or that would make it applicable only in cases where the decree has reference to moneys belonging to an estate of which the party is either executor or trustee, which moneys he holds in trust for the benefit of third parties; but it is

equally applicable to the payment of all sums of money, whether costs or otherwise, included in and directed to be paid by a final decree.

The suggestion that the decree is defective because it provides for the payment to the petitioners or their attorneys, and that this is not equivalent to a judgment that Humfreville has refused to obey any decree of the surrogate by which the rights of any of the respondents have been impeded or impaired, we think is without force. Even if that direction were irregular, it could furnish no defense to the proceeding to enforce the decree: for assuming such a direction to be improper, the appellant's only remedy would be by appeal of a motion to correct the decree. The decree was not void and could not, therefore, be disregarded by reason of any such irregularity. (*People v. Berger*, 53 N. Y. 404; *Ferguson v. Cummings*, 1 Dem. 423.) Nor do we think that any of the other grounds of irregularity suggested are fatal to the order appealed from, which is based on service of the decree and demand, and upon an order to show cause, which is the practice authorized by the Code.

Our conclusion, therefore, upon the merits, taking the language of the sections relied upon, is that the Code as now existing has conferred upon the surrogate power to enforce a decree directing the payment of costs by proceedings for contempt, and that, therefore, the order of the surrogate must be affirmed, with costs and disbursements.

All concur.

#### INSTRUCTING THE JURY.

MR. ELLIS H. KERR, a well-known attorney of Southwestern Ohio, who has been in Geneva, this State, the last week on important professional business, tells a story involving two prominent lawyers of the Dayton (Ohio) bar which is interesting to lawyers outside of Ohio. For the purposes of the story we will call one Mr. Nerve and the other Mr. Van Shirk. A couple of clients of these attorneys "swapped" horses; as a result a difference arose between them which roused the "Irish" in each to such a degree the matter could be settled only by a lawsuit. So action was begun before a well-known, but somewhat eccentric, justice of the peace in Clay township, Montgomery county, and the two prominent attorneys were engaged by the respective parties to look after their interest. The matter at issue was trivial, the whole amount involved not exceeding \$10, and the attorneys resolved to get all the fun out of the case possible. The justice of the peace before whom the action was to be tried was known to have an aversion to instructing juries in cases tried before him; in fact, had always refused to do so; and the two prominent attorneys concluded they would have some sport with the "granger justice" by insisting that the jury should be instructed. It was arranged that Mr.

Nerve, who represented the plaintiff, should request that the jury be instructed, and that Mr. Van Shirk should join in the instance for instruction. The trial was tedious and wearisome to all concerned, and when the attorneys had summed up, Mr. Nerve said: "Now, Mr. Justice, it is necessary that you give the jury instructions before they retire to consider their verdict."

"Wall, I never ha' gin the jury no 'structions, an' I guess it ain't necessary here. Besides, I don't 'sider mysel' competent to 'struct this 'ere jury; they've heerd the evidence, an' they knows as much about the case as I do."

"Oh, but you must," chimed in Mr. Van Shirk, "or the verdict won't be legal; and we want a verdict that'll stick whichever side gets it."

"Wall," drawled the justice, "I never gin no 'structions yit, and my verdicts 've stuck afore now, an' I guess this one'll do the same 'thout no 'structions."

Both the prominent attorneys insisted that the verdict would not be valid unless the jury were instructed, and pressed the old 'squire so hard in the matter that he finally said: "Wall, ef I mus' 'struct the jury, I mus'." Then turning to the jury he said: "Gentlemen uv the Jury: You're as comp'tent ter pass on this 'ere matter as I am; but as I'm required to 'struct you 'pon 't, I say ter ye, gentlemen uv the jury, this 'ere's a case that the court ner you never should 'ave been bothered with. No, gentlemen, it never should a been brought. But since it has a been brought, an' I'm requir'd to 'struct yers, I say to yers, gentlemen uv the jury, that if yers berlieve what Mr. Nerve has said, yers'll bring in yer verdict fer the plaintiff; an' if yers berlieve what Mr. Van Shirk says, yers'll bring in a verdict fer the defendant; but ef yers are like I am, an' don't believe a d—d word neither on 'em said, then I don't know what in h— you'll do."

#### LEGAL CRUELTY.

THE house of lords has stereotyped the narrow definition of cruelty which was used by the majority in the Court of Appeal in refusing the redress to which Earl Russell was, according to the common-sense of mankind, entitled against his wife, says the Solicitors' Journal. According to the rule laid down by Lindley, L. J., "there must be danger to life, limb, and health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty. Without cruelty in the physical form a man cannot on this ground obtain a decree for separation against his wife or a wife against her husband. The facts in the present case which have evoked this decision were succinctly stated by the lord chancellor. The Countess Russell "persistently made accusations against her husband, which, if believed, would drive him from human society; she made them

where they would be most likely to be spread abroad; and as, both in criminal and civil jurisprudence, people are taken to intend the reasonable consequences of their acts, she must have contemplated that all who encountered her husband would regard him with loathing and horror. She did this, as the jury have found, without any belief in her abominable and disgusting accusations, and with a base motive of extracting better pecuniary terms from the husband she thus vilely slandered." Yet this, the majority in the Court of Appeal and the majority in the house of lords have held, does not constitute cruelty of which, when standing by itself, the court can take cognizance in a matrimonial cause. Pollock, B., when directing the jury, took a bolder course. The evidence offered, he directed them, was evidence of cruelty; the jury returned a verdict in accordance with this direction, and Earl Russell obtained at the outset a decree for judicial separation. But in the Court of Appeal Lindley and Lopes, L. JJ., concurred in the narrow view above stated, and only Rigby, L. J., was in favor of the decree. In the house of lords the opinion of Pollock, B., and Rigby, L. J., was supported by the lord chancellor and by Lords Hobhouse, Ashbourne and Morris; but Lords Watson, Herschell, Macnaghten and Shand were on the other side, and the judgment of Lord Davey at the end converted that side into the majority. Of the whole number of judges engaged in the case six were in favor of Earl Russell and seven against him. In this narrow division of opinion it is worth while to notice that neither of the judges of the Divorce Division had a chance of lending their assistance.

It would be of no advantage here to recapitulate the authorities which were cited in the course of the judgments. They were elaborately dealt with by Lord Hobhouse on the side of the minority, and by Lord Herschell on the side of the majority. Lord Hobhouse was able to cite numerous instances in which conduct not amounting to physical cruelty—conduct, for example, of extreme insult—had been admitted to proof in matrimonial cases and had been characterized by the court as cruel. Lord Herschell replied by pointing out that these were cases in which the evidence was relevant to a charge of cruelty and therefore necessarily admissible, though it was insufficient to establish cruelty by itself. The most interesting and important authority is the judgment of Lord Stowell in *Evans v. Evans* (1 Hagg. Cons. 35), and this, taken in connection with Lord Brougham's remarks in *Paterson v. Paterson* (3 H. L. C. 308), furnish all that for the present purpose it is necessary to refer to. In Lord Stowell's judgment two passages are important. In one he lays down a principle, in the other he states what he conceives to be the practical rule. The causes, he says, for which the court will decree separation must be "grave and weighty, and such as to

show an absolute impossibility that the duties of married life can be discharged." This is the principle of which the lord chancellor in the present case laid hold and which enabled him to decide that cruelty in the legal sense existed. But when Lord Stowell went on to propound a working definition of cruelty he found it safest to adhere to the easily applicable limitation that there must be physical danger. "I take it," he said, "that the rules cited \* \* \* from the books of practice are a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into I have observed that the danger of life, limb or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground."

This last phrase is undoubtedly a strong one, but it may be questioned whether it is altogether in keeping with what has gone before. The principle is that the parties shall not be compelled to live together when the conduct of one to the other has been such as to make the discharge of the duties of married life impossible. In practice, however, the cases which had usually come before the courts were cases where physical injury or threat of injury had occurred, and with these the court had found it perfectly safe to deal. In *Evans v. Evans* it was not necessary for Lord Stowell to propound any wider rule. The facts complained of, he said, were such as to fall within the most restricted definition of cruelty. They affected not only the comfort, but they affected the health and even the life of the party. There is really no necessity to regard Lord Stowell's rule as more than a statement of what was the practice of the court under ordinary circumstances. The chance expression that the court had never been driven from the ground of physical injury was not enough to bind judges for all time, and in the same judgment he recognized, as we have seen, a principle of wider application than the ordinary working rule which he propounded.

The other passage of interest in the controversy occurs in the judgment of Lord Brougham in *Paterson v. Paterson* (*supra*), and, although it contained no definite statement of the law upon a broader basis than Lord Stowell's rule, it recognized that the law was not then finally crystallized into that rule. After suggesting various cases of oppression and insult, he says: "If such a case were to be made out, or even short of such a case, which would make the married state impossible to be endured, which would make life itself almost impossible to be endured, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigor of their negative rule, at present somewhat vague, as to

extend the remedy of a divorce *a mensâ et thoro* to a case such as I have put." Lord Herschell characterizes this as a mere speculation on the part of Lord Brougham, adding the remark that he was not specially an authority on ecclesiastical law. But Lord Brougham hardly deserves this treatment. Had the case called for a definite rule at that time, he would very probably have propounded one in the sense he indicated, and the present unfortunate decision would never have been called for. Lord Brougham saw, what is not so clear to the judges who have now prevailed, that the law on such a question as this ought not to be permanently settled by judicial decision, and there is no reason why his speculations, tending towards the establishment of a wider principle, should not at a later date have had effect given to them.

We do not forget, indeed, that Lord Herschell himself expressly says that the law should be capable of development, but he weakens his remark by an unconvincing allusion to the antiquity of matrimonial misconduct. "I have no inclination," he says, "towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development evolves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterized the last century, in this respect there has been no alteration, no new development. I think it is impossible to do otherwise than proceed upon the old lines." But surely there is something wanting here, and had the omission been supplied there might have been a different end to the litigation, and the law would not have had this impassable barrier set up against it. It will be seen that Lord Herschell does not argue, as he plausibly might, that the courts are restricted by section 22 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), to the rules then prevailing in the ecclesiastical courts. He admits the possibility of development, though the present, in his view, is not a case where development should be permitted. Although, however, marital misconduct may not have assumed any new form, yet opinions with regard to the consequences of marital misconduct undergo a change, and it would be perfectly proper at the present day to ascribe to conduct which is cruel only in the sense of inflicting gross social injury and personal suffering as much effect as was formerly ascribed to conduct which produced or threatened to produce physical injury.

But by the decision of the majority the development of the law in the ordinary course is finally stopped. Lord Herschell says the legislature may intervene, but the present is just one of those cases where the judges are able, if they only will, to make the law a good deal more satisfactorily than the legislature. The time was ripe for a

definite statement of the law upon a broader basis, and the house of lords is a tribunal from which such a statement might have been expected. It is quite right, of course, to guard jealously against too easy a relaxation of the marriage tie, but there can be no object in maintaining that tie unimpaired when in point of fact the conduct of one spouse towards the other has been such as to make cohabitation impossible. It is only in extreme cases that this result could be held to follow, but Earl Russell's was such a case, and it plainly called for redress. Physical injury or the threat of physical injury is only one form of cruelty, and it is only one form of conduct which puts an end to the possibility of the due discharge of the duties of the matrimonial relation. Conduct like that of the Countess Russell is in the ordinary use of language equally cruel, and it has quite as much effect upon the married life of the spouse. Whatever view be taken of the authorities at the beginning of the century, it should have been possible now to come to the natural conclusion that such conduct is cruel also in the legal sense and to give the redress which the law prescribes for cruelty as a matrimonial offense.

### Legal Laughs.

"Won't you try the chicken soup, judge?" asked Mrs. Small of her boarder, not noticing that he had gone beyond the soup stage in his dinner. "I have tried it, madam," replied the judge. "The chicken has proved an alibi."—Truth.

### English Notes.

Mr. Albert Gray has obtained one of the coveted places open to the bar—namely, that of counsel to the chairman of committees in the house of lords, which includes the duty of taxing costs in private bill proceedings. His predecessor, Sir J. H. Warner, received a salary of £1,750 per annum. Mr. Gray was called to the bar in 1879, and has belonged to the civil service of Ceylon. Of late years he has practiced as a parliamentary draftsman, and has been employed by the Statute Law Revision Committee. He is also chancellor of the diocese of Ely.

In addressing the grand jury, at Birmingham Assizes, Mr. Justice Cave referred at some length to the charge of manslaughter preferred against Joseph Williams, of Rotherham, which arose out of a boxing contest for the 6st, 7lb. championship of England at the Olympic Club, Birmingham, Michael Kerwin dying from the effects of blows said to have been inflicted in the match. His lordship remarked that sparring matches with gloves, if fairly conducted under ordinary rules, were not unlawful, and, consequently, if death occurred from a blow fairly given in a contest, the person

delivering the blow could not be convicted of manslaughter.

A correspondent of the Daily Telegraph says that in Scandinavia the lot of a constable is so full of enjoyment that barristers leave the bar and solicitors their desks and parchments in order to join the force. A candidate once accepted is provided for in a luxurious manner during the remainder of his life. His quarters will bear comparison with a first-class club, and he has piano and singing lessons free of charge. In this country, when a person becomes very excitable when locked up in a cell, nothing is left for him but to dash himself against the wall or submit to a strait waistcoat. But in Scandinavia, when such a thing occurs, a musical constable wheels the police-station piano into the cell and sings and plays operatic selections to the prisoner until the latter either sees the error of his ways and becomes calm, or quietly falls asleep.

There is a learned discussion in Palmer's Company Precedents (6th edit., p. 409 *et seq.*) as to how the profits of a company are to be ascertained, it being reasonably supposed that dividends can only be paid out of profits, says the Law Times. By the light of nature it is difficult to say whether a company has made a profit, when part of its capital has been lost, until that loss has been made good, and we are glad to have some judicial rule on which to act. In *Bosanquet v. St. John D'El Mining Company, Limited* (noted *ante*, p. 316), the roof of a mine had fallen in, and it became necessary to borrow money to repair the damage done. This money was secured by debentures. Up to the date of re-opening the company made no profits, and the interest on the debentures was paid out of capital. Since the re-opening the company had been making a profit, and the directors now proposed, after carrying over a part to the credit of a sinking fund, to declare a small dividend. Mr. Justice North held that they were not bound to apply the profits in replacing the capital which had been employed in paying the debenture interest in previous years, before they declared a dividend. This decision has the advantage of simplicity, as directors who follow it will not have to consider how the capital has been employed in the past, but whether there are profits in the current year.

### Legal Notes of Pertinence.

Italy abolished capital punishment in 1875, and since then the number of homicides has increased 42 per cent.

Frederic R. Coudert, the famous authority on international law, lies dangerously ill from nervous prostration at his cottage in Bar Harbor. He is now continuously confined to his bed. Mr. Coudert's illness dates back to about four weeks ago, when he collapsed while seated in his office.

The ALBANY LAW JOURNAL acknowledges the receipt of a copy of the proceedings of the Illinois State Bar Association, at its twenty-first annual meeting, held in Chicago July 1 and 2, 1897, and returns thanks for the same to the secretary, J. H. Matheny, Esq. The volume of 82 pages is exceptionally neat in arrangement and typography, and is embellished with fine half-tone portraits of officers and principal speakers. The Illinois Bar Association is evidently in a highly prosperous condition.

South Dakota's new Chattel Mortgage Law contains the provision that at the time of the execution of the mortgage the mortgagee must deliver to the mortgagor a full, true and correct copy of the mortgage, without expense to the mortgagor. The mortgagor must then sign an acknowledgment on the back of the original mortgage, admitting that he has received a copy of such mortgage. This law took effect May 24, and any mortgage executed since that date is void unless it contains this acknowledgment.

A photograph of the scene of an accident is held, in *Dederichs v. Salt Lake City Railroad Company* ([Utah], 35 L. R. A. 802), to be admissible in evidence to aid the understanding of the facts. But in *Hampton v. Norfolk and Western Railroad Company* ([N. C.], 35 L. R. A. 808), a photograph of a place is held inadmissible on the question of the existence or non-existence of a path at a certain time, if the picture was taken two years later, after the situation had changed and a map made near the time was already in evidence.

The Appellate Term of the New York Supreme Court, in a suit in the City Court by William H. Foster against the Standard National Bank, has reversed an affirmance by the General Term of the City Court of an order denying defendant's motion to resettle the case, and has remitted the case to the trial judge for resettlement. The court holds, by Justice McAdam, that the responsibility of settling a case and of determining what occurred at a trial is cast not upon the stenographer, but on the trial judge, aided as far as possible by the stenographer's minutes, by any notes taken by the judge himself at the time, or his memory of what occurred, or by any other means which may satisfy his conscience and enable him to make a truthful return to the appellate court. It will not do for the trial judge to decline to resettle a case merely because matters sworn to have occurred before him do not appear in the stenographer's notes; he must go further and put his refusal upon the ground that they did not occur.

An extraordinary story comes from Iron Mountain, Mich., in regard to the murder of a young girl named Pearl Morrison, who was killed there last week by a tramp, as is supposed, says the New York Sun. One Peter Bons was suspected of the crime, arrested, and put in jail, where he was vis-

ited by a detective in the garb of a Roman Catholic priest; and, under the impression that he was confessing to a clergyman, the prisoner it said to have admitted his guilt. Under the statutes of many, if not most, of the States of the Union a confession made to a priest or minister of the gospel in his professional character, and in the course of discipline of his denomination, cannot be given in evidence; but of course no such privilege would attach to a confession made to a person who was not, in fact, a clergyman. Even then, however, the confession must be shown to have been voluntary before it can be proved. Whether inducements to confess, held out by a pretended priest assuring a prisoner of spiritual benefits, would exclude the confession thus obtained is a question which does not appear ever to have been determined.

### Notes of Recent American Decisions.

**Check — Delay in Presentation.** — The law imposes upon the holder of a check the duty of presenting it for payment within a reasonable time; and if he fail to present the check seasonably the delay is at his own peril. A check drawn upon a bank in Greenville, Ala., was deposited on December 13, with a bank in Philadelphia, and on that day forwarded to a bank in Charleston, S. C., whence it was sent first to Montgomery, Ala., and thence to Greenville, Ala., whereby presentation was delayed until December 19. The drawee bank failed and closed its doors on December 18. Had the check been forwarded direct to Greenville, it would have reached there December 15, and in time to have been presented on the 16th. *Held*, that the delay discharged the drawer. The drawer of a check may prove undue delay in presenting the check under a plea of payment of the debt for which the check was given. (*Watt v. Gaus*, Sup. Court of Alabama, April 15, 1897.)

**Garnishment — Property Subject.** — Where an officer of the law, either acting under police rules or without them, takes from his prisoner personal property in no way connected with the criminal charge, either for its safe-keeping or to remove from his control that which he might use in effecting escape, it is not subject to garnishment. (*Hill v. Hatch* [Tenn.], 41 S. W. Rep. 349.)

**Limitations — Claim for Money Collected by an Attorney.** — An attorney collected notes more than three years before his death, and his client had notice of such collection, but made no demand on the attorney in his lifetime. *Held*, that claims against the attorney's estate for the amounts collected, presented for allowance one year after his death, were barred by the three years statute. (*Leigh v. Williams* [Ark.], 41 S. W. Rep. 323.)

**Master and Servant — Negligence — Defective Machinery.** — Plaintiff, defendant's employe, was injured by the flying apart of the cylinder of de-

fendant's machine, which had been recently purchased of a reputable manufacturer. The evidence tended to show that the cause of the accident was the existence of blow holes, which could not have been detected by inspection. *Held*, not error to charge that the happening of the accident did not itself show negligence, since, though the machinery may have been defective, defendant may have exercised due care by the purchase thereof of a reputable manufacturer. (*Reynolds v. Merchants' Woolen Co.* [Mass.], 47 N. E. Rep. 406.)

**Mechanics' Liens — When Attaches.** — Where a mechanic performs services from time to time on a building under a continuing general contract for services with the building contractor, his work being interrupted only because of the state of the work or his employer's convenience, the "date of the contract under which lien is claimed" for the entire work by him is the date of his first work on the building; and hence, under Pub. St., ch. 191, sec. 5, such lien is superior to a mortgage recorded after that date. (*Savoy v. Dudley* [Mass.], 47 N. E. Rep. 424.)

**Nuisance — Measure of Damages.** — In a suit for maintaining a nuisance by allowing filth to accumulate near plaintiff's lot, it was error to admit evidence of depreciation in market value of the lot as an element of damage, since the nuisance might have been abated at any time by plaintiff. (*N. K. Fairbank Co. v. Nicolai* [Ill.], 47 N. E. Rep. 360.)

**Principal and Agent — Apparent Authority.** — Plaintiff, for the promotion of its cattle business, made loans on cattle through a banker in another State, who procured the execution of the notes and mortgages and sent them to plaintiff, and, on approval of them, plaintiff honored his draft for the amount. The notes and mortgages were payable to plaintiff at its office. *Held*, that the banker had no express agency to receive payment on such notes and mortgages. (*Evans-Snyder-Buel Co. v. Holder* [Tex.], 41 S. W. Rep. 404.)

### Notes of Recent English Cases.

**Settlement — Power of Appointment by Deed or Will Among Children — Appointment to One Child by Deed and to All Equally by Will — Whether Child Receiving Benefit of Appointment by Deed to Bring Same into Account Before Sharing Under Will — Double Portions — Burden of Proof.** — In this case a testator gave £10,000 to trustees to pay the income to his daughter for life, and afterwards to distribute among her children as she should by deed or will appoint, and in default thereof in equal shares. The daughter had three children, to one of whom she by deed appointed sums of £2,000 and £1,333, and by her will she appointed the whole fund to her three children in equal shares. A summons was taken out asking whether the child who had been preferred should



not bring those amounts into account before sharing in the unappointed portion of the fund. It was conceded that no question of election arose, but it was argued in favor of the other children that the rule against double portions necessitated the bringing that sum into account. It was held that the rule practically only applied to the case of a father, on the authority of *Powys v. Mansfield* (3 Myl. & Cr. 359); that the burden of proof in other cases rested on those who sought to establish that the rule against such portions applied; and that, as in this case, there was no evidence to show that the grandfather or the mother had assumed the duty of providing for the children, which *prima facie* belonged to the father, the rule did not apply. The mere fact that in consequence of appointments in this form the fund would be enjoyed in unequal shares would not be sufficient to exclude or rebut the application of the rule in a proper case. (*Montagu v. Montagu*, 15 Beav. 565.) (Re Ashton; *Ingram v. Papillon*, H. C. of J., Ch. Div., L. T. Rep., Aug. 7, 1897.)

Ship — Collision — Damages to Dredger — Remoteness. — A steam dredger, the property of the appellants, was damaged by a collision with a ship of the respondents. The collision was caused by the negligence of the servants of the respondents. The appellants claimed damages in the nature of demurrage, for the loss of the use of the dredger during the time that it was under repair. *Held*, that such damages, though not representing a tangible pecuniary loss, were not too remote to be recovered. Judgment of the Court of Appeal (74 L. T. Rep. 644; [1896] P. D. 192) reversed, Lord Morris dissenting. (*The Gretna Holme*, H. of L., L. T. Rep., Aug. 7, 1897.)

Trade Name — Imitation — Defendant Giving His Name to Company — Confusion — Injunction. — A motion was made in an action for an injunction in the terms of the writ to restrain the defendant, his servants, and agents from trading or carrying on business at Cheapside, Birmingham, or elsewhere, in the name or style of the "Lucas Cycle Components Manufacturing Company," or under any other name or style calculated to lead to the belief that the business so carried on by the defendant is connected with the business of the plaintiff carried on under the name of Joseph Lucas & Son at Little King street, Birmingham. The plaintiff's business had been established at Little King street, Birmingham, for twenty-five years, and had become very large and widely known as manufacturers of fittings and component parts and accessories of cycles, and the name of the plaintiff's firm was well known in the trade and among cyclists in relation to such goods. The defendant, whose name was the same as the plaintiff's, had within a few weeks ago acquired the business formerly carried on at Cheapside, Birmingham, by a limited company having a name quite distinct from that of the plaintiff's, and now

carried on the acquired business under his own name, with the addition of the words Cycle Components Manufacturing Company, trading in cycle fittings and accessories. There was evidence that this conduct on the part of the defendant caused confusion, letters having been addressed to the plaintiff's establishment under the style of the defendant's company, and received by the plaintiff, who returned them to the senders. *Held*, that plaintiff was entitled to the injunction asked for. (*Joseph Lucas & Son v. W. H. Lucas*, H. C. of J., Ch. Div., L. T. Rep., Aug. 7, 1897.)

### New Books and New Editions.

American Electrical Cases, with Annotations. Edited by William W. Morrill. Matthew Bender, Albany, N. Y. 1897.

The sixth volume of this valuable series has just been issued, covering the years 1895-1897, and embracing cases from all the different Federal and State courts, arising from the practical use of electricity. The volume reports in full 281 cases, and gives in addition, in the notes, memoranda of 132 more. The cases form a practical and complete compendium of the law of a constantly increasing subject of litigation, brought up to April 1, 1897.

The Lien Laws of the State of New York, as Contained in L. 1897, Chapter 418, and L. 1897, Chapter 419. By Robert C. Cumming and Frank B. Gilbert, of the Albany County Bar, and Assistants to the Commission of Statutory Revision. New York: Baker, Voorhis & Co. Albany: Matthew Bender. 1897.

This work, as its title indicates, contains the Lien Laws and the amendments to the Code of Civil Procedure relating to the enforcement of mechanics' liens on real property, and liens on vessels. Bills for these two acts, as is well known, were prepared and submitted to the legislature of 1897 by the Statutory Revision Commission, and having been enacted into laws, repealed all former laws relating to the subjects embraced therein. One of the most valuable features of the work is that embraced in the full and complete notes which are given after the several sections, showing all changes and their effect. These cannot fail to be of use in construing the statute. The editors have also selected and carefully considered all cases of the courts of this State which arose under the former statutes, and have applied them, as far as possible, to the new law. The forms contained in the book are prepared with special reference to their practical application to the recently enacted statute. The authors, through their connection with the Revision Commission, were peculiarly fitted for the work, which they have performed with intelligence, care and thoroughness.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, SEPTEMBER 4, 1897.

### Current Topics.

IN an article in the current (July-August) number of the American Law Review, Thomas W. Brown, of St. Louis, gives a *resumé* of the fight for supremacy between the United Press and the Associated Press, for a number of years the two great rival news-gathering associations of the United States, and shows how the former was finally forced to give up the contest and retire from the field, leaving the Associated Press a practical monopoly of the business of collecting and disseminating, through its members, the news of the day. Mr. Brown entitles his article "A Newspaper Trust," and attempts to prove that not only is the existence of this association in its present form offensive to the general law of the country, but that it is obnoxious to the very terms of the Federal Anti-Trust Law. It is now settled, he says, that the transmission of telegraphic messages is commerce; that the term obviously covers news dispatches which are collected, transmitted and published for the purpose of sale. Wherever such news passes from one State to another it becomes interstate commerce, and any contract in restraint of the trade in it is distinctly within the law. Mr. Brown also points out that under the law as interpreted by the highest court it is not necessary that the restraint be unreasonable. Without considering the injury to a large portion of the newspaper press and their employes, who are likely to be driven out of business, he

thinks the conclusive reason why the powers of the law should be invoked to break up this alleged trust is the dangerous and restrictive influence which it will exercise on the public press. He thinks it is beyond question for the public good to increase the number of newspapers—to multiply the number of *foci* of intellectual activity and public criticism, and afford an outlet to every shade of opinion. Discussion being the safeguard of democratic institutions, it follows that an ironclad publishers' trust may be as fatal to discussion as a censor of the press. In the course of his carefully prepared article Mr. Brown points out the fact, well known, that the contracts of the Associated Press with its members forbid their taking news from or furnishing news to papers not members of the association, or admitting new members in any city without the consent of the local members. Thus the newspapers in this association have "locked themselves in and thrown the key out of the window." He does not impeach their judgment, in this respect, but rather regards these publishers as extremely fortunate in enjoying a profitable monopoly—one of the most complete and unassailable in existence. The writer goes on to show that while the steel pool and the sugar trust merely rob us of a portion of our incomes, the newspaper trust may some day rob us of our liberties. In a city of 600,000 people, he says, there are but three daily papers published in English belonging to this monopoly. It is deemed unnecessary to suggest what odious arguments might be resorted to in a time of political strife to bring about a conspiracy of silence and suppression; a conspiracy which, in a close contest, might give a fatal and most unfair advantage to the party producing it. With all their insolence and defiance of public opinion, Mr. Brown says, none of our industrial trusts have had the hardihood to restrict their trade to a single dealer in a large city, as the press association does. The writer regards it as singular, not to say astonishing, that not a single voice has been lifted by the newspaper press "against the introduction of the methods of the financial pirate into a field

infinitely more important than hardware and groceries." Of course this must be an oversight — one of those cases of mental strabismus which are sometimes developed by looking too fixedly at any given object — the sugar trust or the railroad pool, for example. In looking for the mote in a brother's eye they have failed to note the presence of the rock in their own. Now that their attention has been so prominently called to the matter, we may expect the newspapers of the country — especially the anti-trust portion — to start a verbal cannonading that will not cease until the fortress which shields the hydra-headed monster, that has already swallowed all the great dailies of the country, is totally demolished. The public have their hands to their ears — in fact, are all ears.

In a recent issue the ALBANY LAW JOURNAL had something to say about the abuse of the pardoning power by Governor Bradley, of Kentucky, and Lieutenant-Governor Worthington, of the same State, who, during the absence of Governor Bradley from the State, seems to have done an exceedingly lively business, fairly outdoing the chief executive, in setting convicts free. The Louisville Commercial comes to the defense of Governor Bradley, but its self-imposed task of justifying the action taken seems to have proven a little too much for it. It may be true, as the Commercial asserts, that the fact that other governors of Kentucky have not been criticised at all clearly shows that the present assault on Governor Bradley is made, not so much in the interest of the public good as to obtain partisan advantage, and yet the figures given by our contemporary, and evidently taken direct from the official records, are in themselves startling enough. It says that during Governor Bradley's term of office, excluding applications for restoration to citizenship, there have been 1,572 applications for pardons, remissions and respites, of which number 302, or about 20 per cent., were granted. As to restorations to citizenship, Governor Bradley had before him 329 applications, 159 of which were refused. Of those pardoned, it

is conceded that 18 were men indicted for murder, and that 33 were convicted of manslaughter. This looks like a very large number, but to it must be added the cases of executive clemency in which the lieutenant-governor acted, and as to which the Commercial says nothing except that it will, at a future day, publish a condensed statement showing his action and the reasons therefor. The Commercial's attempt seems to be to prove by comparison that, according to the number of applications received, Governor Bradley's percentage of pardons is less than that of any of his predecessors. This, to an entirely non-partisan observer like the ALBANY LAW JOURNAL, looks very much like begging the question. After reading carefully its two-column defense of the governor, we are not by any means convinced that he has not, as has been so freely asserted, abused the power confided in him by the Constitution. It is perfectly legitimate and proper that the public should insist on judging Governor Bradley on his own record, without reference to what any other governor ever did while occupying the same high place. Each individual case should be considered on its merits, and the action of the executive judged by the facts and records. From this standpoint it would seem that Governor Bradley's friends will find much difficulty in proving that he has not abused the power reposed in him, weakened respect for the law, and made the task of properly administering it much more difficult than it would have been otherwise. It was never intended by the framers of the constitutions of the various States that the governors should thus undo the work of the courts and cast loose upon society so many murderers and other dangerous and reckless men, upon whose conviction large sums of money had been, necessarily, expended. The pardoning power ought not to be exercised except in rare and peculiar instances, in order to correct wrongs or injustices incident to the administration of justice.

Parents all over the country have been deeply interested in the details of the plot,

happily rendered abortive by reason, mainly, of the vigilance of newspaper proprietors and reporters, to extort from the father of five-year-old John Conway, of Albany, N. Y., a large amount of ransom for the return of the little fellow, who was actually kidnapped and hidden in a secluded spot in the suburbs of the city, but was rescued before harm had befallen him. In many of its features the case very much resembled the more famous one of Charlie Ross, except that the central figure in the former is a live instead of a dead hero, and at least two of the presumably guilty parties have been captured. Happily, the crime of kidnapping is comparatively rare in this State, with reference to children, most of the cases in the law reports relating to the carrying off of grown persons. According to the second subdivision of section 211 of the Penal Code of New York, a person is guilty of kidnapping who wilfully "leads, takes, entices away, or detains a child under the age of 16 years with intent to keep or conceal it from its parent, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child." The penalty is a term in the State prison, not exceeding fifteen years, and it is altogether likely that the guilty parties in the Conway case, when ascertained, will receive the full severity of the law. Nothing less will answer the ends of justice.

—

The question of expert testimony is agitating judges, lawyers and litigants in England as well as in this country. One of our London exchanges, the Solicitors' Journal, mentions the fact that at the close of the evidence in an action to recover damages for personal injuries, brought before Mr. Justice Vaughan Williams, recently, at the Birmingham Assizes, his lordship, in his address to the jury, said it always pained him that a trial of that nature was so expensive. Some one is injured, and on both sides medical examinations are made, not for the purpose of improving his condition, but to

ascertain what his condition was for purposes of litigation. In view of the expense, which his lordship characterized, and not without reason, as "frightful," he could not help thinking that some day a plan such as has been adopted in Australia might be agreed upon, whereby persons desiring the opinion of an expert on any matter concerning which scientific evidence was important, could have an appointment made from an official roll of experts, who should be the person to make the examination, and then give his evidence to the jury. The court conceded that there might be practical difficulties in the way of carrying out this plan, but his lordship said he never tried an action in which scientific evidence was given without feeling that the consequent expense made it very difficult indeed to deal with the case, because the amount of damages became quite an insignificant item, as the unfortunate man who was compelled to defray the costs had such a frightful amount to pay. The same condition of affairs, with variations, is frequently met with in this country in the administration of justice. In criminal trials, too, experts are found on opposite sides who give often conflicting and always expensive evidence. A plan somewhat similar to that suggested by Mr. Justice Williams in the above-mentioned case has been proposed in New York, and while not unreservedly indorsing it, we would urge the consideration and discussion of the subject, on the part of the profession, with a view to agreement, if possible, upon some plan that would do away with the scandals and abuses connected with the present system, or rather lack of system.

—

The New York Supreme Court, Appellate Division, First Department, had before it, in the case of Elsa Forster, plaintiff-appellant, v. Salvatore Cantoni, defendant, an interesting question as to the survival of causes of action. The original defendant in the action was the sole defendant, and if the cause of action survived, the plaintiff had the right to have the action continued as against the representatives of the defendant. It was conceded that of the two causes of action

the first cause did not survive the death of the defendant, while the second cause of action did. The question, therefore, was whether, under the mandatory provision of the Code, the plaintiff was entitled to have the action continued, at any rate, so as to enable her to try the second cause of action. Assuming that, notwithstanding the mandatory provision of the Code, there was still vested in the court discretion to determine whether or not the plaintiff had lost her right to continue the action by laches, or such conduct as would make it inequitable to allow her to take advantage of the provisions of the Code, the majority of the court were unable to see why the plaintiff should not have such right. The opinion proceeds: "To justify a denial of the application, the facts presented to the court must show some act of the party applying which would justify the court in refusing to give to the applicant the relief that the Code directs. It is not claimed here that the plaintiff has been guilty of laches in making the application, but it is claimed that because the plaintiff has united in the same complaint two causes of action, one of which would survive, and the other would not, such joinder of causes of action gives to the court a discretion to refuse to continue the action as to the cause of action which does survive; and stress is laid upon the fact that the first cause of action as alleged shows a flagrant violation of her duties as the wife of her former husband, and that the contract upon which she bases her right to recover is one which is immoral and contrary to public policy to enforce. While I am not disposed to question the accuracy of this statement of the first cause of action, still I know of no rule which allows a court to refuse to give a plaintiff relief where a good cause of action is alleged because the plaintiff's conduct has been immoral or against public policy. Nor do I think, under the provisions of the Code, that the court is justified in denying absolutely a right to continue an action to recover for a cause of action that survives because the plaintiff has joined such a cause of action with one that does not survive. By section 755 of the Code it is provided that an action

does not abate by any event, if the cause of action survives or continues. I think this applies when one of several causes of action alleged in the complaint survives, as well as where all of the causes of action survive, and that in such a case the court is bound to allow the action to be continued as to the cause of action which does survive. Such an order is not an adjudication that all of the causes of action survive. The order itself can expressly adjudge that as to the cause of action that did not survive, the action is not continued; or, exercising the discretionary power vested in the court, which seems to be recognized by the decisions of the Court of Appeals, the motion could be granted upon condition that the plaintiff consent to strike from the complaint the cause or causes of action which do not survive. An affirmance of this order would defeat the plaintiff's right to any substantial recovery upon this cause of action which does survive, for the Statute of Limitations has run against the greater portion, if not all, of this second cause of action; I think the plaintiff is entitled to have that cause of action tried by the method provided by law, and that she should not be deprived of that right unless it appears that in some way she has lost it by virtue of some act of hers which would make it inequitable to allow her to proceed. In the case of *Coit v. Campbell* (82 N. Y. 515), in construing section 757 of the Code, the court say: 'We think the true construction is that where a party has the right to a revivor or continuance of the action, the relief must be granted on motion. And we also think that this right is to be determined according to settled rules of procedure in equity so far as they have been established by precedent.' And in the case of *Holsman v. St. John* (90 N. Y. 464), it was held that where a cause of action survived it was error on the part of the court below to refuse to revive the action upon motion, and the Court of Appeals in that case reversed the order of the Superior Court and granted the motion. I think, therefore, that the order should be reversed and the motion granted, upon condition that the plaintiff consent to strike out the first

cause of action." Judges Patterson, O'Brien and Parker concurred. Judge Rumsey dissented. He did not think this was one of the cases in which the court had power to exercise any discretion. The right to substitute the executor of a deceased party was solely statutory, and it could only be done as to the whole action.

The usually accurate and always careful Boston Herald says of a well-known deceased lawyer's will: "Charles Coudert, who died a few weeks ago, and whose will is now being contested in the New York courts on the ground of irregularity, was deemed an expert on all questions of probate law, and had drafted some of the most important wills recorded at the New York surrogate's office. That was one of the specialties whose management he assumed as partner of his more distinguished brother, Frederic Coudert. It is thus again demonstrated that the most successful draftsmen of the wills of others cannot be trusted to draw up instruments making testamentary disposition of their own property." It would be of interest to have the Herald explain how the contesting of a will—not the breaking of it, mind you—proves that a testator is unable to draft a will that will stand the test of the courts.

Judicial statistics, like most other sorts, while interesting, are not always to be relied upon without explanation. For example, the latest volume published in England shows that more divorce suits are commenced by husbands against wives than by wives against husbands. There were 353 suits in the year by husbands, as against 220 by wives. Should it then be concluded that it is the husbands who are the aggrieved parties, and the wives who are the sinners? The London Law Journal thinks not; indeed, it declares the true inference is quite the other way. Wives, it says, do not seek divorce, not because they have not greater grievances than their husbands, but because they have more to lose. The break-up of the home is much more disastrous to the wife than to the husband. Then there are

the children to be considered. "Personally the wife, even when innocent, suffers more in reputation from the censoriousness of society, unjustly, no doubt; but society is so constituted, and it is vain to protest. Moreover, the wife (such, again, are the ethics of society embodied in the law) has to prove unfaithfulness *plus* desertion or legal cruelty—to get over two stiles, in fact, where the husband has but one to surmount. A curious revelation of the statistics is that unfaithfulness breaks out mostly after between ten and twenty years of matrimony. The spouses presumably are tired of one another. Human life, as insurance companies know, has its critical periods, its dangerous ages, and the second decade seems to be the critical one of married life." All of which is true philosophy. Figures will lie sometimes, unless they are watched.

#### Notes of Cases.

In *City of Indianapolis v. Navin*, decided by the Supreme Court of Indiana in June, 1897 (47 N. E. R. 525), it was held that a statutory provision of that State, limiting fares of street railway companies to three cents in cities having a population of 100,000 or more, does not violate a provision of the Constitution of Indiana providing that corporations, other than banking corporations, shall not be "created" by special act. It was further held that the statute in question, limiting fares of street railway companies to three cents in cities having a population of 100,000 or more, does not, as being local or special, violate a constitutional provision of Indiana which provides that all laws shall be general when a general law can be made applicable, with certain exceptions, since the passage of such statute, if local or special, constitutes a determination of the legislature that no general law will apply, which determination the court cannot review.

Frank X. Hass brought suit in the City Court of New York against his tenants, Hyman Brown and others, to recover damages for alleged violation of a covenant in the lease. The General Term has affirmed judgment for the defendants on a verdict in their favor, holding, by Justice Schuchman, that although the written lease provided that the lessees should not use the premises for any purposes other than that of a paper-box factory, the lessor could not recover, as matter of law, for an alleged violation of the covenant, in that the lessees stored, in a small space upon the second floor of the premises, forty or fifty tons of card-

board paper, which broke the beams beneath the floor, where it appeared that he had frequently visited the floor, knew of the stock of paper kept on hand, and had said that the floor would hold ten times as much paper as the lessees had there, and the question whether there was a waiver by the lessor was one proper for the consideration of the jury.

Delia Vahue was non-suited in her suit against the New York Central and Hudson River Railroad Company for personal injuries caused by being struck by an engine in Rochester, and the exceptions were ordered to be heard in the Fourth Appellate Division in the first instance. Judgment was there ordered for the defendant, the court holding, by Presiding Justice Hardin, that evidence that when plaintiff approached a railroad crossing at night, from which her view in one direction was obscured by dense smoke from a passing train, she merely looked up and down the tracks, and then, without waiting for the smoke to clear, stepped upon them and was struck by a train concealed by the smoke, did not establish freedom on her part from contributory negligence.

#### AMERICAN BAR ASSOCIATION.

OUTLINE OF THE PROCEEDINGS OF THE ANNUAL MEETING AT CLEVELAND, OHIO, AUGUST 25, 26 AND 27.

CLEVELAND, Ohio, was the Mecca of many of the most famous lawyers of the United States last week. The occasion was the annual meeting of the American Bar Association, which proved one of the most interesting in the history of this dignified and influential organization. The American Bar Association is now nearly twenty years old, having been organized, in Saratoga, N. Y., in 1878. Its membership embraces many of the foremost lawyers of the country. Without official or political axes to grind, and asking no favors of any administration, national or State, it has been the aim of the association, from the beginning, to better such laws as seem ineffective, and to correct by general legislation in all the States such statutes as by their conflicting and contradictory nature embarrass the citizen, complicate procedure and defeat the ends of justice. The laws abolishing days of grace were pushed to general enactment by this association. The law providing for the organization of the United States Court of Appeals had its origin here, and the whole influence of the entire body is for uniformity in State laws. From its members came the sturdiest support of the arbitration treaty which the state department negotiated with England, and which the United States senate defeated; and the far-reaching influence of the association, as is shown by the action taken at the

meeting just closed, will be directed to the formulation of a movement to revive that or a similar convention between the two great English-speaking countries. Some idea of the quality of the membership of this association may be obtained from the list of presidents, which is as follows:

1878-79 — James O. Broadhead, St. Louis.  
 1879-80 — \*Benjamin H. Bristow, New York.  
 1880-81 — Edward J. Phelps, Burlington, Vt.  
 1881-82 — \*Clarkson N. Potter, New York.  
 1882-83 — \*Alexander R. Lawton, Savannah, Ga.  
 1883-84 — Cortlandt Parker, Newark, N. J.  
 1884-85 — \*John W. Stevenson, Covington, Ky.  
 1885-86 — William Allen Butler, New York.  
 1886-87 — Thomas J. Semmes, New Orleans.  
 1887-88 — \*George G. Wright, Des Moines.  
 1888-89 — David Dudley Field, New York.  
 1889-90 — Henry Hitchcock, St. Louis.  
 1890-91 — Simeon E. Baldwin, New Haven, Conn.

1891-92 — John F. Dillon, New York.  
 1892-93 — J. Randolph Tucker, Lexington, Va.  
 1893-94 — Thomas M. Cooley, Ann Arbor, Mich.  
 1894-95 — James C. Carter, New York.  
 1895-96 — Moorfield Storey, Boston.  
 1896-97 — James M. Woolworth, Omaha.

Mr. Broadhead is one of the foremost lawyers at the Missouri bar, a former governor and prominent citizen. E. J. Phelps was United States minister to England. Mr. Lawton was a distinguished southern advocate and confederate general. Thomas J. Semmes is a brother of Commodore Semmes, whose arrest by the American navy was the one incident of the late war for which President Lincoln had to apologize. David Dudley Field is a brother of Justice Stephen J. Field, of the United States Supreme Court — himself a famous lawyer and a millionaire. Judge Dillon is too well known to American citizens to need comment. Simeon E. Baldwin is on the Federal bench in Connecticut. Thomas M. Cooley, as jurist and author, needs no introduction. James C. Carter served as counsel in the Behring Sea case and again in the income-tax case, which was declared unconstitutional by the United States Supreme Court.

The opening session was held on Wednesday, 25th inst., with an attendance of nearly 300 members. President J. M. Woolworth, of Omaha, in his annual address, reviewed the legislation of the past year by congress and the legislatures of the States and Territories, and called attention to the increasing vigor of the police power. Nine-tenths or more of the statutes were passed in its exercise. The activity of that power must necessarily increase as society becomes more and more highly organized; but with us it seems to outrun necessity. He then said in part:

"Two facts press upon the attention. In the

\*Deceased.

first place, while the wage-earners are men of like passions as other men, no better and no worse, and therefore to be expected to put their personal interests before those of others, yet they display a strange and enthusiastic loyalty to their class; so that if one section falls into trouble, those who are at the moment less unfortunate contribute relief from their poverty with generosity. They exemplify the saying, 'If one member suffer, all suffer with it.' The sympathetic strike is the expression of this passion. In the next place, the wage-earners submit to a discipline as rigid and severe as an army in battle. Each abdicates his free will, his judgment, his personal wishes and interests. He is no longer an individual, but an atom of a mass, the smallest part of a machine driven by a power greater than steam, and directed by the hand of the engineer at his pleasure. What this great body of the citizenship, possessed of political power, transported by the enthusiasm of self-sacrifice, directed by a relentless discipline, will be when it becomes thoroughly saturated with these doctrines, it is not hard to divine. In that day, if it ever comes, the federations of labor, their battalions enthusiastic, compact, disciplined, organized and moving with one impulse at the word of command, when launched upon institutions under which they suppose themselves trodden down, will sweep from the face of the earth not corporations, syndicates, trusts and aggregated capital only, but all the whole order of industrial society as now organized. The remedy which I venture to suggest, as that which our profession is competent to administer, is the application of the mechanism of the law to the education of all in the rights and duties of citizens, to the end that they apprehend justice. The education referred to is not such as is to be had in the schools. They teach the principles of political morality, illustrating them by the manifold experiences of the race in the course of its evolutions, and enforcing them by sanctions drawn from many sides, just as they teach the principles of personal morality; but unhappily one may know the former best, and be a bad citizen, just as he who knows the latter best may be a bad man. All that learning is very admirable and desirable; but it does not go far enough. The education implied in the statement must convey to the mind so vivid a notion of every right that to realize it is the one object of desire and to infringe it arouses the whole man in arms. It informs, enlivens and invigorates the conscience, so that a man is as sensitive to a wrong as to a personal indignity. All the habits, prejudices and temperament of the man must be for his inviolable integrity. This high endeavor, purpose and practice is possible only after long continuance in the exercise of the rights and duties of citizens."

President Woolworth introduced Judge Samuel F. Hunt, of Cincinnati, the representative of the

State Bar Association. Judge Hunt's address was largely one of congratulation that Ohio had been selected as the meeting place of the National Association. The salient point in his address was that the people must look largely to the lawyers of America for the enthronement of the law.

The address of welcome on behalf of Cleveland was delivered by James Hoyt, Esq.

After electing sixty-nine applicants to membership, the association adjourned and spent the afternoon enjoying a lake excursion under the guidance of the local association.

#### THE ANNUAL ADDRESS OF GOVERNOR GRIGGS.

There was a large attendance of ladies and members, besides members of the local bar, at the session on Thursday morning, in anticipation of a discussion on the arbitration treaty. As soon as the meeting was called to order President Woolworth introduced Hon. John W. Griggs, governor of New Jersey, who delivered the annual address. Governor Griggs spoke on "Law-Making," in part as follows:

"An extended experience by personal participation in legislation, according to the American system, has led me to believe that there is no one thing in all the various departments of government or business that is carried on with less scientific or orderly method than the making of laws. This is not due to the fact that legislation is an obsolete necessity—rarely called for after the centuries of growth and pruning and perfecting through which the English law has passed. No age of English or American history has ever seen such activity and profusion in legal enactment as now prevail. With the imperial parliament at Westminster and the Federal congress at Washington in almost continual session, there are nearly thirty parliaments in the British colonial system and legislatures of forty-five American States holding annual or biennial sessions, all engaged in supplementing and amending the old laws and in devising and passing new ones. Besides these are countless cities, towns and boroughs, each with a legislative board exercising the power of law-making upon many important matters of municipal life and government. The steps of the citizen desiring to walk uprightly are beset with labyrinths of statutory enactments that are intricate and confusing, and often so conflicting that he must stumble, turn which way he may. Volume after volume of annual statutes is issued year by year in every State of the Union, so that it is a heavy task for the lawyer to keep familiar with the growing mass of statutory laws of his own State.

"Wherever legislative bodies assemble are found exceeding activity and willingness to exercise the fascinating power of law-making. The process of turning a mental conception into a law is so simple and easy in the ordinary State legis-



lature that laws are losing the sanction of solemnity and moral authority that they once possessed.

"There is nothing so ancient and well approved in our legal system that some one cannot be found to venture an improvement. The most novel and complicated problems are constantly arising from the advancement and development of business and science, or trade and social relations. Nevertheless, it is true that we have no class of skilled legislators — men trained to construct laws as men are trained in all the arts and professions of the world. Every other department of business, of trade, of art, of commerce, has its skilled and experienced men, its engineers, its electricians, its statisticians, its architects, its designers. Interpretation of law is a science; law-making is not. For centuries there has been a lawyer class whose special study and preparation have been directed to the understanding of the law as it is found, so that they might guide men by their counsel or speak for them in court, or unravel for them the intricacies of legal systems incomprehensible to the untrained mind of the layman. Judges construe the law, give it its proper application, say when this or that is within the law or without the law. To prepare one for such judicial service, especial study is deemed essential — *lucubrationes viginti annorum*. But when it comes to the very act of making laws, all requirements of special study, experience, training and legal insight are absent. There is no skilled class of legislators, nor is there any school of legislation at which may be learned the theory and practice of constructing a statute. Generally speaking, statutes are the products of unascertainable authors — children of nobody — unable to boast of definite parentage. No one certifies to their completeness or accuracy. The actual practice of our ordinary State legislatures is generally something in this wise: The members of the two houses meet at the time appointed for the convening of the session. The attention of the members is engrossed with matters of a political nature. There is a political majority and a political minority. The choice of officers, from president of the senate and speaker of the lower house down to the smallest clerkship, engages the largest interest of the members who are in the political majority. There is no feature in the process of legislation that should be more potent and useful in the shaping of proposed laws and making them conform to the true standard of accuracy, correct expressing and completeness, than the standing committee. The chief interest that it has for the legislator, unfortunately, arises from the influence and power that it can exercise in a political way upon the various subjects that come before it. In most instances there are matters that have been made the objects of campaign discussion and party platform, which obtain the paramount attention of the legislature and obtain the most prominent notice and discussion in the newspapers and among the

people. Upon these subjects legislation is undertaken and carried through under the guidance of political leaders, often men of large experience and signal ability. Proposed laws of this kind are subject to careful examination so as to avoid failure from technical defects, and to see that no interests are affected except such as are within the scope of the party plans and purposes. Often the help of able lawyers skilled in the work of drafting and constructing laws is called in by the political managers. Laws passed under this kind of influence are generally what may be called governmental in their character, and relate to matters connected with the administration of state affairs or to public policies of unusual importance.

"While these things are being transacted by the assembled legislators and engrossing the attention of the public, numerous miscellaneous bills are being introduced from day to day by the members and referred to appropriate committees. The number of distinct legislative propositions submitted in the form of bills at each session of our State legislatures is enormous, and is becoming larger every year. These thousands of propositions to alter the law of the land cover almost every conceivable object of government, every department of public life. There is usually no general scheme of uniform and consistent statutory revision in these masses. They are heterogeneous, often absurdly contradictory.

"If representative bodies like our State legislatures are unable to deal with entire success with all the complicated and subtle questions that are presented for their consideration, how much less can it be expected that the masses of the people would be able to do so? Yet we find some who seriously propose to relegate legislation to the body of the people, and by means of the system known as the referendum take the popular voice, not through the people's chosen representatives, but from the direct votes of the people themselves. This is to abandon the system of representative government. Our ancestors were sensible enough to know that the knowledge and temper and deliberation necessary to law-making were not to be found in the assembly of all the citizens. Upon this idea the government of England and her colonies is based. The Federal government of these United States and the government of all the States of the Union are based upon the same principle. To depart from it is impossible. To indulge in the practice of referendum, except upon such matters as constitutional amendments, would tend to destroy confidence in our republican system and produce the highest degree of instability, subjecting the judgment of the uninformed and the passionate for that of the selected and responsible representatives. The operation of this practice is seen in the submission of constitutional amendments to the vote of the people. Very rarely, indeed, can wide popular interest be

aroused over such an election; the vote is always light; and the discussion usually is confined to perfunctory newspaper editorials and to those who take unusual interest in public affairs. The most pertinent argument against the proposition to establish the system of legislation by the 'initiative and referendum' is found in the fact that the people do not desire to make their own laws. They want them made by their representatives.

"We do not want the system changed; it is only necessary that our legislative bodies shall be controlled, restrained and regulated by a proper sense of the solemnity and responsibility that pertain to the power they exercise; that they shall learn to respect the wisdom of conservatism, to value stability more than experiment.

"The extension of the practice of holding only biennial sessions of State legislatures — a practice prevalent now in more than thirty States — will do much to decrease the amount of legislation. It is to be hoped that the system may be extended to other States. There is room for improvement also in the quality of the men selected as members of the State legislatures. Too much regard is paid to political qualifications and not enough to legislative ability. This is not the fault of the citizens; very often they get the best obtainable. We need more legislators with moral and legal backbone to stand up against all propositions that lack positive utility.

"There are some principles of legislative policy that are so plain and safe that they need only to be stated to be approved. Make sure that the old law is really deficient. Be careful to consider whether the inconvenience arising from the deficiency of the old law is of enough importance to deserve an act of the legislature to cure it. Be careful that the remedy be not worse than the disease. Avoid experiments in law-making, especially if recommended by men or parties who are void of knowledge or wanting in respect for established customs. Do not go on the idea that the world is out of joint, and you were born to set it right.

"Let us continue our labors for uniformity of law upon proper topics, for simplicity of procedure, for better legal education, for international arbitration; and at the same time let us strive to increase the spirit of careful conservatism, which is the best preservative of good, to cry a continual alarm against trifling with the deep-laid foundations of our jurisprudence, and to preserve for our laws that sentiment of reverence and respect which hitherto have so distinguished the Anglo-Saxon race."

Prolonged applause expressed the interest of the delegates in the paper when Governor Griggs concluded.

#### AN ARBITRATION RESOLUTION ADOPTED.

Contrary to expectation, there was no discussion on the arbitration question, which came next in

order. The committee had drafted a resolution which satisfied all delegates, they having slept on the question and cooled off. John Prentice Poe read the report, which was in part as follows:

"*Resolved*, That the American Bar Association, renewing with emphasis the strong declaration made by its last annual meeting in favor of the adjustment of controversies between nations by the medium of enlightened international arbitration, expresses its earnest hope that the efforts to establish so beneficent a principle may not in their general spirit and purpose be relaxed, and that the administration of President McKinley will take such steps as may be appropriate to negotiate just and liberal treaties with foreign powers for the accomplishment of this important result. John Prentice Poe, Maryland; Judge E. B. Sherman, Chicago; James H. Hoyt, Cleveland."

A motion to send the resolution to the house and senate was defeated.

At the afternoon session a number of reports on various subjects were made by the several special committees appointed to report thereon.

The evening session was an interesting one. A paper was read by Robert Mather, of Illinois, on "Constitutional Construction of the Commerce Clause," followed by another by Eugene Wambaugh, of Massachusetts, on "The Present Scope of Government." Discussion on the papers, participated in by a number of leading attorneys, closed the day's proceedings.

#### THE CLOSING SESSION AND BANQUET.

The closing session of the association was held on Friday, and was largely devoted to suggestions from members of the committee on commercial law. An important paper on bribery was read by Adolph Moses, of Illinois. "The public mind," said Mr. Moses, "has become firmly impressed with the belief that powerful aggregations of capital have had considerable success in corrupting legislative and municipal assemblies and public officials. It behooves the American Bar Association, as leaders of public opinion and framers of proper legislation, to suggest such amendatory legislation as may be effective in compelling bribe-givers and takers to testify against each other under promise of constitutional immunity."

A resolution to that effect was adopted and will be reported upon at the next annual meeting.

Walter S. Logan, of New York, offered a comprehensive report urging the enactment of legislation to enable a creditor of a debtor, who is squandering his property, to secure the interposition of the courts to protect his rights, although the debt may not yet be due. The convention instructed the committee to consider the suggestion.

President Woolworth announced these committees:

On Parole of Prisoners and Cognate Subjects — S. F. Hunt, of Ohio; J. H. Stenner, of Rhode

Island; R. W. Williams, of Florida; J. H. Nason, of Maryland.

On Courts of the United States — Edmund Wetmore, of New York; C. F. Libbey, of Maine; G. P. Wanty, of Michigan; R. A. Mercer, of Pennsylvania; J. H. Hoyt, of Cleveland; J. H. Raymond, of Illinois; H. C. Tompkins, of Alabama.

The special committee to which had been referred a resolution from the committee on judicial administration and remedial reform reported that it thought amendments to the law should be asked of congress to provide an appeal from the United States Circuit Court of Appeals from interlocutory orders of appointment of receivers and interlocutory orders granting temporary restraining orders. The convention instructed the committee to present the matter to congress.

Judge R. S. Taylor, of Indiana, offered a resolution on the subject of trusts, which aroused considerable interest, but was adopted without discussion, as follows:

*"Resolved,* That the committee on jurisprudence and law reform be requested to submit to the association at its next annual meeting a report on the subject of existing laws in relation to trusts and combinations in business, with reference especially to the question whether or not it is practicable to provide by law for such discrimination among organizations of the character by reference to the reasonableness of the contracts on which they rest, their effect upon the public interest or the interest of those engaged in them as shall place it within the power of the law and the courts to deal more effectively with those which are mischievous in their nature and tendency than has been found possible hitherto."

Nominations for officers for the ensuing year were reported by the general council as follows: President, William Wirt Howe, of New Orleans, secretary, John Hinkley, of Baltimore; treasurer, Francis Rawle, of Philadelphia. Executive Committee — Alfred Hemenway, of Boston; Charles Claflin Allen, of St. Louis, and Charles Noble Gregory, of Wisconsin. The nominees were elected without discussion.

The list of vice-presidents elected, one from each State, is as follows: Alabama, Thomas N. McLellan; Arizona, John C. Herndon; Arkansas, W. M. Rose; California, John A. Gibson; Colorado, Moses Hallett; Connecticut, Washington F. Wilcox; Delaware, George Gray; District of Columbia, Henry E. Davis; Florida, John C. Avery; Georgia, Frank H. Miller; Idaho, Herman Stuart Gregory; Illinois, Thomas Dent; Indian Territory, J. W. McLoud; Indiana, Robert S. Taylor; Iowa, J. H. McConlogue; Kansas, John D. Milliken; Kentucky, Charles S. Gibbs; Louisiana, Thomas S. Stemmes; Maine, Joseph W. Symonds; Maryland, David W. Sloane; Massachusetts, M. F. Dickinson, Jr.; Michigan, Augustus C. Baldwin; Minnesota, Hiram F. Stevens; Mississippi, Charles

B. Howey; Missouri, G. A. Filkenburg; Montana, William D. Dixon; Nebraska, Charles F. Mander-son; New Hampshire, John L. Spring; New Jersey, Charles Borchertling; New York, J. Newton Fiero; North Carolina, John L. Bridges; North Dakota, Bourke Corbett; Ohio, Samuel F. Hunt. Oklahoma Territory, John T. Dille; Oregon, Charles H. Carey; Pennsylvania, Simon P. Wol-verton; Rhode Island, James Tillinghast; South Carolina, Clarence S. Nettle; South Dakota, Frank R. Aikens; Tennessee, J. W. Bonner; Texas, T. S. Miller; Utah, Richard B. Shepard; Vermont, Wil- liam E. Johnson; Virginia, Jackson Guy; Wash- ington, George M. Foster; West Virginia, W. W. Vanwinkle; Wisconsin, J. C. Ludwig; Wyoming, John A. River.

At a meeting of the Legal Educational Section, Charles Noble Gregory, of the University of Wis- consin, read a paper on "The Wage of Law Teachers." Mr. Gregory said in part:

"In general in this country the law teachers who receive fixed salaries were somewhat more highly paid than the teachers of other topics, even in the same university. In the European law schools a law professor is paid exactly the same compensation received by his fellow-professors in other faculties, but in France he is paid more, and in the Netherlands, Germany, Italy and Sweden but little less than the judges. In this country, in the best established schools, a professor giving his entire time is paid from \$4,000 to \$5,000, and there seems to be a tendency in them to make the com- pensation of the dean and of the full professors much the same. In a large number of important schools the professor's compensation is \$2,500 to \$3,000, and the dean, or head of the school, often receives \$3,500 to \$4,000. Lord Chief Justice Rus- sell's pregnant remark, made to us last year, 'that justice and its administration are among the prize prime needs and business of life,' has remained with me ever since. I am sure we have many of us pondered it and quoted it. No one can deny its far-reaching truth, and that being so, the training of bench and bar, sole ministers of justice, as they are, cannot be too well provided for. I think the large and wise observation of the lord chief justice will commend itself to a far wider circle than that of Mr. Cook, Q. C., who has lately said that 'a good voice, a good temper, and a knowledge of the judges are the main things for success at the bar.' The ideals toward which we look, and for which our law schools are maintained, I hope are rather 'that prime need and business of life,' trained and enlightened justice. I hope and be- lieve that they will not be denied adequate sup- port; that they will not be asked to content them- selves with a mean or grudging maintenance, and that in providing for the training of the lawyer it will not be forgotten that in every free and civil- ized community he has been found. in the words of d'Augusseau, 'as necessary as justice.'"

The committee to which was referred a resolution inviting the International Law Association to meet at the same time and place with the American Bar Association in 1898 made a favorable report, and the resolution was adopted. An effort will be made to make the '98 meeting of these two great bodies an event in the history of the country. President McKinley will be urged to speak before a joint assemblage of the two associations. The meeting will probably be held at Saratoga, the usual place of meeting.

President McKinley was the guest of the American Bar Association at its banquet in the evening. The toastmaster announced that the executive committee had reported the election to honorary membership in the association of William McKinley, of Ohio. The announcement was greeted by cheers.

In response the president said: "I count it a great distinction to be chosen to be a member of the national bar. I did not suspect that such an honor awaited me. I could not deny myself the opportunity which the courtesy of your committee afforded me to pay my respects to this honorable body of gentlemen. I come to linger with you in fraternal relation and to exalt the profession to which we belong. For I believe that is a part of the privilege of the association. I thank you for the distinction you have given me, and not wishing to interrupt the programme I bid you all good-night."

#### ORIGIN OF CHANCERY COURTS IN NEW YORK.

ROBERT R. LIVINGSTON, FIRST CHANCELLOR.

IT was said by Joseph Story, in his unequalled work on "Equity Jurisprudence," that "equity law in America had its origin at a far later period than the jurisdiction properly appertaining to the courts of common law; in many of the colonies, during their connection with Great Britain, equity had no existence at all, or it was imperfectly and irregularly administered: in the State of New York, whose rank in jurisprudence has never been second to that of any State in the Union, if it has not been the first among its peers, equity was little known until after the lapse of many years."

Nothing whatever was known of chancery practice in the colonies until the organization of the Colonial Court of Assizes, under the "duke's laws," at Hempstead, in 1665, which was composed of the colonial governor, members of his council, high sheriff and such justices of the peace as might attend. It had original jurisdiction in all criminal matters, and held trials by jury. In civil cases it had jurisdiction where the value in question was twenty pounds or upward. In addition to its judicial powers, this court exercised a kind of legislative power and regulated the edicts of James, Duke of York. It also exercised equity powers. In 1683 it was abolished and a Court of

Chancery established in its place by name. The colonial governor, or such person as he might appoint, was chancellor, assisted by his council. It was continued by an act of the colonial legislature, passed May 6, 1691, but expired by limitation in 1698. It was revived by ordinance on the 28th of August, 1701; suspended June 13, 1703, and finally re-established November 7, 1704. This court met with bitter opposition from the general assembly, not because the people did not consider such a court necessary, but because they doubted the right of the governor to establish an equity court in the colony and the propriety of constituting the governor and council such a court, deeming its decrees oppressive and the delays and expenses attending its operation onerous and unnecessary. This court continued down to the formation of the state government, and was reorganized by the Constitution of 1777, as it existed under the colonial laws, with a few changes applicable to the Constitution of the State. Robert R. Livingston was appointed chancellor. The comprehensive grasp of his mind, his accomplishments as a scholar and statesman, and the part he took in drafting the Declaration of Independence, enabled him to subject to practical principles the many fragmentary and disjointed details of equity law, as it existed when he took his seat on the bench, as the presiding officer of a court destined to take the highest rank among the tribunals of the State and nation, if not of the world.

During the struggle for independence but little if any business was done in the courts of this State, though the records of the Court of Chancery through that period show the transaction of more business than any of the law courts.

This tribunal continued as thus organized until 1788. In May of that year a convention was called in the city of New York, consisting of delegates from all the counties in the State, and composed of the ablest jurists therein, among whom were Governor George Clinton, president of the convention, Robert R. Livingston, Alexander Hamilton, John Sloss Hobart and John Jay. Chancellor Livingston was elected chairman of the judiciary committee. His report was a model of judicial learning, practicability and wisdom. He directed his attention largely to the Court of Chancery, and all the provisions recommended by him were adopted. He virtually reorganized the Court of Equity. The chancellor was appointed by the governor, by and with the consent of the council of appointment. Masters and examiners were appointed by the council of appointment; the registrar, clerks and other officers by the chancellor. By a later provision the reporter of the Supreme Court was the reporter of the Court of Chancery. A seal of the court, designed by Livingston, was ordered by him soon after he assumed the duties of chancellor. The die of the seal, which is still preserved

in the State library, shows that no changes of any consequence were ever made in it. With a few changes the procedure of the Court of Chancery remained the same as organized by Livingston down to 1821, when the convention of that year made some important changes appropriate to the times. Among these was an appeal to the Court of Errors from the decisions of the chancellor, who was a member of that court, but his duties were restricted to giving his reasons for decisions appealed from. The circuit judges were given equity powers, subject to appeal from their decisions to the chancellor, and from him to the Court of Errors. With these and some other changes the procedure in the Court of Chancery remained as organized by Robert R. Livingston until the court was abolished by the constitutional convention of 1846.

Thus, as we have seen, Robert R. Livingston was the founder of the system of equity jurisprudence in the State of New York. It is true that previous to his appointment as chancellor there was a Court of Chancery, which had existed during the English colonial government over a century. But it was regarded by the people as an irresponsible and dangerous tribunal; so that when the framers of our State Constitution, of which Livingston was one, decided to retain the colonial court, subject to such changes as would render its proceedings applicable to the new government, in many respects a new court had to be created, and the duty of formulating these changes was committed to Livingston.

He had no precedents in equity to guide him, for there were no reported cases in equity until 1814, when James Kent assumed the duties of chancellor. Therefore the rules that guided him were found in the numerous volumes of English chancery reports and the principles that a succession of the great English chancellors, Nottingham, Cowper, Macclesfield, Hardwicke and Eldon, had explained. Livingston's great merit as a chancellor was penetration, sagacity, prudence and comprehensive wisdom, with which he applied the principles of those great English jurists to the administration of his duties as an equity judge. He retired from the office of chancellor May 1, 1801, after a service of twenty-four years. He then devoted himself to duties that added distinction to his name and perpetuity to his fame. Among these was his connection with Robert Fulton, with whom he was associated in applying steam for propelling vessels. Chancellor Livingston died at Albany, March 26, 1813.

The first object that attracts attention on entering the room of the Court of Appeals, in the capitol at Albany, is a noble bronze statue of Robert R. Livingston, the first chancellor of the State of New York, placed there by the bar of the State as an eloquent, enduring expression of its reverence for his illustrious character and career.

It represents a commanding form, standing in a dignified, natural attitude, the right foot slightly in advance of the left, the weight of the person resting partially and easily upon it. The right arm rests partly across the breast, holding the judicial robe; the left arm rests in a natural position by the side, while in the hand is a scroll containing the procedure of the Court of Chancery, as remodeled by him. The statue commands attention and study for the dignity and grace of its pose and accuracy of its composition. But the intellectual expression that presides over the face, in the visible harmony of manly beauty, is the triumph of the artist. Indeed, the whole statue is a magnificent tribute of the noblest profession to Robert R. Livingston, who adorned it at the bar, elevated it on the bench, reflected its learning as a minister of state, and published to the world its love of popular freedom in the lines of the Declaration of Independence.

There are few great men to whom we are brought near, however dazzling may be their talents and careers, who are not thereby painfully diminished in the estimation of those who approach them. The mist of distance gives a kind of radiance to their characters, often concealing their defects. Yet it may be affirmed without fear of contradiction that Livingston rises rather than falls with the nearest survey of his character and career.

The old Albany city hall, or Stadt Huys, as it was called under the old Dutch colonial government, never in the two hundred years of its existence witnessed a more memorable event than that which was enacted within its walls on July 25, 1786. On that day, in that old historic hall, the first Trial Term of the Court of Chancery of the State of New York was opened under its first Constitution.

But there was more than the opening of the court that directed the attention of the people to the old Stadt Huys on the occasion to which we have referred. This was the presence of Robert R. Livingston, the chancellor, who was to preside over the deliberations of the court. As was natural, the occasion summoned to the old hall a most brilliant assemblage of the greatest lawyers of the times.

Livingston was then in the midst of his brilliant and useful career, with a still more distinguished and useful career before him. He was one of the men who largely aided in the formation of our State and National government, and, as we have seen, an artisan of our system of equity jurisprudence, one of the most eminent of the scholars, jurists and patriots of that important and critical period of our Nation's existence — the confederacy of the States.

Livingston was born in the city of New York November 27, 1746. He early exhibited the qualities of mind that constitute a finished scholar. He

was educated at Kings, now Columbia, College, graduating in 1765. The tendencies of his mind naturally attracted him to the legal profession, and accordingly, after a careful preparation, he was called to the bar, and at once took a high position in his profession in the city of New York. His legal accomplishments were early recognized by the governor of the colony, who appointed him recorder of the city of New York. But his attachment to the cause of liberty, which was then being agitated, resulted in the loss of the office of recorder. He was thereupon elected to the first general congress of the colony. In 1801 he was appointed minister plenipotentiary to France by President Jefferson. His reputation went before him, and he was received by the first Napoleon Bonaparte, then first consul, with marked attention and deference. It is an interesting incident in the history of Livingston that during his official residence of several years at the French capital this plain American chancellor was the favorite foreign minister. With the aid of James Monroe, he took an active part in the negotiation which terminated in the cession of Louisiana to the United States. In 1804 he took leave of the French court, and when he parted with Napoleon it was with mutual regret. After making an extensive tour through Europe, he returned to Paris, before leaving for this country. During his stay there Napoleon, then emperor, presented to him a beautiful and expensive snuff-box, with a miniature of the former. In 1805 Mr. Livingston returned to the United States.

By an interesting coincidence John Jay and Livingston, who had been law partners, were the recipients of high judicial honors, conferred upon them May 8, 1777. Jay was appointed chief justice of the State, and on the same day Livingston was appointed to preside over the Court of Chancery. Both of these illustrious lawyers went to the bench having the polish of accomplished scholarship and liberal legal learning, ornaments—may we not say corner-stones?—of the bar of the Empire State. It was the fortune of Jay to give to the bar of that State the fame of seating the first chief justice of the nation on its bench in the person of himself.

As chief magistrate of the State, as foreign minister of the nation, as the servant of the people in many other distinguished positions, Jay continued to reflect honor upon himself, on the bar of the State and nation for many years. In some respects Livingston's career was not as eminent as that of Jay's; but the part he took in giving the Declaration of Independence to the nation elevates him in the scale of illustrious distinction higher than it was the fortune of Jay to ascend.

"Robert R. Livingston," wrote Thomas Jefferson to John Adams, "is in every sense of the word a wise, good and great man, one of the ablest of our American statesmen. Nothing that

he writes or does seems to cost him any effort, yet there is beauty, power and practicability in all his intellectual productions. It is not a power that awes; it is gentle, unpretending, but resistless."

Jefferson wrote this with full knowledge of Livingston's mental endowments. With Franklin and Roger Sherman, he was associated with Livingston in the great work of writing the Declaration of Independence. On many occasions Jefferson in after life, with generous emotions, acknowledged the power, influence and usefulness of Livingston's pen on that instrument, the very name of which elicits the admiration of every American citizen.

Early in July, 1776, while Livingston was actively engaged with his illustrious associates in preparing the Declaration, he was hastily summoned to New York to attend a meeting of the provincial assembly, of which he was a member. On July 8, 1776, largely through his influence, the title of the province of New York was changed to that of the State of New York. By this assembly he was appointed a chairman of the committee that wrote the first State Constitution. He did not receive the summons to attend the convention in New York to which we have referred until after the Declaration was completed, but he did before it was signed, and this prevented him from affixing his signature to it. But he is invested with all the glory of being one of its authors.

It is needless to say that the presence of a character like this at the opening of the first trial term of the Court of Chancery, as its presiding officer, excited immense interest among the people.

Precisely at half-past nine in the morning the city hall bell announced the arrival of the hour for the court to convene. According to the custom of the times in opening the terms of courts, the sergeant-at-arms, the sheriff of the county, both in full uniform; the mayor of the city and the members of the bar waited on the chancellor at his hotel and escorted him to the city hall. The court-room was thronged with spectators. Amid the most impressive silence the chancellor took his seat on the bench, the crier made the usual proclamation, and the first Trial Term of the Court of Chancery under our free institutions was opened for business.

Having thus described the presiding judge of the court, let us glance at some of the great lawyers who were present.

One of the first of these to claim our attention is a man a little below the medium height, but with a dignified and distinguished bearing. "His head is finely shaped, symmetrical and massive; his eyes are dark, deep-set and full of life and fire; his nose is formed after the Grecian mold; his mouth well shaped, close-set, with a strong, firm jaw. The characteristics of the spare, clean-cut features are penetration and force. There is a piercing look

about the face even in repose. When he is moved, in the strife of debate, fire comes into his eyes, which has a marvelous effect on his auditory. As men listen to him they feel profoundly the mastery of his strong nature, his imperious will and the passionate energy which gives such force to his pathos, to his invective and to the even flow of clear, convincing argument."

This man, young as he appears, sits in the bar entwined with the laurels of the orator and the soldier, for it is Alexander Hamilton whom you see. His practice as a lawyer is large and successful, though blended with an active participation in politics, and he appears to-day as the counsel for his illustrious father-in-law, Gen. Philip Schuyler, who has an important case on the calendar.

Three years later Hamilton accepted the portfolio of the treasury department in the cabinet of Washington, and his great national financial policy was given to the world, and five years later, on January 19, 1791, Aaron Burr was elected a senator in congress by the legislature of the State of New York, over Gen. Philip Schuyler. This was the beginning of that relentless feud between Hamilton and Burr, which terminated in the fatal duel on the heights of Weehawken.

Not far from Hamilton there sits a lawyer whose form, face and character need no description from us. "He has faced the red artillery" and the flashing bayonets of the British soldiery on many a bloody field of the Revolution. "Where the death bolts fell deadliest" he stood and knew no fear; but he was destined to face enemies far more terrible and relentless than British cannon or British bayonets, the prejudice and condemnation of his enemies, and their hereditary and bitter denunciation. Yet he was the ablest lawyer, logician, learned and eloquent advocate that ever stood at the American bar. We need not say that this is Aaron Burr.

An illustrious jurist has said: "As a lawyer, Burr was the equal of Hamilton; as a scholar, he was his superior, and as to character — well, both had their faults and their social frailties, those amiable weaknesses sometimes denominated licentiousness; both were politicians, schooled in all the arts of their calling. They were opposing politicians; their opposition led to bitter hatred, and, as was the custom of such men in the times in which they lived, they fought a duel, in which, as was generally the result of such contests, one was killed. Political hatred and powerful family influence poured unvarying wrath on the head of the survivor of this legitimate contest. Time will remove that family influence and hereditary hatred will lose its venom, if it has not already lost it."

Burr was present at this court as the opponent of Hamilton in the suit entitled "Philip Schuyler v. Henry Teneyck and Others" — the action to which we have referred. It was a case of great importance, involving questions of the most intri-

cate nature. It was brought by Schuyler to perpetually enjoin Teneyck and others from building a pier and breakwater at low-water mark on the banks of the Hudson. The pier would abut the property of Schuyler, while the breakwater, which was of considerable extent, would, as was contended, impede the navigation of the river. Teneyck, and those interested with him, and they were among the most influential citizens of Albany, derived their right to construct the breakwater by an act of the legislature of 1794.

In his bill of complaint Hamilton prayed for a perpetual injunction restraining Teneyck from proceeding with his work, alleging that the act of the legislature permitting it was unconstitutional, in that the structures proposed to be erected, particularly the breakwater, would obstruct the navigation of the river and also greatly damage Schuyler's property; and that the pier would be a nuisance.

The case bristled with sharp and intricate legal questions. It was precisely the kind of case in which Burr delighted, for he reveled in the subtleties of the law with the enthusiasm of a poet amid scenes which inspired fancy and kindled imagination. He had interposed a demurrer to Hamilton's carefully prepared bill. As a ground he alleged that a State court could not interfere with any preventive remedy against the erection of a breakwater, even if it did obstruct the navigation of the Hudson, and to prevent it recourse must be had to the United States Supreme Court; that the building of a pier was a privilege which every citizen enjoyed, inasmuch as it was to be constructed on his own property.

There were other important constitutional objections to the act permitting these structures.

It is a singular coincidence that one of the grounds of demurrer to the constitutionality of the act of the legislature to which we have referred was subsequently urged against the right of the legislature of the State to grant to Chancellor Livingston and Robert Fulton the exclusive right to navigate the waters of the Hudson with vessels propelled by steam. This case was decided in favor of the chancellor and Fulton in all the courts of this State, and it went from the Court for the Correction of Errors to the Supreme Court of the United States, where the judgments of all the State courts were reversed by the opinion of Chief Justice Marshall (*Gibbon v. Ogden*, IX Wheaton, 1-240).

The arguments on both sides of the case before the chancellor were conducted with consummate ability; but to Burr belongs the credit of suggesting the grounds which constituted the basis of the reasoning and conclusion of the chancellor in deciding the case. They were listened to by the court, the bar and the people with intense interest, for they were made by two of the greatest lawyers in American history.

In that part of his speech in which Hamilton insisted that the act of the legislature granting the respondents in the case the right to erect the structure that impeded the navigation of the Hudson, he rose to the highest height of eloquence; but it was more like parliamentary oratory than that of the close, condensed reasoning of the well-disciplined lawyer.

Burr, in reply, did not indulge in rhetorical excursions. His style was pure, simple, the vehicle of reason, logic, and irresistibly conclusive.

Taking another view of the lawyers present in the bar, our attention is directed to a young advocate, who, five years previous to the event which we are describing, began the practice of law in the city of New York. There is much in his bearing and personal appearance to attract attention. He is a favorite in Albany, for here he studied his profession, here he was admitted to the bar, and here he began his practice. His professional career, though brief, is already successful. He has become to the bar of the State what Henry Brougham was to the English bar when about his age. It must be remembered that at the time about which we are writing, and for many years subsequent, eloquence at the bar was cultivated with assiduity, as a powerful means of success in the profession; but it was cultivated by none more successfully than by Brockholst Livingston, for he is the advocate to which we are directing our attention. The beautiful lines dedicated to Bushe, the eloquent ornament of the Irish bar, apply happily to Livingston:

"Sedate at first, at length his reason warms,  
And every word and every gesture charms."

Like Burr and Hamilton, Livingston had a brilliant military history. At the commencement of the Revolutionary War he entered the Continental Army, with the rank of captain, but was soon attached to the staff of Gen. Schuyler, with the rank of major. In the more active and dangerous duties of the soldier he soon was raised to the position of colonel. At the battle of Saratoga he led a daring and brilliant charge on the British lines. After the surrender of Burgoyne he continued with the army, participating in many engagements, until the close of the war, when he went to Albany and prepared for his profession, under the instruction of that historic pillar of the Albany bar, Peter W. Yates. Professional success soon gave him judicial promotion, and when Judge Morgan Lewis, of the Supreme Court, retired from the bench on his election as governor, Brockholst Livingston was appointed to succeed him. In 1807 he succeeded Justice William Patterson on the bench of the Supreme Court of the United States. His long and distinguished judicial career, perpetuated in the history of his country, was terminated by death March 12, 1823.

Brockholst Livingston was a son of Governor

William Livingston, of New Jersey, and brother of Chancellor Robert R. Livingston and Edward R. Livingston, secretary of state in President Jackson's cabinet, and his firm friend, and a brother-in-law of John Jay. He was educated at Princeton. It is said his father at first greatly desired that he should become a minister of the gospel; but while at college an incident occurred which changed his mind, and he decided that his son was better qualified for the bar than the pulpit.

One day in a pleasant humor young Livingston, with the assistance of a less gifted classmate of the name of Sabine, imprisoned a disagreeable, irritable, pug-nosed professor of mathematics in one of the distant rooms of the college, where he happened to be engaged, and where he was compelled to remain several hours, even until he made night hideous with his cries for relief. Terribly enraged at this indignity, he commenced the work of detecting the culprit or culprits who had thus imprisoned him. At length, by close and ingenious investigation, the professor obtained evidence enough to order Livingston and Sabine to appear before the faculty to answer. Sabine was first examined, but so faithfully did he obey Livingston's instructions to remain silent that nothing of importance could be elicited from him. Then came Livingston's turn, and he was plied with all manner of questions, that he managed to answer so adroitly that nothing positive was established against him.

"Mr. Livingston," said the professor; "this great crime, sir, my cruel and inhuman imprisonment, lies between you and Mr. Sabine; that is certain. Now, sir! what have you to say to this?"

"That I am delighted with what you say, professor."

"Delighted with what I say, sir! And so you glory in your abomination, do you? Delighted with what I say—you—you What do you mean, sir?"

"I mean just what I said. I really am delighted to hear you say that this great crime lies between Sabine and myself. I had some fears that you expected to lay it on one or both of us; but you seem to think that it only lies between us," said Livingston, with ludicrous composure.

This answer was equivalent to the ablest defense. It convulsed the entire faculty with laughter, except the astonished professor, who appeared like an italicized exclamation point in an old-fashioned spelling-book—a mark of wonder and surprise. Livingston and his friend were acquitted. The incident coming to the knowledge of the father of the former, it caused him to decide that his son was better qualified for the bar than the ministry.

Among the other lawyers present at this first term of the Court of Chancery was Abraham Van Vechten, the father of the New York State bar, the first lawyer who took the oath of office under



the Constitution of 1777. Then there were John V. Henry, acute, ingenious, logical and thrillingly eloquent; William W. Van Ness, the rarest genius of his times, and subsequently a judge of the Supreme Court of the State; Josiah Hoffman and others of equal distinction.

In the evening Governor George Clinton gave a reception to Chancellor Livingston, the members of the bar, the mayor of the city and prominent citizens. It was one of the most memorable social occasions in the history of the Capital City, graced by the presence of Robert R. Livingston, Alexander Hamilton, Aaron Burr, Brockholst Livingston and the other eminent jurists we have named. It may well be said:

"There was a sound of revelry by night,

And *New York's* capital had gathered then

Her beauty and her chivalry, and bright

The lamps shone o'er fair women and brave men."

L. B. PROCTOR.

### Before the Final Bar.

ON Monday, August 23, at Villa Nova, a suburb of Philadelphia, James W. Paul died, the oldest member of the Philadelphia bar. Mr. Paul was admitted to practice in 1837, having lived a busy life of sixty years in his chosen profession. This well-known lawyer has served in an advisory capacity for many of the largest financial institutions in Pennsylvania. He is survived by four children, James W. Paul, Jr., Frank W. Paul, Allen G. Paul and Lawrence T. Paul. Mr. Paul's daughter, it will be remembered, was the late wife of William Waldorf Astor.

Supreme Court Justice Wm. J. Osborne, of the Second Judicial District, died last week at his residence in Brooklyn, aged 60 years. He was a native of New York city, a graduate of Columbia College, and an able lawyer. He is survived by a widow and one daughter. Justice Osborne was elected a City Court judge of Brooklyn in 1888, and the amended Constitution of 1894 wiped out the court and made the judges thereof members of the Supreme Court. Justice Osborne's term of office would have expired in December, 1900. Under the State Constitution his successor will be appointed by Governor Black, and will serve until December 31, 1898. The vacancy will be filled at the November election next year for the full term of fourteen years, as required by the Constitution.

### English Notes.

It is stated that Mr. Justice Cave has sent in his resignation, in pursuance of his intention announced some time ago.

The Victoria pension fund, which now amounts to £8,146 9s. od., will be closed on October 15th

next, and the administration of the fund will be subsequently handed over to the directors of the Solicitors' Benevolent Association, to be applied by them in providing pensions or annuities for necessitous members of the legal profession, their widows or families, without qualification or restriction, in such manner as the committee of the association may think expedient, the fund to be kept permanently as a distinct fund.

The treasury will find it difficult to resist the demand for an increase in the number of the judges of the Queen's Bench Division. In making it the council of the bar follows the example of its predecessor, the bar committee, and of the Incorporated Law Society. It is a demand which has been supported by the lord chief justice and by the attorney-general, and by everybody, in truth, entitled to speak with authority of the condition of business in the courts. An economical chancellor of the exchequer will find it all the harder to ignore the consensus of opinion by reason of the unquestionable fact that our judicial system is, so far as litigants are concerned, self-supporting. — London Law Journal.

[Lord Justice Lord Ludlow's abandoned name of Lopes was always pronounced by his friends at the bar so as to rhyme with "slopes," "hopes," and so on.]

Go, Ludlow, go! The bar can't shape

In language all it thinks and hopes.

But don't imagine you'll escape

Your old familiar name of Lopes.

— Law Times.

In the county of London, during last year, 7,300 inquests were held by the different coroners and their deputies.

A correspondent of the Daily Graphic says that the senior barrister of England, with the exception of Mr. Charles P. Villiers, M. P., is Mr. F. V. Woodhouse, who was called to the bar at the Inner Temple on the 20th of November, 1829. Mr. Woodhouse, who lives at Albury, Surrey, and is considerably over ninety years, is the head of the Catholic Apostolic Church, founded by Edward Irving, and is the only survivor of the twelve "apostles" who were chosen by that community in the thirties.

A curious action for personal injuries was heard at the Bromley County Court, when a Miss Claxton, of Beckenham, sued a grocer, named Booth, of the same place, for £50 damages for injuries sustained through the ignition of a box of "safety" matches warranted "to strike only on the box." The matches were purchased from defendant's shop in April last, and when plaintiff was in the act of opening a box the matches suddenly ignited, inflicting such injuries that for six weeks she was incapacitated from carrying on her business. The matches, some of which were pro-

duced in court, were of Swedish make, of the "Windmill" brand, and were supplied to the defendant by Messrs. Bryant and May, it being explained on that firm's behalf that they did occasionally supply foreign matches in this way, but only "to oblige a customer." For the defense it was urged that the term "safety matches" was merely a trade designation, and implied no legal warranty. His honor held, however, that "safety matches" had come to be generally considered as matches striking only on the box, and therefore as being safe in that respect. The way in which these matches had ignited was quite inconsistent with such a description. He gave judgment for £21 10s., with costs on the scale between £20 and £50.

### Legal Notes of Pertinence.

An important conference of prominent lawyers of England and Continental Europe has just been held at Brussels under the auspices of the Federation of Belgian Advocates, with a view to the formation of an international organization in which the bar of every important European country shall be represented. France, Germany, Great Britain, Spain, Austria, Russia, Holland, Sweden, Norway and Switzerland sent delegates to this congress, and the sentiment was unanimous in favor of a permanent international federation of barristers. The officers of the conference were appointed a committee to determine upon the best methods of bringing about the desired result.

Governor Black has appointed Myron E. Bartlett, of Warsaw, as county judge for Wyoming county, N. Y., to fill the vacancy caused by the death of Judge Lorish.

The State Democratic Committee will meet in New York September 16 for the purpose of nominating a candidate for the Court of Appeals chief judgeship.

Police Magistrate W. R. Timmons, of Danville, Ind., who sentenced a woman to the rock pile for thirty days, on August 20, imposed as a punishment on three boys an hour's reading of the Bible each day at the Police Court.

No divorces are granted in Mexico. The courts, for good and sufficient reasons, will grant a separation for forty years, but that is the most that can be done.

In some places in Spain, among them Vergara, where Golli was garroted, an old custom prevails of immediately after the execution arresting the executioner and charging him with murder before the court of justice. "Yes, I killed a man," answers the executioner, "but I did it in the name of the law, for the benefit of society, and in obedience to the commands of your honor." Then the court discharges him, saying that justice has been done.

### Notes of Recent American Decisions.

**Contracts — Public Policy.** — An agreement between rival applicants for a street railway franchise to combine in order to prevent competition between themselves or by others in procuring the franchise, and to avoid the imposition of conditions by the municipal authorities, is void as against public policy; and equity will not interfere to compel one of the parties to share with the others the fruits of their combination. (*Hyer v. Richmond Traction Co.* [U. S. C. C. of App., Fourth Circuit], 80 Fed. Rep. 839.)

**Deed — Community Property.** — A wife acquires no community interest in land conveyed to her husband by his parents without consideration, and for the sole purpose of putting the title in the son's name so as to enable him to qualify as surety on his father's postmaster bond; the deed being never delivered, though it was recorded by the father, who retained it. (*Crenshaw v. Harris* [Tex.], 41 S. W. Rep. 391.)

**Husband and Wife — Parol Agreement to Convey Land.** — Where the husband obtains money from the wife's father with which to pay a debt for which he is bound as surety, and executes his note therefor, under an agreement that it is to be regarded as an advancement to the wife, and invested in real property as her separate estate, the note to be extinguished when this shall be done, and the note is subsequently assigned to the wife, the wife's heirs may enforce the agreement, as against the husband's assignee for creditors, by compelling the conveyance to them of land devised to the husband in consideration of the payment which he had made as surety. (*Walker v. Walker's Assignee* [Ky.], 41 S. W. Rep. 315.)

### The Magazines.

The American Monthly Review of Reviews for September is an excellent number, containing all the features which have contributed to give this sterling periodical such wide popularity. The editor, in his "Progress of the World," discusses all the leading topics with his customary acumen and good judgment. Among the contributed articles are sketches of three members of the new Nicaragua Canal Commission — Admiral Walker, Capt. O. M. Carter, Corps of Engineers, U. S. A., and Prof. Lewis H. Taupt. The Hon. J. L. McCurry, formerly our minister to Spain, contributes an estimate of the murdered premier of Spain, Señor Canovas del Castillo, and his relations to modern Spanish politics. Mr. Ralph Easley writes on "The Sine Qua Non of Caucus Reform," advocating participation in party primaries by the so-called "better element" in American politics.

An attractive and timely contribution to the opening pages of the September North American Review is that by Prof. Goldwin Smith, who dis-

cusses the question, "Are Our School Histories Anglophobe?" F. B. Thurber furnishes a valuable article on "The Right of Contract," and an interesting paper on "Egyptian Prisons" is presented by Major Arthur Griffiths, her majesty's inspector of prisons. A most appalling state of affairs is disclosed by Charles Frederick Holder's graphic article on "Chinese Slavery in America," while under the title of "The Lesser Man" Mrs. G. G. Buckler deals most cleverly with the woman question. Michael G. Mulhall, in his concluding paper in his series on "The Progress of the United States," draws attention to "The Pacific States," and Prof. W. Garden Blaikie, D. D., furnishes an admirable review of the state of "Central Africa Since the Death of Livingstone." Admirers of athletic sports will find food for reflection in the article by Hamblen Sears on "The Influence of Climate in International Athletics," while "The Problem of the Twentieth Century City" is forcibly considered by the Rev. Josiah Strong, D. D., "Farmers' Institutes and Their Work" are instructively treated by Frederic W. Taylor, secretary of the American Association of Farmers' Institute Managers, and under the caption of "The United States and the Western Hemisphere" two articles of strong interest are presented, viz.: "The Liberation of the Spanish-American Colonies," by the Hon. H. D. Money, and "Our Diplomacy in Regard to Central American Canals," by James Gustavus Whiteley. Other topics dealt with are: "The Administration and Hawaii," by Longfield Gorman; "A New Business Alliance," by C. M. Harger, and "The Alleged Repeopling of Ireland," by Edward Byrne.

There is more than a spice of adventure about the September Century. "What Stopped the Ship," by H. Phelps Whitmarsh, is a story setting forth a mid-ocean mystery. A tale of peril in Alaska, called "An Adventure with a Dog and a Glacier," is by John Muir, whose timely paper on "The Alaska Trip" was printed in the August Century. "Prisoners of State at Boro Boedor" is an illustrated article on the experiences of two ladies in an out-of-the-way region in Java, by Miss E. R. Scidmore, author of "Down to Java," in the August number. There is another instalment of the extravaganza by Mrs. Marion Manville Pope, "Up the Matterhorn in a Boat," with pictures suggesting the daring adventures of her aeronauts. A subject of current interest is treated in a paper on "Cruelty in the Congo Free State," with striking photographs and notes of travel, made by the late E. J. Glave, in whom there is now an additional interest connected with his explorations in the Yukon region. Adventuresome also are the other serials—"Hugh Wynne," Dr. Weir Mitchell's American novel, and "The Days of Jeanne d'Arc," Mrs. Catherwood's study of the maid of Orleans. "Browning's Summers in Brit-

tany," by Mrs. A. M. Mosher, is both an illustrated paper of travel and a study of the English poet's Breton work. The variety of the number is further increased by "Glimpses of Gladstone," by Harry Furniss, with characteristic drawings of the English statesman by the writer, not before printed; "A New Note in American Sculpture," by Arthur Hoeber, treating in text and illustrations of the statuettes by Miss Bessie Potter, of Chicago; the next to the last instalment of Gen. Porter's "Campaigning with Grant," and a "knowing" article by the Baron Pierre de Coubertin on "Royalists and Republicans of France." Announcement is made in detail of the Century's annual prizes for literary work by college graduates.

To present the best thought in the whole range of living literature is the mission of *The Living Age*—and how well it has fulfilled this mission for over half a century its record fully testifies. Edited with a sound judgment and a keen literary instinct, it seldom fails to gather within its pages the most valuable expression and record of the world's progress and growth along every avenue of thought and activity, and continually grows in value with the ever steadily increasing stream of periodical literature.

Harper's Magazine for September opens with an article entitled "Around London by Bicycle," by Elizabeth Robins Pennell, richly illustrated by Joseph Pennell. "The Milkweed," the last unpublished work of the artist-author, William Hamilton Gibson, is illustrated with his characteristic delicacy. A significant forecast of the part the United States must be prepared to take in future conflicts is given in "A Twentieth Century Prospect," by our leading naval authority, Capt. A. T. Mahan, U. S. N. "George du Maurier," by Henry James, a view of the artist and writer as he appeared to an intimate friend and fellow-craftsman, is important as an interpretation and exceedingly interesting. The third instalment of "The Kentuckians," by John Fox, Jr., illustrated by W. T. Smedley, ends dramatically with a sudden personal encounter between the mountaineer and his rival of the blue-grass region. "The Beginnings of the American Navy," an historical sketch by James Barnes, describes our early successes on the sea, and explains the elements in our national life which contributed to our sea power. The article is richly illustrated from old and very rare prints in the possession of the author. In the fourth instalment of "The Great Stone of Sardis," by Frank R. Stockton, the author's invention finds full scope, and the humor of the situations increases in proportion. "The Lotus Land of the Pacific," by John Harrison Wagner, presents a familiar view of native life in Samoa. The number also includes several excellent short stories and poems.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, SEPTEMBER 11, 1897.

### Current Topics.

THE recent annual meeting of the American Bar Association, at Cleveland, a full and interesting synopsis of whose proceedings was given in last week's issue of the ALBANY LAW JOURNAL, proved to be one of the best of recent years. This national organization of lawyers has a distinct place, a positive mission. Its members are as far removed as possible from any suspicion of self-seeking. Its objects, as is well known, are in the line of reform and improvement in legal methods, and the quality of its membership is such as to give great weight to its utterances. The papers read and discussions had during the three days' session were of a high quality, and of deep interest to every enlightened citizen. We shall take occasion, in the near future, to refer in greater or less detail to some of the leading subjects discussed, but we cannot refrain from calling the attention of the bar, at this time, to the admirable address of the Hon. John W. Griggs, governor of New Jersey, the best portions of which were given in last week's issue of the ALBANY LAW JOURNAL. The distinguished speaker chose for his topic "Law-Making," which he discussed with a keenness of insight, breadth of view and wise conservatism which made it a particularly valuable contribution to contemporaneous thought. Governor Griggs referred to and deprecated the facility with which volumes of statutes are constantly being brought out by national and state legislatures, constituting,

VOL. 56 — No. 11.

as they do, a mass of hastily prepared and illy digested laws, the great majority of which are useless, if not positively detrimental to the public interest. For even the trained lawyer, to keep familiar with the growing mass of statutory law of his own State—to say nothing about those of the other forty-four—is a heavy task. Reference was also made to the slovenly methods of legislation, and to the fact that, as a rule, the men who make the laws possess no special training or qualification for the difficult and important work. The speaker truly said that while interpretation of law is a science law-making is not. To use his own language, "When it comes to the very act of making law, all requirements of special study, experience, training and legal insight are absent. There is no skilled class of legislators, nor is there any school of legislation at which may be learned the theory and practice of constructing a statute." All is haphazard, and the event must determine whether they are good or bad, whether they express the actual intent of the author, who, generally speaking, is unascertainable, or some intent entirely foreign to his will. Coming to the question of remedies, Governor Griggs distinctly declared against any fundamental changes in the constitution of parliamentary bodies, for with all its defects, he believes, with every true American, that our representative system is the best the brain of man ever devised. What he argued for is the control, restraint and regulation of legislative bodies, the wisdom of conservatism, the value of stability as opposed to experiment. Incidentally he declared in favor of biennial sessions of legislatures, a system now in vogue in more than thirty States of the Union, and strongly urged more care in the selection of law-makers. He truly declared that "too much regard is paid to political qualifications and not enough to legislative ability." With equal truth the speaker said this was by no means wholly the fault of the citizens, for the very men, scholars and lawyers, who are best fitted to guide and restrain legislation are most unwilling to give their time to the service of the public in the legislature. Not without reason

he put a large measure of the blame for the enactment of faulty legislation upon the legal profession, for there is no doubt that bills are mostly framed by lawyers. Practical patriotism, eternal vigilance and moral stamina, besides the expert knowledge how to frame a law, are the qualities and attributes most needed in legislators. Then the new statutes will be reduced to the minimum, the public interests greatly benefited, and the work of the courts enormously lightened. Governor Griggs is entitled to the thanks of every public-spirited citizen for the valuable contribution he has made to a subject than which few are more important, and the public discussion of which will do much to arouse a public sentiment that is sure to bear valuable fruit in practical results.

Pennsylvania's so-called Alien Tax Law, to the peculiar provisions of which reference has heretofore been made, is a dead letter, rendered nugatory, as we felt certain it would be, by the courts. It will be remembered that this peculiar piece of "freak" legislation imposed a tax of three cents a day upon every male alien wage-earner, and placed upon his employer the duty of collecting the tax. The object, while not entirely clear, was presumably to force aliens to become naturalized or be shut out from competing with citizen labor. Of course, one of the first results was to create a "boom" in the business of naturalizing, and some of the judges, not entirely pleased with the wholesale citizen-making which they were compelled to do, to the exclusion of other weightier matters, put applicants to such severe tests that many were unable to get their naturalization papers. Not a few of these aliens lost their employment, as their employers did not care to be bothered about withholding a part of their wages and turning it over to the State. Under these circumstances, it was natural, if not inevitable, that an early test should be made. Several suits were brought. John Fraser, a British subject, a part of whose wages had been withheld by the Pittsburg firm which employed him, was one of the plaintiffs who brought an action, in the United States Court, to recover the amount

that had been retained. Judge Acheson had no difficulty in finding the Alien Tax Law unconstitutional. The court said, in part: "Evidently the act is intended to hinder the employment of foreign-born, unnaturalized male persons over 21 years of age. The act is hostile and discriminates against such persons. It interposes to the pursuit by them of their lawful vocations, obstacles to which others under like circumstances are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. Now the equal protection of the laws declared by the fourteenth amendment to the Constitution secures to each person within its jurisdiction of a State exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here." Judge Acheson held, following numerous precedents and approved interpretations, that under the fourteenth amendment protection is not restricted to United States citizens, but extends to all persons within the jurisdiction of the States. No subject of any foreign country can be deprived of privileges enjoyed by citizens, native or naturalized, nor can any greater punishment be placed upon them in case of their committing crime. The proposed tax was plainly a deliberate discrimination against alien laborers admitted to the hospitality of the United States. To impose a tax upon them from which citizens are exempt is to deprive them of the equal protection of the laws, which the Constitution guarantees. It is one thing to pass laws to keep foreigners out, but quite another to attempt, by law, to discriminate against them after they have been allowed to come in. This is so plain and elementary a proposition that the wonder is any body of law-makers could look at the matter in any other light. The decision is so conclusive in its reasoning, and so well supported by Supreme Court decisions that there can be little hope of any other result, and it is not probable that the matter will be

further pressed by the State authorities. It has been well suggested that this episode should lead to a full consideration and discussion of the rights of alien residents within a State. The assumption among State and municipal law-makers, that aliens have no rights which the local law-makers are bound to respect is an exceedingly vicious one, and the Alien Tax Law is not its only expression. The passing of laws and ordinances forbidding the employment of aliens by any contractor engaged in any public work is, as the Philadelphia Press points out, a discrimination to the disadvantage of aliens, and it is quite possible that it would not stand the test which has just been applied to the Alien Tax Law. The passage of such an act as the latter is merely an exemplification of the ignorance or the carelessness of the average legislator, to which Governor Griggs referred in his paper before the American Bar Association, and ought to give additional stimulus to the reform he so earnestly advocated.

Asheville, N. C., furnishes a case of irregular practice on the part of an attorney — to characterize it by no stronger term — which is not without a moral and a warning. The facts, as given in the columns of the Asheville Citizen, appear to be, in brief, that Attorney George W. Justice was arraigned, last week, before Police Justice Eug. D. Carter for contempt of court in having, as alleged, misrepresented the amount of a fine imposed by the court upon clients of the defendant. In the case of Mrs. Matilda Green and her daughter, Georgia Green, Mr. Justice appeared for the defendant. The attorney induced Justice Carter to make the amount of the fines, in lieu of thirty days' imprisonment, \$15, and then, as alleged, represented to the women that the fines amounted to \$20, and appropriated to himself \$5, having previously been paid by the defendants the fee agreed upon between himself and his clients. Judge Carter, after taking testimony, found the facts to be substantially as above stated, and sentenced the offending attorney to pay a fine of \$50, and that he be imprisoned in the common jail of Buncombe county until said

fine was paid. In rendering his decision Judge Carter took occasion to discourse very entertainingly as well as vigorously on the subject of shysters. Here is a sample, which shows that the North Carolina police magistrate can sling a pretty vigorous quill when he tries: "I do not know whether the ancient civilizations were pestered with a shyster-lawyer, to which our modern type corresponds, or not. I know the one we have is about the most pestiferous entity of this age. I am at something of a loss to understand the forces that have produced him. I have sometimes thought that he must be one of the unwholesome and noxious products of our modern spirit of intense commercialism, which, it seems to me, tends ever to the utter destruction of the highest and best in man. So far as I have observed our modern shyster, he has one striking peculiarity; each one seems to be *sui generis*; he originates himself, operates a system of his own invention, and has no sense whatever of ethical propriety. The highest ambition of each shyster seems to be to out-shyster every other shyster, and to be a shyster unlike any other shyster. In deed each one seems to be a specimen without a group, a type without a class, a species without a genus, an offspring without a parent, a fountain without a source, a *nullius in filius* in social economy, a hermit in the solitude of his own infinite littleness, a full bullet in the woods of moral incertitude, an anomalous retarding force that we must reckon with as we advance along the highways of progress. The real all-wool-and-a-yard-wide shyster seems to glory in his professional shame, winks approvingly at the contemplation of his own meanness, felicitates himself upon his ability to arrive at results by ways that are dark, and by tricks that are vain, jokes about his felonies against the law, and, in hopeless moral stupidity, laughs in the face of those who despise him for his meannesses. To use the language of metaphor, he has the hide of a rhinoceros, the conscience of a wolf, the heart of a spaniel, and the brain of a goslin in great things, and of a fox in little things. Pachydermatous to imperviousness, he feels the wound of no rebuke; conscience-

less to the point of moral idiocy, he feels the sting of no castigation." This will doubtless strike the average lawyer as pretty well said, though its rare and redundant rhetorical beauties will very likely be lost upon Attorney Justice (what's in a name?), who has not only appealed the case to the County Court, but declares he will bring suit against Judge Carter for libel. It seems to us that the Asheville police magistrate is on the right track. He certainly has the shyster "down pat." If the attorney with the judicial name finds the cap fits him, let him put it on. Meanwhile, whatever may be the result of this libel suit, we want Judge Carter to be assured that he has our most distinguished consideration.

The statement made by the Madrid correspondent of the Cologne Gazette, that Spain has recently proposed to the Powers the establishment of a penal colony on some isolated island, where dangerous anarchists of all nations can be confined for life, while like a good many other newspaper statements, "important if true," would be still more important if there were any probability that the concert of the Powers would be in tune. How to deal with anarchy and anarchists is, indeed, a most difficult problem. These misguided, misanthropic opponents of all law work in secret and in the dark. The deadly blow comes suddenly and without warning, like a bolt out of a clear sky. The anarchists must be first apprehended before they can be sequestered, and for every one banished a dozen might spring into dangerous activity. Spain's alleged plan has some features which have met with favor, and the great majority of mankind would be only too happy if the anarchist assassins — the wolves and jackals of civilized society — could be permanently and safely herded on some far distant, isolated isle, there to work out their own salvation in their own way, constituting, as it were, a sort of anarchist experiment station. After the dangerous elements had been once thus herded, it would be a comparatively simple matter to keep them there, though we apprehend the difficulty of capturing these birds of prey is not fully appreciated by the

proponents of the plan referred to. There would even be practical unanimity in indorsing the proposition, made with fine irony, that especial care should be taken to provide the isolated anarchists with all necessary materials and facilities for the manufacture of high explosives. No anarchist would have any logical grounds for objection to the carrying out of the plan, for, having proclaimed himself an opponent of all law, he would be entirely inconsistent in invoking its protection for any purpose or reason. Nevertheless, the alleged plan is not likely to be put in practice for the reasons already suggested. Besides, the causes which breed anarchy and anarchists not having been removed, would continue in operation with similar results. In suitable soil the noxious weeds would continue to grow. Let us hope that such soil will never be found in free America.

A well-known New York city attorney calls attention to the practical working of the somewhat singular provision of the New York Code of Civil Procedure, which was interpolated by the legislature of 1896, which reads as follows: "No appeal shall be taken to said court (Court of Appeals) from a judgment of affirmance hereafter rendered in an action to recover damages for personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment, or written instrument, as in fraud of the rights of creditors, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, *or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals.*" A little study of this provision is likely to convince any lawyer that it has been well termed an anomaly in the right of appeal. It will be noted that although the decision of the Appellate Division may be unanimous, and that in such event no appeal shall be taken to the Court of Appeals, yet an appeal may be allowed by a single judge of that court, a privilege which is accorded only to

defendants in the classes of actions particularly specified. Thus, while a railroad company, for example, which, dissatisfied with a verdict of a petit jury in a damage suit, carries its case to the Appellate Division, there to meet further defeat in unanimous affirmance, may have its appeal heard in the Court of Appeals, on the certification of one member of that tribunal, this privilege is denied to defendants in all classes of actions not above specified. Without considering at all the question whether it is proper to permit any one member of the Court of Appeals to decide the question of an appeal to that court, thus prejudging the very case he will be called upon to hear, it may well be doubted whether the provision of the Code above quoted would successfully withstand a test of constitutionality, in view of the provision — section 10 of article 6 of the new Constitution — which declares that “no unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain a finding of fact or a verdict (not directed by the court) shall be reviewed by the Court of Appeals,” except on the certificate of the lower court itself that there is a question of law involved which may properly be carried to the court of last resort for decision. We quite agree with our contemporary, the New York Mail and Express, that the Code amendment of 1896 is an arbitrary and dangerous enlargement of the right of appeal to the Court of Appeals tending to defeat the announced purpose of the Constitution framers of 1894, which was to limit the number of appeals to the highest court, and to make the Appellate Division of the Supreme Court the *dernier ressort* in a much larger class of cases than were finally determined by the old General Term. It is to be hoped that a constitutional test of this peculiar provision will be speedily made.

The highest legal tribunal of one State at least — California — is now on record as opposed to the recognition of hypnotism. The Supreme Court of the Golden State has just affirmed the judgment of guilty of murder in the first degree found against J. E. Banks,

who killed Mrs. Harriet Stiles and J. B. Borden at Ocean Side, San Diego county, on September 6, 1895. The novel claim was made in the case that a hypnotist, one B. A. Stevens, had hypnotized the defendant after the murder, and that the latter denied the crime, while under the hypnotic spell. Commissioner Searles, before whom the case came, refused to recognize any such “gauzy” plea, and the Supreme Court decides that he was right in his refusal and in his conclusion that the law did not recognize hypnotism. Though the court was unanimous in its finding, Justice McFarland took occasion to say that he did not entirely agree as to the attitude of the law toward hypnotism — that while it could not be considered in this case, and there was no error in the refusal of the lower court to admit the testimony referred to, it was possible that under other circumstances the hypnotic power might properly be considered by the courts.

Our esteemed contemporary, Law Notes, falls into error when it alleges that the ALBANY LAW JOURNAL, in an editorial upon the alarming overcrowding of the legal profession, ascribes this as a cause for the numerous “text-books, encyclopedic works, digests, works on practice, reports, etc., with the eternal revision, amplification and repetition.” We have done nothing of the sort. The article to which Law Notes refers was a brief review of a paper which Percy L. Edwards, Esq., of Owasso, Mich., contributed to a recent number of the Michigan Law Journal. The context clearly shows that we were giving the thoughts of Mr. Edwards without at all indorsing them. We may add, however, that we quite agree with Mr. Edwards that the flood of legal products has reached, to the lawyer who desires to keep thoroughly posted on the state and development of the law, proportions that are almost appalling. This, as every member of the profession knows, is the truth. The literature of the law, like every other branch, has shown marvelous development, and in such a mass of matter there must necessarily be some, perhaps much, that is unnecessary, if



not worthless. It is perfectly true, as Law Notes suggests, that if there were not a demand for text-books and legal periodicals they would soon cease to exist, and equally true that many have so ceased. There will always be a demand for certain first-class publications. What we object to is needless amplification and repetition — the rehashing of worked-out materials, the threshing of old straw. Those that belong to this class reach oblivion by a short and easy route, which is well littered with literary corpses in various stages of decomposition. As in the realm of nature, it is simply a question of the survival of the fittest. Of many of this class of literary progeny it might well be asked what they were ever begun for, inasmuch as they sink into early graves, "unwept, unhonored and unsung," and we might also add unread. "What is our able contemporary growling about?" inquires Law Notes. We growl not, neither do we bite, nor will there be any bone of contention between us if our contemporary catches our meaning, which we have endeavored to make plain.

The ALBANY LAW JOURNAL has heretofore called attention to the law's scandalous delays in criminal procedure in this country, and at the risk of becoming tedious we desire to revert once more to the matter, which is one of great and vital importance. Nearly every State in the Union is able to furnish striking examples of this evil, which has brought the law and the courts into contempt, and furnished too often an excuse for lynch law. Under the system which permits judges of the higher courts to grant "certificates of reasonable doubt," most flagrant abuses have grown up. Years often elapse before the convicted criminal is brought to well-merited punishment, if, indeed, he does not succeed in escaping altogether the consequences of his crimes. It can hardly be denied that for these flagrant abuses the judiciary is directly responsible, and unless greater care and caution are exercised by judges the demand for the repeal or modification of existing laws will become so great as to be irresistible.

### Notes of Cases.

In *Fidelity & Casualty Co. of New York v. Willey*, decided by the United States Circuit Court of Appeals, Third Circuit, in April, 1897 (80 Fed. 497), it was held that a provision in an accident policy that the same shall not take effect unless the premium is paid prior to an accident is waived on a renewal of the policy, when, according to the usual course of dealing between the insurance company and its agent, the company transmits the renewal receipt to the agent, and charges him with the amount of the premium, and the agent then delivers it to the insured without exacting prepayment. The court said in part: "As the court below said, when considering the question reserved, 'the verdict of the jury establishes that it was the usual course of dealing between the company and its agent, Mr. Scott, for the company to charge Scott as its debtor with the premium on policies of insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named in the receipt. The question of law reserved is whether under the circumstances the fact that the renewal premium was not actually paid by Getty to the company constitutes a defense.'" And this is the main question raised by the assignments of error. If it was new, difficulty might be found in answering it. It is not new, however. It was involved in *Miller v. Insurance Co.* (12 Wall. 285); *Elkins v. Insurance Co.* (113 Pa. St. 386, 6 Atl. 224); *Insurance Co. v. Carter* (Pa. Sup. 11 Atl. 102); *Insurance Co. v. Hoover* (113 Pa. St. 591, 8 Atl. 163); and numerous other cases, which need not be cited. It is urged, however, on behalf of the plaintiff here that *Miller v. Insurance Co.* is distinguishable from the case before us, and that all the other cases cited, which followed it, were decided under a misapprehension of that case. The only distinction pointed out consists in the fact that the Brooklyn company instructed its agents that if they delivered policies without exacting prepayment of premiums as the policies required, they would be charged with and held responsible for the amount. It is difficult to see the importance of this fact. The instruction was a caution, simply, to the agents, who would have been as clearly responsible for such premiums without it. The delivery of the policies under the circumstances would be a violation of duty, and would necessarily render the agents liable for the premiums. The caution did not, therefore, affect their obligations to the company. The court thought it tended, with other circumstances named, to support an inference of authority to deliver policies without exacting prepayment. This may be so; but its tendency in that direction is certainly no greater than is the charge itself

against the agents, on forwarding policies for delivery. What the case decides is correctly stated in the syllabus, as follows: 'Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, 'as the same will stand charged to their accounts until the premiums are received,' and the agent did nevertheless deliver a policy, giving a credit to the insurer and waiving a cash payment, \* \* \* the company was bound.' Under the circumstances of that case, and of the one before us, the charge against the agent and delivery of the policy, or premium receipt, to the assured may be treated as a transfer of the assured's indebtedness to the agent, and consequently a payment as between the former and the company; or as an estoppel of the company against setting up the stipulation for prepayment of the premium in avoidance of the policy. We are not called on to consider the reasonableness of this rule; it has become a part of the law of insurance. Companies can avoid it by avoiding the facts on which it rests, but in no other way."

The Kentucky Supreme Court decided, in *Waller's Adm'r v. Marks, Etc.* (Ky. L. Rep., Vol. xix, No. 3, p. 121), that an agreement by the legatees under a will to pay to one of several persons proposing to contest the will a certain sum of money in consideration of his agreement to withdraw his opposition to the probate of the will, and to assist in its probate, is enforceable, not being against public policy or in violation of the laws against champerty and maintenance. The court said, in part: "It seems to us to be well settled that a compromise or surrender of an apparently equitable claim is a sufficient consideration to support a promise to pay. In the case at bar the pleadings of appellant show a clear case of an equitable claim if not a legal claim. The appellees' interest, it seems, was to some extent antagonistic to that of the intestate, and also opposed to the supposed interest or claims of some others. Now, to avoid litigation or to lessen or narrow the same, the contract in question is entered into by which, if appellees succeed in obtaining the amounts which they were contending for, they would pay to the intestate the sum he was claiming; otherwise he would and did surrender his claim, and also agreed to assist appellees in the common object, viz., to secure that which they all believed was justly due them. Moreover, the presumption of law was that the will then in contest was the true will of the testatrix, and that presumption is fortified by the fact that two courts sustained the will. Suppose that A and B were both claiming an interest in a tract of land, and had reasonable grounds to so claim, and that C and others were claiming the same land, no one being in possession, would not A have a right to contract with B to relinquish his claim and aid B in his contest with C and others

upon the condition that if B succeed that B would convey fifty acres of the land to him (A)? It seems clear to us that the contract in question is not in violation of public policy, and does not tend to obstruct justice or hinder the proper enforcement of the law. The second contention of appellees is that the contract is in violation of the laws against champerty and maintenance. In support of that contention some decisions of this court are cited. *Lucas v. Allen* (80 Ky. 681) is not applicable to this case. Lucas was an officer of the city of Louisville, and agreed to furnish information, etc., by which the payees could recover taxes illegally collected by the city, for which he was to have a certain portion of the money so recovered. It was properly held that he could not enforce such a contract. In *Young v. Evans* (8 Ky. Law Rep. 353), a Superior Court decision, it appeared that a party had contracted with the administratrix to cancel a debt he held on her if she would not file exceptions to a claim he had filed against her as administratrix of her daughter. It was properly held in that case that the contract could not be enforced. The reason is obvious. It was an attempt by the creditors to hire the administratrix to omit a judicial duty. *Brown v. Beachamp* (5 Monroe. 413) is also cited by appellee. It will be seen from the opinion cited that Richardson had no interest in the suit, but agreed with one of the parties to aid them in the litigation, and if successful, was to have part of the land in contest. The court held that such a contract was illegal and could not be enforced. The court said that 'maintenance signifies an unlawful taking in hand and upholding of quarrels or sides to the disturbance or hindrance of common rights, \* \* \* as where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country in relation to matters wherein he is in no way concerned, or where one officiously intermeddles in a suit depending, which no way belongs to him by assisting either party with money or otherwise.' Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it. It will be seen from the foregoing that the contract in question is not in violation of the law as to champerty and maintenance."

In *Mott v. Fowler*, decided by the Court of Appeals of Maryland in June, 1897 (37 Atl. R. 717), it was held that an agreement, on sufficient consideration, to act as administrator, without compensation, is valid, and that where one agrees with the widow and children of a decedent to act as administrator without compensation, and they become sureties on the bond, as well as waive the right of administering given them by statute, the agreement is supported by sufficient consideration. The court said: "It would be a reproach to the law if such a claim as the appellant is making in

this case could be recovered. It appears that the late Caleb S. Maltby, who was a man of large means, residing in the State of Connecticut, died there intestate. The principal administration upon his estate was had in that State. But he also owned some valuable leasehold property in the city of Baltimore, which his widow and two daughters sold; they also being residents of Connecticut. They were advised that they could not make a satisfactory title to this Maryland leasehold estate without administering here. Not desiring to be troubled with the details of this administration, and only for the purpose of making a good title to property they had already sold, they requested the late George P. Mott, who was then in their employ, and had been for a long time employed by the late Mr. Maltby, to act as administrator without compensation. He replied that he would be happy to act in the capacity mentioned if it would spare 'the ladies trouble and expense.' And in the same letter in which he made this statement he estimated that the total expenses of administration, not including attorney's fees, would not exceed \$300; giving the two items, viz.: State tax on commissions and court expenses, and excluding all commissions for himself, except, of course, sufficient to pay the State tax on administrator's commissions. But in addition to this he stated again and again that he was acting without compensation, and when congratulated on the fact that he would get commissions on a large estate, he replied that 'it did not amount to anything for him — only the honor.' But it is conceded that Mr. Mott agreed to act as administrator without compensation. He died, however, before completing the administration, leaving a will in which the appellant, his widow, was named as executrix. She filed a petition in the Orphans' Court of Baltimore city, claiming commissions for her husband as administrator of C. S. Maltby; and the court below refused to allow any, and passed an order dismissing her petition. From this order she has appealed. As we have already said, the claim here set up is without merit. In the case of *Bassett v. Miller* (8 Md. 548), in which a widow gave up her right to administer upon the estate of her husband in consideration of receiving from the party in whose favor she relinquished all the commissions except \$100, this court (Mason, J., delivering the opinion) said: 'While such contracts should not be encouraged, it is far better, in view of public policy and sound morality, that they should be sustained than that conduct should be tolerated by this court by which solemn engagements may be repudiated, and fraud and deception perpetrated with impunity.' But the 'engagement,' contract, or whatever it may be called, which was made between the late Mr. Mott and the widow and children of the late C. S. Maltby, by which the former was to act as administrator without commissions, can be sustained upon well-settled

principles of law. It is said to be without consideration; but not so. The widow and children, in consideration of the agreement of Mr. Mott, not only waived a valuable right (that of administering) which the law (article 93, section 18, Code Md.) vested in them, but they assumed the obligation of sureties on his bond for the faithful performance of his duties as administrator. These constitute a sufficient consideration (*Drury v. Briscoe*, 42 Md. 154; *Steele v. Steele*, 75 Md. 477, 23 Atl. 959; *Ohlendorf v. Kanne*, 66 Md. 499, 8 Atl. 351). As was said in *McCaw v. Blewit* (2 McCord, Eq. 90): 'He voluntarily undertook the duty under the express stipulation that he would not charge commission, and he cannot now be permitted to violate that contract. That which was expressly declared to have been intended as a gratuity shall not now be converted into a demand.' We do not consider it necessary to fortify our conclusion by the citation of other authorities, or by a discussion of the right of the Orphans' Court, in its discretion, to refuse commissions in a case like this. The testator of the appellant made a valid and binding agreement, which was binding upon him during his life, and now that he is dead it is equally binding upon his executrix."

#### IS INSURANCE A GAMBLING CONTRACT?

**P**UBLIC policy forbids wagers, and the statute books of many of our States contain laws prohibiting betting. "Why then," asks your moralist, "does the law sanction insurance?" A popular impression prevails that a policy of insurance — be it fire, life, marine or accident — is simply a wagering contract, but that the law, from charitable motives, tempered also by considerations outside the realm of statutory construction, permits such contracts.

The strict moralist, who, it is likely, will be ignorant of the fundamental principles of insurance, will declare that a man who buys a policy of insurance is simply making a wager with the insurance company that the insured premises will burn down before a certain date; that the insurance company, taking into consideration all the probabilities, wagers that the other party will not suffer a loss by fire; and that the odds being greatly in favor of the company, it agrees, in the case of loss, to pay a sum wholly disproportionate to, and many times larger than, the sum it receives as a premium.

Life insurance affords the best illustration from the moralist's standpoint, and a superficial consideration of his arguments shows them to have some merit. In the light of the moralist the life insurance company wagers that the assured will live long enough to repay the company, with interest, for the amount it binds itself to pay to the beneficiary of the policy in the event of the death

of the assured. The moralist has at least one legal authority to support his view. Speaking of wagers, Sir William Anson, than whom the law of contracts recognizes no more eminent authority, says: "It is obvious that a wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects. A man who bets against his horse winning the Derby is precisely in the same position as a man who bets against the safety of his own cargo. Yet we should not hesitate to call the one a wager, while the other is called a contract of marine insurance. A has a horse likely to win the Derby, and therefore a prospect of a large return for money laid out in rearing and training the horse, in stakes and bets. He wishes to secure that he shall in no event be a loser, and he agrees with X that in consideration of X promising him £4,000 sterling if his horse loses, he promises X £7,000 sterling if his horse wins. The same is his position as owner of a cargo. Here, too, he has a prospect of large profits on money expended upon a cargo of silk; here, too, he wishes in no event to be a loser, and he agrees with an insurance company or an underwriter that in consideration of his paying the company or the underwriter £10 sterling, the said company or underwriter promises to pay him £5,000 sterling if his cargo is lost by certain specified perils. The law forbids A to make such a contract unless he has what is called an insurable interest in the cargo, and contracts in breach of this rule have been called mere wagers, while those which conform to it have been called contracts of indemnity. But such a distinction is misleading. It is not that one is and the other is not a wager; a bet is not the less a bet because it is a hedging bet; it is the fact that one wagering contract is and the other is not permitted by law, which makes the distinction between the two. Apart from this, there is no real difference in the nature of the contract. A life insurance is in like manner a wager."

This view is erroneous, and results from a misconception of the nature of any insurance policy. Let us assume for the sake of argument that the insured of a policy of fire insurance never has a loss by fire. Has he received anything for the money he has expended in payment of premiums? If he has, the moralist and Sir William Anson alike are in error, for there can be no wager where there can be no loss. That the insured does receive something admits of no question. He gets indemnity. This carries with it a sense of security, and in the case of fire and marine insurance a certainty of having at the expiration of the policy either that which he insured or its pecuniary value. This feeling of security, intangible though it may be, is yet a sufficient return even though the insured pays premiums year after year. The same argument applies to marine and accident insurance, and

when we consider life insurance the moralist's argument fails utterly. No matter what form his life insurance policy may take, the assured gets returns in his lifetime. If his policy be an endowment, and he lives until the end of the period stipulated in the policy, then he gets, in addition to the sense of security, a cash return equaling and often exceeding the total amount of his payments. If the policy chances to be one of the many other forms which the ingenuity of life insurance companies has devised, the assured will get a return from the company in some form and, in addition, indemnity.

JOSEPH M. DAVIS.

NEW YORK CITY, Sept., 1897.

### LIFE INSURANCE,

EFFECT OF WARRANTY THAT ASSURED IS IN GOOD HEALTH.

NEW YORK SUPREME COURT — APPELLATE TERM.

July, 1897.

Present: Hons. Joseph F. Daly, P. J.; David McAdam and Henry Bischoff, Jr., JJ.

Oththila Woehrle v. Metropolitan Life Ins. Co.

Appeal by defendant from affirmance by the City Court, General Term, of a judgment in favor of plaintiff.

MCADAM, J. — The action is by the beneficiary named in a policy of insurance issued by the defendant May 21, 1894, upon the life of her husband, Frank Woehrle.

The policy provides "that no obligation is assumed by the company" \* \* \* "unless on said date the assured is alive and in sound health."

In answer to a question contained in the printed and written application for the policy, which was thereby made a warranty, in consideration of which the contract was made, the assured said he was then in sound health, and had never been sick or under treatment in any dispensary, hospital or asylum. In a paper called a "declaration and warranty by the insured," and signed by him, it is agreed and warranted that the application has been made, prepared and written by the applicant or by his own proper agent, and that the company is not to be taken as responsible for its preparation, or for anything contained therein or omitted therefrom. It was also agreed that any untrue answer would render the policy null and void. It was clearly proved that all of the answers above referred to were false; that the assured had been treated by Dr. Kubin at the German Hospital for Bright's disease, and that at the time he was discharged from that institution, on April 2, 1894, he was not well. The policy was issued May 21, 1894, about seven weeks afterwards, and the assured died of Bright's disease on the first day of August following. The falsity of these answers

clearly constituted a breach of the warranty and avoided the policy.

The plaintiff claims that, because the assured had trouble with his eyes and could not see well, and for the additional reason that the application was not read to him, and he did not know what answers had been inserted therein, it is not binding on the beneficiary, and *O'Rourke v. John Hancock Life Ins. Co.* (10 Misc. 405, 63 St. R. 522) and *O'Brien v. Home Benefit Society* (117 N. Y. 310) are cited to sustain this contention.

In those cases the persons insured were illiterate; the applications were prepared by agents of the insurers; the untrue answers were written out by the fraud or mistake of the agents, and the defendants were held estopped from setting up the breach. Those cases are inapplicable here, for in this instance the assured was not illiterate, and there was no fraud or mistake by the agents of the company, as there is an express warranty that the persons who prepared the application are to be regarded as the agents of the assured, and that the company is not to be responsible for its preparation or anything contained therein or omitted therefrom. (See *McDonald v. Hancock M. I. Co.*, 17 App. Div. 16.) The defendant had the right to protect itself in this manner against the effect of fraudulent acts even of its own agents, and the provision is valid and enforceable against the beneficiary. (*Bernard v. United Life Ins. Ass'n*, 14 App. Div. 142.)

It is impossible, therefore, to avoid the legal conclusion that the policy, by reason of the breach of warranty, was annulled, and that the motion made at the close of the case to dismiss the complaint on that ground should have been granted. The exception to the refusal to dismiss is consequently fatal.

The defendant's counsel requested the trial judge to charge the jury that if the deceased was not in sound health at the time of the application upon which the policy issued, the plaintiff could not recover. The trial judge declined so to charge, and said in substance that if a disease existed in the insured and he knew nothing about it, and honestly answered "no," there might be a recovery. The defendant's counsel then requested the court to charge "that it is immaterial whether the assured knew the answer was untrue." The court declined so to charge; and to these several rulings the defendant excepted.

The trial judge evidently confounded the difference between a mere representation collateral to the contract and a warranty, which is part of it (*Richards on Ins.* 62); for in the latter case it is not important that the party making the warranty believes in its entire truth; if it be false in fact it avoids the contract. (*Clemans v. Supreme Assembly*, 131 N. Y. 485, 488; *Cushman v. N. Y. Life Ins. Co.*, 63 Id. 404, 409; *Gratton v. National Life Ins. Co.*, 15 Hun, 74, 78.) Whether untrue to the knowledge of the party proposing the life is to the

company matter of little importance; for a warranty, the basis of the contract, is taken with reference to the fact and not with reference to the knowledge of the party. (*MacDonald v. Law Union F. & L. Ins. Co.*, 9 L. R. Q. B. 328, 331.)

In *Foot v. Aetna Life Insurance Company* (61 N. Y. 571), the court charged the jury, substantially as the trial judge did here, that the answers of the assured did not vitiate the policy unless knowingly untrue, and the Court of Appeals held that the judgment was properly reversed at the General Term.

The action by the plaintiff is on the policy, and in affirmance of its different provisions. She cannot enforce those that are beneficial and eliminate those that are detrimental to her. If the action had been founded on a rescission of the contract, to recover back the premium paid on the ground of fraud, or to reform the policy in equity, different rules perhaps might be applied.

The judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concur.

#### WINE VERSUS WATER.

HOW A LAWYER ONCE ELOQUENTLY ARGUED THE CASE FOR THE PLAINTIFF.

AT the late annual meeting and banquet of the Kansas City Bar Association, one of the most entertaining responses was by Judge John F. Philips. In response to the requests of numerous friends, Judge Philips consented to reproduce, as best he might, from the storehouse of memory, the last response to a toast at the State Bar banquet, given at Pertle Springs, by the late Judge Lindley, *clarum et venerabile nomen*. Judge Philips said: I know you will deem it no detraction from your worth, wit or humor when I say these occasions lost their highest ecstasy when Judge Lindley went out of our social sky, a lost pleiad, with no star of first magnitude to take his place. My recollection of that rare, racy ebullition is not so accurate as in days gone by; but the salient points, the originality, the felicity of expression, minus the inimitable facial expressions, are photographed on my memory.

I was president of the association that year, and *ex-officio* toastmaster. With little premonition, I called on him, in the "wee small hours" of the night, to respond to "Wine v. Water." He was as mellow as antique Catawba, and ruby colored. With that merry twinkle in his eye which I never can forget, his face beaming with good humor, he spoke substantially as follows:

*Mr. Toastmaster and Gentlemen of the Bar:*

I plead no surprise and no lack of preparation at being suddenly called upon to respond to this toast. But I want it distinctly understood that,

as a lawyer, I espouse in this cause the side of the plaintiff; and if water has a friend around this "bar," I am willing to divide time with him, and even give him the closing speech.

Poets and Gough and Murphy have written and orated about the beautiful water. They have pictured it in foaming cataracts, bubbling brooks, gurgling rills, crystal sprays and cooling springs. I admit its virtue in ice, mixed with other things; but outside of purposes of transportation of commerce, for running grist-mills to make cornmeal for distilling uses, and the assistance it rendered Christopher Columbus in finding "the land of the free and the home of the brave," with some lesser applications, such as washing feet, face and hands occasionally, I arraign the defendant for all manner of sins.

Water is the implacable foe of the human race. It is the fierce element of destruction. It beats down your gardens, with their beautiful flowers and nourishing vegetables. It deluges your fields and annihilates your crops. It ploughs up your highways and undermines your railroad tracks, washes away bridges, carrying off your cattle and hogs, and it drowns people. I never read of but one fellow being drowned in a wine vat, and I almost envied him his last sensations.

It is charged that wine leads men to ruin. So do women: but who would abolish the use of women? They crippled somewhat, so history tells us, the military career of Mark Antony in Egypt: but what a royal time he had with those "Roman punches" and Cleopatra! It is charged against my client that he is the author of the "Jimjams," and puts snakes in men's boots. But there is hydrophobia, which runs a dog mad: and men have perished oftener from want of water than of wine.

The book of Prophecy tells us that this great world—this vast heap of terrestrial matter—in the final grand wind-up is to be wrapped in flame; that old Jupiter, I suppose, is to turn on all the volts of his mighty electrical machine, and turn the whole mass into fine ashes. All we can say to this is that it is prophecy. But the verity of history is, as given us in the Bible, that the only time God Almighty ever did hide from view the whole face of the earth, and rid it of the pest of men, four-footed beasts and creeping things, save a few pairs reserved for propagation purposes, he employed in the work the element of water. And had it not been for that job I could never have seen the necessity of dividing the work of creation in the proportion of three-fourths for water and one-fourth for land. And I never hear of a community going "wet" and "dry" that I don't think the "drys" in the end will get the worst of it. And speaking of the flood, I pause to say, that I have never had it in my heart to speak disparagingly of that little spree of old Noah just

after he was let out of the ark. Mr. Toastmaster, I know you and John Henry can fully enter into my sympathy for the old man. Take his case home to yourself. Imagine us penned up for forty days and nights in that miserable, crazy, ill-ventilated craft, with a lot of assorted elephants, rhinoceros, bears, wolves, canines, monkeys, coons and civet cats, rank with compound odors, blown from no fragrant, scented garden of the Hesperides, with nothing to see nor drink, save water covered with slime and dead bodies. No wonder that having been thus "water-logged" he day after day let fly swift-winged pigeons to see if they might not find on some remote mountain, some towering Chimborazo, unreachd by the flood, some undaunted philanthropist, called a "moonshiner," with a still, high and dry, in working order. And who can blame him for striking out the first season in search of a vineyard, and filling his hide to the full with the rich, exhilarating juice of the grape? The good Lord did not anathematize him for it, for he not only let him live 360 years, but he painted with ineffaceable lampblack that smart Alex boy Shem for laughing at the old man's nakedness.

Moses was a great man, though I think he made a mistake in putting his "horn" on his head instead of in his mouth. He was not only a great lawgiver, leader and warrior, but he was no lover of water. He never had much use for it after floating around in his helpless infancy in a wicker basket in the bulrushes of the Nile.

When he was leading the children of Israel out of Egypt, you remember he came to the Red Sea. Though sorely pressed by the sword of Pharaoh's enraged army, he refused to "take water." He declined to even wet his feet with it; but asked the Lord to part the waves until he and his people could pass over dry-shod. But old Pharaoh—the fool Prohibitionist—seemed rather to like the water; so he and his army waded in, and you know what happened to them.

There are in the whole of the Old Testament but three instances of people craving water. One was when the throat of Moses' soldiers got over-dry from eating too much "quail on toast." Moses had not taken the precaution to load up a caravan of asses with Egyptian corn, and learn the art of making "corn juice" for use in all seasons, wet or dry. So he smote the rock in Horeb, and caused it to run water, as an evidence of God's power to work miracles. The second instance was when that over-due, unweaned boy of Hagar's wanted to nurse out in the wilderness. As there was no vineyard near, and he was too young to tamper with the juice of the grape, she prayed for water as a last resort. The third instance is recorded of that old rascal Dives, and he was in Hell, and wanted only a single drop at that.

The blessed Master, who was a man of sorrow and acquainted with grief, and ever touched with a feeling of our infirmities, while he preached righteousness, temperance, and of the judgment to come, was not a Prohibitionist. He converted water into wine, but nowhere and at no time did he convert wine into water.

Strong drink, like arsenic and gunpowder, may have slain its thousands; and scattered over the earth may be seen "drunkards' graves." But when Gabriel shall sound his trump and bid the dead arise, the victims of John Barleycorn may present a sorry crowd, yet what a small army they will present compared with the slain in battle, and that innumerable host with bedraggled robes, dishevelled locks, slimy with weeds and mud, which shall come up from the bottom of the sea and rivers, where laughing navies have gone down, and boats of gay and happy parties have upset and blown up and gone into the insatiate maw of the all-devouring waters. Old Bacchus will make a small showing against old Neptune in the muster day of the Judgment.

I produce as an important witness the writings of the illustrious dead, Bobby Burns. Who does not love the rare child of Ayershire, whose tender soul could pour forth its poetic melody at the sight of a poor, helpless mouse, his hapless ploughshare, in its rudeness, turned out of its warm, cozy bed; whose muse broke forth in humorous verse at seeing a louse creeping on a lady's bonnet:

"Ha! where ye gaun, ye crawlin' ferlie;  
Your impudence protects you sairly.  
I canna say but ye strunt rarely  
Ow're gauze and lace:  
Tho' faith I fear ye dine but sparely  
On sic a place."

Yes, he, who embalmed in pathetic poesy his love for his Highland Mary, has taught us more of the best use and value of corn than all the agricultural colleges and granges in Missouri. He dubbed it John Barleycorn. He tells us of his indestructibility; how, when buried beneath the cold sod, he rises again. When you fling him into "darksome pits, to sink or swim," and waste "o'er a scorching flame the marrow of his bones," and the miller crushes him between the narrow stones, and takes his very heart's blood "and drinks it round and round again," yet,

"John Barleycorn was a hero bold,  
Of noble enterprise,  
For if you do but drink his blood,  
'Twill make your courage rise.  
'Twill make a man forget his woe;  
'Twill heighten all his joy:  
'Twill make the widow's heart to sing,  
Tho' the tear were in her eye."

Even John Milton, the blind old bard, whose genius penetrated the skies, walked with the

angels of light over the golden pavements; who in his celestial vision saw old Lucifer hurled from the battlements of glory into the lowermost deeps of Hell, never gave any testimony in favor of water. And although he had no experimental knowledge of the mellow Moselle, never tasted the golden-hued Liebfrou milk, nor had his dainty palate dilated with Epicurean gusto with the sparkling Johannisberger floating around like quicksilver, tickling the lining of his throat, nor lived to have his imagination quickened with Mumm's extra dry, nor enjoyed, as has your speaker, the acquaintance of our own Ike Cook, yet his genius was alacrified by wine, as he wrote:

"One sip of this  
Will bathe the drooping spirits in delight  
Beyond the bliss of dreams.  
Be wise and taste."

Rare old Ben Johnson, who perhaps knew more about rank English ale than a gentleman's drink, and who was never entirely satisfied with anything save himself and Boswell, who salted and pickled his proverbs and huge wit, said, "Wine gives a man nothing." That may be so, but man has given a good deal to wine, and gotten a great deal of fun out of it. But old Ben did admit that wine warmed into motion what had been locked up in frost in a man. I've known men who could carry around an icicle in their pocket all summer without thawing it a few drops.

But Bill Shakespeare, king of the poets, royal good fellow, the great delineator of human character and interpreter of human nature, although he did not, in early youth, know a gentleman's preserve from a wild forest, knew what he was talking about when he said in "As You Like It,"

"Good wine needs no bush."

And again in "Othello: "

"Good wine is a good, familiar creature  
if it be well used.

Exclaim no more against it."

And I suspect he had been out late at night, after a play in Drury Lane, and got up next morning with a head on him, when he spoke of wine as an invisible Spirit, to be called, in the absence of a better name, Devil.

Old Homer, however, who got his fresh from the vineyard, hard by Ismarus in Thrace, spoke of it as "luscious, pure, a drink for gods." Wish I had taken a run over to Thrace when I was "over seas."

And now, may it please the court, I have about exhausted the subject and the patience of the jury, and beg that your honor, on account of your leaning a little toward the plaintiff, might omit your customary charge to the jury, and let the case go at once to this jury of "wine bibbers," to whose habits and capacity I confidently submit the cause of my client.

## LAWYER MARKS IN CHICAGO.

THE ORIGINAL OF THE PETTIFOGGER IN "UNCLE TOM'S CABIN" IN THE WINDY CITY.

JUDGE ABRAHAM MARKS, who is said to be the original of "Lawyer Marks" in Harriet Beecher Stowe's famous novel, "Uncle Tom's Cabin," a playmate of Edgar Allan Poe and Chief Justice Marshall, and associated with many prominent jurists in the south, is stranded in Chicago, at the age of 83 years. With a dignity which he maintains gracefully, and with keen mental faculties, the old man sat in the parlor of a friend's house, at 422 West Fourteenth street, and told the story of his life to a reporter of the Chicago Evening Post, full of adventure and association with famous characters. In his own words, he is only "sojourning" in the city, and charity is a level to which Judge Marks refuses to descend. Many years of his life were spent in southern Louisiana, Texas and in contiguous territory during the wild days of 1837-'40. He was probate judge in San Antonio, Texas, and editor of the Monroe Standard, in Louisiana, which involved him in a duel and half a dozen indictments for libel. A warm Whig during the heated political era in the south, when the drop of a hat implied "pistols at three paces," the old judge is still a hide-bound Republican who can hold his own in any argument.

S. Kubreener, who has placed his home at the disposal of the old judge, is neither a relative nor an acquaintance of Marks, but was attracted by his courtly manner when the judge called upon Attorney I. B. Lipson with a letter of recommendation from Kansas City. He sympathized with the caller and is performing kindnesses out of pure admiration for his guest.

Until three years ago Judge Marks was high in the legal profession of New York. For many years he was the sole legal guardian of the sewing machine patent obtained by Elias Howe from infringement. During his latter years of practice he became an authority on injunction law. He has made fortunes and lost them, but through all adversity he goes smiling, carrying his four-score and three years with an ease that a man of 60 would envy.

A high silk hat still bears the signs of better days, and admiration mingles with pity for the old judge, who was once pitted against the strongest members of the New York bar, and forded eight streams in Louisiana in company with Gen. Johnson, a district judge in Louisiana, to open the sessions of a Circuit Court. Seated with his legs crossed and his sharp eyes reflecting the passing thought, he told his life-story modestly and in a manner that forbade all doubt.

"I was born in Richmond, Va., eighty-three

years ago," he said. "My grandfather fought in the battle of Yorktown, and was so strong a patriot that he bought the continental currency, which was never redeemed, up to the last issue, and then pasted them on the wall of his bedroom. Within a stone's throw of my home lived Edgar Allan Poe. A life mark on my forehead shows where I was hit with a stone from his slungshot, accidentally discharged. Poe drank, chewed and was very wild. In my boyhood days I also associated with Justice Marshall, of the Federal Supreme Court. When I was two or three years old my family lived at Pensacola, and were close friends of Gen. Andrew Jackson's family. When the general removed to Tennessee my family moved with them, and lived with them two years. My recollection of Gen. Jackson's wife was that she continually sat in one corner of a huge fire-side and smoked a pipe. She could neither write nor read. My father received as a present the epaulets worn by Gen. Jackson during the battle of New Orleans, and which were worn by Editor Mordecai Noah, of the New York Courier-Enquirer, when he delivered a political speech in Tammany Hall.

"I was graduated from Union College in 1832, and immediately entered the office of Robert Sedgwick Field. Here I made the acquaintance of Aaron Burr. After I obtained leave to practice law I traveled to New Orleans, but before leaving for the south attended the reception to Gen. Lafayette, where my mother sang the 'Marseillaise' and was applauded by the general. From New Orleans I left for Monroe, and there established the Monroe Standard. I had a duel with a fierce Democrat of the name of Alexander, but the bullet went only through my coat. This was in 1837, and my next venture was to set out on horseback for Texas with a man of the name of Kauffman, who on the way lost his horse and provisions at a faro table, and by reason of that incident became a congressman later, and is the man after whom Kauffman county is named. In Houston I met 'Sam' Houston, president of the Lone Star Republic, as Texas was called, before it was admitted to the Union. I called on Mr. Houston in his State mansion, which was a log cabin. He asked me to go to San Antonio to take charge of the Probate Court there. I left for that city July 3, 1838, with a party of five.

"Assassinations and duels were common in Texas at that time, and I had many narrow escapes from death. I went back to Louisiana to visit my brother, a farmer in Arkansas. There I became associated with Gen. Johnson, and we forded six or eight creeks and traveled forty miles a day to reach Pine Bluffs, where we were to hold court. Gen. Johnson appointed me district attorney, and the attorney-general and the jury had to hold its deliberations in the hollow of a huge tree.



Police were absent, lawlessness prevailed, and the courts had a hard time. At Pine Bluffs I met Tom Tunstall, who sold a common yellow dog one day to a man who wanted a coon dog, and later became governor of the State. He was first a saloon-keeper, and then went to the legislature.

"From Arkansas I went to Morgan Point, La., and was married to the daughter of a Harvard professor visiting there. From New Orleans I went to New York and became patent attorney for Elias Howe, inventor of the sewing machine. When the combination of Wheeler & Wilson, Grover, Baker and Singer was formed, I remained to defend the company's rights against infringements. President Clark died with an estate of \$26,000,000, Singer died with \$13,000,000, and the manufacturer of the boxes died a few years ago worth \$3,000,000. In 1862 the sewing machines were employed to make uniforms for the soldiers, and that proved a mine of money. Howe invented first a machine which would have served only to be exhibited as a toy, but he obtained a patent on his eyed needle and shuttle."

Speaking of the manner in which his name came to figure in "Uncle Tom's Cabin," he said: "Mrs. Stowe wished to localize her story, and some one mentioned my name as the only attorney in the vicinity when she wanted a name for the character of Marks. When I saw Henry Ward Beecher on one occasion, he told me confidentially that if I were to see the original manuscript it would be seen that he had written a large part of the book."

There is nothing of the Lawyer Marks character about Judge Marks. He is candid, and has an air of honesty which commands admiration. For a man so old he is marvelously well preserved. Although his latter years are a struggle against odds, he is cheerful, and still hopes to continue in the practice of law.

### Before the Final Bar.

**D**ANIEL G. ROLLINS died at his country home, at Somerset, N. H., on the 30th ult. He was last seen in the New York courts about a month ago, as counsel for the directors of the American Tobacco Company, being associated with Joseph H. Choate, Williamson W. Fuller and others. For thirty years Mr. Rollins had been a distinguished figure in the legal profession of New York city. He was born in Great Falls, N. H., in 1842, his father being Daniel G. Rollins, for many years judge of the Probate Court of Strafford county, N. H. Mr. Rollins received his early education in his native village, and subsequently entered Dartmouth College, where he was graduated in the class of '60. He studied law in the Harvard

Law School, was graduated in 1862, and admitted to the bar of New Hampshire in 1863. He began the practice of his profession in Portland, Me. Mr. Rollins went to New York in 1866, and accepted the appointment of assistant United States district attorney under Daniel S. Dickinson, and retained the position during the subsequent administrations of United States District Attorneys Samuel G. Courtney and Edwards Pierrepont. Mr. Rollins returned to private practice in 1869, forming a partnership with Thomas Harland. He practiced extensively in the United States courts until January 1, 1873, when, at the request of District Attorney Phelps, he accepted the position of assistant district attorney. During his incumbency of the office of assistant district attorney, Mr. Rollins tried the most important cases that came up during Mr. Phelps' term. Mr. Rollins was the unsuccessful candidate in 1880 against Recorder Smyth for the recordership. Upon the death of District Attorney Phelps, early in 1881, Mr. Rollins was appointed by Governor Cornell to fill the unexpired term. He was elected surrogate in 1881, and served a six years' term. When he became surrogate the new Code had just gone into force, and during his term his decisions regarding its application to the business of that office became precedents. After leaving that office he became a member of the law firm of Carter, Rollins & Ledyard. In 1889 he left that firm and did business by himself until two years ago, when he took Robert Hunter McGrath, Jr., into partnership. He was a member of the Union League Club and of the Century, the University, the Down Town, the Lawyers' and the City Club, and of the New England Society.

In the death of Col. George Bliss the New York bar loses one of its ablest and most distinguished members. In December, 1872, he was appointed United States district attorney for Southern New York. Thereafter he had not cared for public office, preferring to devote himself to his profession, in which he attained an enviable position. He was engaged in many prominent cases, and in the conduct of all of them showed himself to be peer of any one in legal learning.

The death of State Senator Joseph Mullin, of Watertown, N. Y., occurred in New York city with startling suddenness, heart disease being the cause. The deceased was 50 years of age, a native of Watertown, and the son of Judge Mullin, of the Supreme Court, one of the State's most distinguished jurists. He chose the law as his profession, and in its practice achieved success. As a member of the State senate he took rank with the best debaters in that body, having served continuously from 1892 till his death.

### Legal Laughs.

One day, at the late English Dean of Ely's table, a legal gentleman was lamenting the gaps which death had recently made in his profession. "We have lost," he said solemnly, "not less than six eminent lawyers in as many months." The dean, who was quite deaf, at once rose and repeated grace: "For this and all His mercies," etc.

An application was made to a local police justice for a warrant under section 385 of the Penal Code, and among the citations presented to him was *Tanner v. Albion* (5 Hill, 121), the dictum being "A bowling alley kept for gain or hire is a nuisance *per se*." The learned justice studied a long time and announced his decision: "The only thing that troubles me is that *per se*; I think it means the thing is a nuisance if you prove it to be so."

The conclusiveness of an entry of the death of a woman on the record of court recently led to her discharge when she subsequently appeared in court in Chattanooga. The attorney-general took her by the arm, and walking up to the judge's stand, said: "Here is our dead defendant. I think we had better try her." To which the court replied: "I think not. We have her on the record as dead. Rose, you will have to go home and die. Let the former order stand." — *Case and Comment*.

I had a delightful talk the other night with that prince of story-tellers, Deputy Attorney-General Kisselburg. One tale that particularly amused me was about Willard Newell, the actor, who studied law in Troy. He was in the same class of candidates for admission to the bar. This was under the old rules, when a part of the examination was oral. The presiding judge, who shall be nameless, was somewhat deaf. He put this question to Newell: "How many kinds of gifts are there?" A certain attorney, who is now a judge, quietly signaled Newell by holding up two fingers. Newell caught on and promptly replied: "Two." "And what are they?" asked the judge. "Umph-umph and umph-umph-umph," replied Newell, knowing that the judge was deaf. "What's that?" roared his honor, whereupon the wag of a lawyer joined in with: "Your honor, he's all right; he said, 'Gifts *causa mortis* and gifts *inter vivos*.'" "Did you so answer?" said the justice. Newell nodded an affirmative — and passed. — *Albany Journal*.

### Legal Notes of Pertinence.

Sergeant Egan, of the Boston police force, has been admitted to the bar. He entered the Boston University Law School in 1894, and was graduated *cum laude* last year. A few weeks later he passed the examinations for the Suffolk county bar with

honor. He has been on the police force fifteen years. He was born in Boston in 1858.

For the first time in the history of the Supreme Court of California a written examination has been given to an applicant for license to practice law. The examination, which was successfully passed, was taken by Theodore Grady, a deaf mute. He is a teacher in the asylum for the deaf and dumb at Berkley. He has studied law for several years, and expects to become a writer of briefs, and perhaps an author of legal works.

A curious assignment of error was made in a case recently determined in the Court of Criminal Appeals of Texas. When the case came on for trial in the District Court in San Patricio county the counsel for the defendant, who was to take the leading part in conducting the defense, was found to be drunk. The junior counsel therefore moved for a postponement, which the court refused to grant, and the junior was obliged to go on and do the best he could without the advice of his leader. In answer to the proposition that the trial judge erred in compelling the defendant to go to trial under such circumstances, the appellate court said: "An examination of this record shows that nothing could have been done for appellant that was not properly done by counsel who managed the case during the trial. He seems to have contested the case upon every issue, and to have managed the defense with adroitness and skill; and in view of the result — imprisonment for only twenty-five years, when the jury from the facts would have been warranted in visiting upon the appellant a much severer penalty — we cannot say that any other counsel could have done better." The crime was one for which the law authorized the jury to impose the death penalty if they saw fit.

A case has been filed in the appellate court at Mt. Vernon, Ill., raising a question of law as to how far a railroad company can limit its common-law liability as a common carrier by private contract. The railroad (Big Four) offered in evidence a contract, one provision of which was as follows: "In the event of any unusual delay or detention of said live stock, caused by the negligence of said carrier or its employes, or its connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained." The Circuit Court, however, gave the following instructions to the jury: "A common carrier cannot contract for exemption from liability for a failure on its part or that of its servants to exercise ordinary care in the transportation of its business. The plaintiffs may, independent of such contract, bring an action against the defendant for damages resulting from the negligence of defendant in not performing its duty as a common carrier." The

jury found for the shippers. The appellant company brings the case to the appellate court, asking that its contract be declared legal.

We recently had occasion to mention the peculiar practice which prevails in the Probate Court in England of applying to the judge for leave to swear that the death of a particular person occurred at a specified time. Two interesting applications of this sort were made to Mr. Justice Gorell Barnes in London on August 9. The good ship "Cedric the Saxon" sailed from the port of New York on September 19, 1896, under the command of Captain David Rees, bound for Padang, in the island of Sumatra. She was spoken the next day, and has never been heard from since. The insurance on her has been paid as a total loss, and the court gave the captain's wife leave to swear that he died on or since September 20, 1896. The other application was by an Australian lady, whose brother was entitled to a fund in chancery amounting to upward of \$5,000. This brother left England in 1853 on a hunting expedition to South Africa. Since his departure none of his relatives had ever heard from him or of him. The judge permitted the sister to swear that his death occurred in 1854 or subsequent to that year. These two cases, arising on the same day, illustrate the varied and cosmopolitan character of the interests with which the English courts have to deal. -- New York Sun.

### English Notes.

Lord Esher, master of the rolls, attained his 82d birthday on August 13 last.

The statement that Lord Ludlow will retire from the Court of Appeal before the reopening of the courts in October is denied. The London Law Journal has information that nothing definite as to the resignation of Lord Ludlow has yet been arranged.

During the hearing of a case before Mr. Justice Grantham, at Leeds, one of the witnesses for the plaintiff, an old man named James Briggs, stepped into the witness-box wearing an old-fashioned broad-brimmed Quaker hat, and ignored a whispered intimation from the judge's clerk that he must remove it. His lordship asked him if it was part of his creed to keep his hat on, and under what circumstances he wished to keep it on. The witness replied that he believed it to be required of him to keep it on in the presence of all men, but that he thought it right to take it off when using the name of the Almighty. He added that, although he did not wish to act with any want of respect to the court, he did not feel called upon to uncover. The learned judge said he should be sorry to say anything to hurt any one's conscience, and that he would not ask the witness to remove

his hat, and the old man accordingly was allowed to make an affirmation with his hat on.

Application was recently made to the High Court, Queen's Bench Division, by the Incorporated Law Society, to strike a solicitor (name not given) off the rolls. The charge against the respondent was that he falsely represented to the assistant paymaster-general that he was able to identify one B. as the person entitled to receive a certain sum out of the Chancery Division of the court, whereas B. was quite unknown to him. The statutory committee of the Law Society found that the charge was proved, and that the respondent had been guilty of the professional misconduct alleged. It was urged, in mitigation of the offense, that the respondent's action was prompted by a desire to save B. any further trouble in obtaining the payment desired, and not with the hope of getting any pecuniary advantage for himself. The court, considering all the circumstances, and taking a lenient view of the matter, thought that if the respondent were compelled to pay both the costs of the inquiry before the committee of the Law Society, and the costs of the application in court, coupled with the disgrace he had undergone in having the matter brought publicly into court, he would be sufficiently punished to make him more careful in future. An order to this effect was entered.

The disinclination of judges to retire is a very natural one; it is the disinclination to self-effacement, says the London Law Journal. Nobody likes to be shelved, least of all the children of this generation: for if there is one quality more than another characteristic of the nineteenth century it is the passion for notoriety — "*digito monstrari et dicier hic est.*" All have it — politicians, actors, authors, artists; and it is a passion which grows. How morbid it may become is shown in the case of the man who set fire to York Minster merely to enjoy celebrity — "*volitare per ora virum.*" Lawyers are not exempt. Even so great a judge as Chief Justice Cockburn liked — so Lord Bramwell tells us — a page of the Times devoted every day to him and his doings, and picked out *causes célèbres* for his list. There is another cause operating in the case of successful lawyers which accentuates the disinclination to quit a post of honor, usefulness and emolument, and it is that the lawyers have less than most men other resources, other pursuits and hobbies to fall back upon. No profession is so absorbing as that of the law, where the lawyer is in the full tide of professional ambition. No galley-slave chained to the oar toils harder than does the much-retained leader at his briefs. What is the moral? Lawyers should be wise, and cultivate while they still have leisure some pursuit, some study, which will furnish recreation for the evening of life. Fearne, of "Contingent Remainders" fame, found time to

construct optical glasses and musical instruments. The late Mr. Justice Grove gained not only relaxation but renown in the abstruse problems of the correlation of forces in science. The late Lord Coleridge had his happy hunting ground in literature. Lord Justice Fry is a devotee of botany, and Lord Davey of gardening — "*sua cuique voluptas*." With studies and pursuits like these retirement can never be dull. It means to rest, but not to rust.

### Notes of Recent English Decisions.

Divorce — Practice — Alimony *Pendente Lite* — Husband's Income — Affidavit as to — Attendance for Cross-Examination. — A wife instituted a suit against her husband for restitution of conjugal rights, and afterwards presented a petition for alimony *pendente lite*, which, according to the practice of the Divorce Court, was not required to be sworn to. It stated that the husband had an income of over £70,000 a year from various properties. The husband, in answer to the petition, filed an affidavit, from which it appeared that his resources were very much smaller than alleged in the petition, his net income after deducting expenses amounting to about £17,000 a year. The wife applied to the registrar, under rules 86 and 191 of the Divorce Rules, for an order to compel the husband to attend for cross-examination upon his affidavit. Rule 86 provides that "the wife, if not satisfied with the husband's answer, may object to the same as insufficient, and may apply to the judge ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon." Rule 191 requires the application to be made in the first instance to the registrar. The registrar refused to make any order for the cross-examination of the husband, and allowed the wife £3,000 a year for alimony *pendente lite*. Barnes, J., declined to interfere with the discretion of the registrar, and refused to order the husband to attend for cross-examination. The wife appealed. *Held*, that the husband's affidavit was full and sufficient; that it was not an evasive affidavit, and that there was no ground for supposing that anything had been kept back; that rules 86 and 191 did not give the wife a right to have her husband cross-examined, that those rules had reposed a discretion in the registrar, and that unless he had proceeded upon a wrong principle, or had exercised his discretion wrongly, the court would not interfere. *Held*, therefore, that the appeal must be dismissed. Decision of Barnes, J., affirmed. (*Sykes v. Sykes*, Ct. of App. No. 2, L. T. Adv. Rep., Aug. 14, 1897.)

Trade-Mark — "Kynite" — Explosives — Invented Word — Registration. — Motion by Kynoch & Co. that the comptroller might be ordered

to proceed with the registration as a trade-mark of the word "Kynite" in respect of an explosive. The word was composed of "Kyn," the first syllable of the applicant's name, with the termination "ite." The comptroller refused to register the word, because the termination was capable of having "reference to the character or quality of the goods," like dynamite, cordite, etc.; also, there was a mineral called "Kainite," for which it might be mistaken, and a word "Kinetite." The application was then referred by the comptroller to the court, pursuant to section 62, sub-section 5, of the Patents, Designs and Trade-Marks Act, 1883. The applicant submitted that "Kynite" was "an invented word," having no "reference to the character or quality of the goods." *Held*, that "Kynite" was an invented word not descriptive of the character or quality of the goods, and the comptroller must proceed with the registration of the trade-mark. (*Re Kynoch & Co.*, Ch. Div., L. T. Adv. Rep., Aug. 14, 1897.)

### Notes of Recent American Decisions.

Common Carrier Not Bound to Ascertain Real Owner of Goods, but Must Follow Directions — Same — Several Parties Bearing Name of Consignee. — 1. The contract of a common carrier is not that he will ascertain the owner of goods, and deliver them to him, but that he will deliver the goods according to directions; that is, at the place or destination, and to the party designated to receive them, or to his order. 2. Where two men of like name live in the same town, and one orders goods from a distant dealer, who ships them in the common name, simply; in the absence of notice to the contrary, the party giving the order is, in contemplation of law, the one to whom they are sent. Consequently, delivery to him will be a due execution in that particular of the contract of carriage, although the consignor believed the order was from, and intended the goods to go to the other man. The result is not varied by the circumstance that the purchaser fraudulently assumed the name used in buying, provided it is that by which he was known at the place of destination, unless negligence is shown, and this, the mere fact that the delivery was not refused by the carrier, until inquiry could be made of the shipper as to which party the goods were designed for, fails to establish. (*Southern Express Co. v. Oskamp, Nolting & Co.*, Ross Co., Ohio, Circuit Court. Decided at May Term, 1897.)

Corporations — Stock — Negotiability. — Where a cashier of a bank, in which non-negotiable securities had been deposited for safe-keeping, took the securities without authority, and pledged them as his own, it amounted to embezzlement at least, so that the pledgee acquired no title as against the owner. (*O'Herron v. Gray* [Mass.], 47 N. E. Rep. 429.)

**Descent and Distribution—Slaves.**—The enabling act of 1865-66 (chapter 40, sec. 5), declaring all free persons of color, who were living together as husband and wife while slaves, man and wife, and their children legitimately entitled to inherit any property acquired "by said parents," confers the right of inheritance only as to property descending from parents, and does not authorize collateral inheritance. (*Shepherd v. Carlin* [Tenn.], 41 S. W. Rep. 340.)

**Insurance—Assignment of Policy as Collateral.**—Where assured in a mutual fire insurance company assigned the policy to a creditor as collateral, the assignee could recover for a loss which occurred while the assignor still owned the property, since, in the absence of any provision to the contrary in the by-laws or rules of the company or in the policy, it could be assigned absolutely or as collateral; and the company having consented to the assignment, and the original contract of insurance being still in force, the assignee could collect the amount payable under the policy in his own name. (*Merrill v. Colonial Mut. Fire Ins. Co.* [Mass.], 47 N. E. Rep. 439.)

**Intoxicating Liquors—Police Power of States.**—Any State may, in the exercise of the police power, declare that the manufacture, sale, barter and exchange, or the use as a beverage, of alcoholic liquors, are public evils, and having thus declared, can forbid such manufacture, sale, barter and exchange, or use within her territory. (*W. A. Vandercook Co. v. Vance*, U. S. C. C., D. [S. Car.], 80 Fed. Rep. 786.)

**Mortgage Securing Several Notes—Pro Rata Application.**—Defendant, who had indorsed a note to a bank, agreed that the bank might accept such security and grant such extensions of time for payment, as its officers might deem proper, and that the same should not affect his liability. Subsequently the maker gave the bank a mortgage to secure several notes made by him to different persons, and indorsed to the bank. *Held*, that defendant's note should be credited with its proportionate share of the proceeds on foreclosure of said mortgage. (*Home Sav. Bank v. McLaren* [Mich.], 71 N. W. Rep. 796.)

**Riparian Rights—Ownership to Middle of River—Easement of Navigation—Respective Rights of Owner and Public—Owner of River Bank Entitled to Injunction. When.**—1. The ownership of a riparian proprietor to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such uses as may be reasonably incident thereto. 2. Among the rights of the public is that of mooring vessels for the purpose of repairs, and of putting in engine, boilers and machinery, after such vessels have

been launched. Such use, reasonably enjoyed, is not a trespass upon the lands of a riparian owner, in front of whose river bank, outside of the dock line, such vessels are moored, and such owner will not be entitled to an injunction forbidding such use, unless special injury to his property is shown. 3. But the right of the public does not extend to use of lands of the owner not covered by water. And where a builder of vessels so moored carries lines from them across the river bank of such riparian owner, against his objection, and fastens them upon the land of such builder, and insists upon the right to continue such acts, the riparian owner may be entitled to an injunction, although his land is unimproved, and such acts produce no actual present damage. (*Pollock v. Cleveland Ship Building Co.*, Ohio Sup. Ct. Decided June 22, 1897.)

### New Books and New Editions.

**The Law of Sales of Personal Property.** By Francis M. Burdick, Dwight Professor of Law in Columbia Law School. Little, Brown & Co., Boston, Mass. 1897.

An elementary work on any branch of the law has to be exceptionally good in order to share in the general high estimation which has been awarded in the past by students and practitioners to the volumes which have thus far appeared under the name of student series. Robinson on Elementary Law and Cooley on the Constitution have already earned the name of classics, so that the public naturally look for a book "par excellence" when appearing in this series. It is not too much to say that Mr. Burdick will not put this good company to shame. In a treatise of 300 pages he has concisely presented to the reader the essentials and groundwork of the law of sales. No verbosity mars the pages of this well-written book, and every sentence is made to say something to the point which cannot fail to impress on the mind of the student some of the leading principles of this important branch of commercial law. Mr. Burdick has entered a field which will be made stronger by his presence there, and without exaggeration it can be said has added another very creditable work to the text-book series. His judgment in condensing and emphasizing the essential points is largely due perhaps to his experience as a teacher in the law school. The cases cited are numerous and apt, thoroughly explaining the points the author would elucidate. Not only the student and the lawyer, but the well-informed business man, would do well to become familiar with the principles of this important branch of the law as outlined in Mr. Burdick's work. The appendices, including the factor's acts of different countries, complete the value of the book from a comparative legal standpoint.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, SEPTEMBER 18, 1897.

### Current Topics.

IN the latest issue of the Medico-Legal Journal, the editor, Clark Bell, Esq., has an interesting and valuable article on the subject of criminal appeal in England. The author truly says that the proposed amendment of the law of criminal procedure in England, allowing an appeal to the convicted, is well worthy of attention not only among the British public but on the part of all English-speaking people. The bill referred to, which has already reached a second reading in the House of Commons, under the charge and direction of Mr. Pickersgill and his colleagues, has been framed with the object of giving effect to the recommendations of the judges, in their report in 1892, to the Lord Chancellor. Mr. Bell undoubtedly voices the sentiment of most Americans when he expresses regret that Mr. Pickersgill should have placed the reasons of the bill on such narrow lines as the acknowledged disparity of sentences passed upon offenders by different judges, for precisely the same class of offences and committed under similar circumstances. As Mr. Bell well says, disparity of sentences, while a recognized evil on both sides of the Atlantic, "is only an incident to the major and more important question which confronts the British publicists, where, under the present system, an innocent person wrongfully convicted on a trial before a single judge, is placed wholly outside the judicial power to correct any errors or mis-

takes of law or fact occurring on the trial, or review or modify the sentence." That such mistakes do occur is sufficiently attested by the statement of Mr. Justice Grantham, that 4,600 petitions were made last year to the Home Secretary from convictions, upon which no less than 420 orders had been made by that officer, granting the relief asked, in whole or in part. The defects of the present system, and under which reliance must be had wholly on a Home Secretary, who, as Mr. Bell points out, may not be a lawyer at all, or familiar with the principles of law, are too apparent to need emphasizing. It will hardly be denied anywhere that a full bench of judges (the bill provides for six to be selected by the Queen's Bench division of the High Court of Justice, sitting with the Lord Chief Justice) would be a safer and far better tribunal to pass upon a case than the Home Secretary of Great Britain, freely conceding the fact, which is undeniable, that some of the ablest men in England have graced that office. Mr. Bell well asks whether the liberty or the life of the citizen charged with crime is of less value in British eyes than the bank account of the defendant, which should give a right to an appeal to save property while denying it to save life. It may be worth while to glance for a moment at the objections made in England to the proposed reform in criminal procedure. These objections may be said to have been voiced by Lord Justice Lopes, who, in a charge he recently made to the grand jury at the Wilts Quarter Sessions, commented on the bill now pending in these words:

"The comparison of criminal cases with civil is delusive; they stand altogether on a different footing. In civil cases the verdict proceeds on the weight of the evidence, and no verdict of a jury is allowed to be impeached, unless it is so unreasonable as to be almost perverse, a state of things which, in a criminal case, would justify the interference of the Home Secretary. In criminal cases the accused is presumed to be innocent until proven guilty, and the jury are emphatically told that they must not convict, unless they are satisfied, beyond a reasonable doubt,

of the guilt of the accused. The risk of an innocent person being convicted in England is infinitesimal, and that risk, in my opinion, will be practically removed if, as I hope soon will be the case, the accused and the husband and wife of the accused are permitted to give evidence in criminal cases."

\* \* \* \* \*

"The existence of a Court of Appeal, empowered to reverse a conviction of facts, will introduce an element of uncertainty in the administration of the criminal law highly detrimental to the deterrent effects of punishment."

\* \* \* \* \*

"It will relax, too, the sense of stern responsibility now so keenly recognized by the juries, proceeding, in my judgment, from the feeling that their verdict is final and irreversible."

\* \* \* \* \*

"Is there to be an appeal in every criminal case? If so, the temptation to appeal will be overwhelming—and at whose cost? In the case of a poor man, it must be at the cost of the public, otherwise the rich will have an unfair advantage over the poor."

None of these arguments are likely to strike the average lawyer or publicist on this side of the water, at least, as having any great weight. In the light of experience few will share the apprehensions of Lord Lopes. It may be added, as a relevant fact, that in Her Majesty's Dominion of Canada the law of criminal appeal is as broad and full as in any American State. Nor should any of the scandals or abuses which have grown up under the system, as administered in the United States, deter Great Britain from instituting the much needed reform, for, in the course of time, such abuses are certain to be eliminated, in whole or in part, by remedial legislation. Mr. Bell does not urge the abolition of the Home Office system which, as he freely concedes, is in many respects an admirable one. It has faults that could be corrected, evils that could be remedied, and its powers might even be increased, as has been done in Canada. At present its powers are limited to pardon and commutation—powers which, under our Constitution, are

vested for the general good in the President of the United States for crimes against the government, and in the States, in the Executive, sometimes acting in conjunction with a board of pardons. Again referring to the procedure in Canada, the author shows that the powers vested in and exercised by the Home Secretary in Great Britain are vested in the "Minister of Justice," and the new statutes of the Dominion also give to this officer a power not granted to the Home Secretary of Great Britain—a power that is not executive, but judicial; a power unprecedented in modern governments, so far as the author is aware; a power in any case of his own volition, *to order a new trial before any court in any part of the Dominion of Canada*. Such a power, Mr. Bell shows, could not be granted an executive in the American States, because all judicial power and functions are, by the organic law, vested in the judiciary. It is not intended by the advocates of the right of criminal appeal in Great Britain to impair functions of the Home Office. It is a fact of interest that in Canada the right of appeal is entirely judicial and outside the functions of the Minister of Justice. Mr. Bell's article concludes with a statement of the views of eminent judges and jurists of the United States and Canada, given at the personal request of the writer, making the contribution a most notable one to the discussion of one of the most important questions which has come before the British public for many years.

The New York law of 1897 (chapter 506), which amends the Penal Code by making it a prison offense for any person, except the accredited agent of a transportation company, to sell a railway or steamship ticket (popularly known as the Anti-Ticket Scalping law), went into effect on the first inst. The new law, while favored by the majority of the newspapers of the State, has been bitterly opposed at every stage of its progress, and is still being fought by the Commercial Travelers' National League, on the ground that it seriously interferes with their constitutional rights, as well as the rights of merchants. Already, it is understood, a test case

has been arranged, an arrest made, and the plan formed to have habeas corpus proceedings bring the case at once before the Supreme Court. The commercial men hold that the law bears a false title, given by its authors with the object of deceiving the public as to its true purport. They also oppose the law because, in their view, it abridges their constitutional right to dispose of personal property in whatever market best suits the owner. It is also alleged that the anti-scalpers' law relieves the railroads from the redemption of mileage at the price paid therefor, and subjects the holder to a two years' penalty if he offer to sell it. Noting the fact that one of the provisions of the new law is that mileage books shall be redeemed within thirty days after the date of expiration thereof, it is pointed out that, if a mileage book offered for redemption contained 300 miles, the 700 used would be charged at three cents a mile, and the holder of 300 miles would get nothing in return for this unused portion of the book. The provision of the new law with reference to the redemption of unused tickets is as follows:

"Every person who shall have purchased a passage ticket from an authorized agent of a railroad company, which shall not have been used, or shall have been used only in part, may within thirty days after the date of the sale of said ticket, present the same, unused or partly used, for redemption, at the general office of the railroad company which issued said ticket, or at the ticket office where said ticket was sold, or at the ticket office at the point to which the ticket has been used. If said ticket, wholly unused, shall be presented for redemption at the ticket office where sold, the same shall be then and there redeemed by the agent in charge of said ticket office at the price paid for said ticket. If said ticket, partly used, shall be presented for redemption at the ticket office where sold, or at the ticket office at the point to which used, the ticket agent at either of said offices, upon the delivery of said ticket, shall issue to the holder thereof a receipt, properly describing said ticket and setting forth the date of the receipt of said ticket, and the name of the person from whom received, and shall

thereupon forthwith transmit said ticket for redemption to the general office. It shall be the duty of every railroad company to redeem tickets presented for redemption, as in this section provided for, promptly and within not to exceed thirty days from the date of presentation at the general office or from the date of the aforesaid receipt. A wholly unused ticket shall be redeemed at the price paid therefor. A partly used ticket shall be redeemed at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket of the same class between the points for which said ticket was actually used. Mileage books shall be redeemed within thirty days after the date of the expiration thereof in the same manner. Every railroad company which shall wrongfully refuse redemption, as in this section provided for, shall forfeit to the aggrieved party fifty dollars, which sum may be recovered, together with the amount of redemption money to which the party is entitled, in an action in any court of competent jurisdiction, together with costs; but no such action can be maintained unless commenced within one year after the cause of action accrued."

This looks like an entirely fair and equitable arrangement, in view of which it does not seem possible that any clause inserted in mileage books to the effect that no part of the same shall be redeemable would have any effect in avoiding the liability of the company issuing the mileage book. If this redemption were not so stringently provided for, under adequate penalty for the violation of such provision, the commercial men would undoubtedly have stronger grounds for protesting against the law than are now apparent. It is undeniable that the ticket-scalping evil had reached proportions which demanded some legislative correction. It seems equally certain that some of the "drummers" are opposing the new law partly, if not mainly, for the reason that it cuts off perquisites acquired by very shrewd and expert manipulation of tickets, whereby many commercial men have been able, by "scalping" tickets and charging their employers full fares, to add considerably to their



income. So long as transportation companies are compelled to redeem the unused portions of tickets, there would seem to be no great hardship in compelling all travelers to purchase them from accredited agents. We believe the courts will experience no difficulty in finding the new law constitutional, as involving no abridgment of personal rights guaranteed by the organic law of the State.

Statutes prohibiting the playing of the game of base ball on Sunday have been, as is well known, declared unconstitutional by the courts of several of the States. Among these in the Cuyahoga County (Ohio) court, which recently, in the case of *State v. Powell*, carefully discussed the question and reached the conclusion that such statutes are clearly contrary to the organic law of the State. The reasons given for reaching this view of the law are interesting and worth reciting. The section under consideration, 7032a, provided that "whoever on the first day of the week, commonly called Sunday, participates in or exhibits to the public, with or without charge for admittance, in any public room, ground, garden or other place in this State \* \* \* any base ball playing, he or she shall, on complaint made within twenty days thereafter, be fined in any sum not exceeding \$100, or be confined in the county jail not exceeding six months, or both, at the discretion of the court." This statute, the court says, must rest for its validity on one of two predicates, to wit: It must be either unlawful or an offense to play or exhibit base ball on Sunday, because it is Sunday, or it must rest, in order to be an offense, upon the fact that it is an immoral game or exhibition, falling clearly within the police power or regulation, and, therefore, a crime. It is not a crime to play base ball on Monday or any other day of the week, says the court; hence, if it rests upon the fact, or is made a crime because it is played on Sunday, then it is clearly in conflict with the Constitution and cannot be upheld, because the doctrine is well settled, and especially in Ohio, that all statutes which inhibit common labor, statutes that refer to the first day of the week, com-

monly called Sunday, are not enacted or enforced to compel the observance of that day as a day of religious worship, but as a day of rest. Therefore, for the legislature to enact a statute prohibiting the playing of base ball on Sunday, because it was Sunday, would be unconstitutional and void. Another fatal objection is found in the fact that the act in question makes no exception in behalf of that class of people who conscientiously observe the seventh day of the week as Sunday or Sabbath, the Supreme Court of Ohio having, on two or three occasions, distinctly declared that a statute providing for the observance of the first day of the week, commonly called Sunday, as a day of rest, is void and unconstitutional unless it contains such an exception. Next, examining the question whether the statute can be upheld because the act inhibited falls within the police power, the court points out that it is fundamental that all acts falling within the broad power of police regulation under the constitution must be something in the nature of a nuisance, or in fact immoral, or having an immoral tendency, or detrimental to the good or welfare of the whole people. The court is clearly of the opinion that to play or exhibit base ball does not fall within the provision of the general definition above given as to police regulation. Whether the legislature of Ohio may or may not enact a statute that would be constitutional and valid as inhibiting the playing of base ball on Sunday the court does not feel called upon to decide, but clear it is to the mind of the court that the statute as enacted, grouping base ball playing among a lot of immoral games such as gambling, etc., is unconstitutional and void.

The London Law Journal mentions the fact that the question "Can a judge be guilty of contempt of court?" was raised in regard to a case in which a county court judge made some exceptionally strong observations on the conduct of a bankrupt who applied for his discharge. Among the numerous epithets bestowed by the judge on the proceedings of the applicant was that of "bare-faced and impudent robbery." The fact that crim-

inal proceedings are pending against the bankrupt, and that unless the venue is changed, he will be tried by a jury in the town in which the County Court judge has denounced him in such strong terms would seem to make it difficult for the defendant to secure a fair and impartial trial. It is true that if anybody but a judge had thus stigmatized his conduct while criminal proceedings were pending he would have been compelled to answer a charge of contempt, with the chance of being mulcted in a considerable sum. But as to judges the rule that they cannot be prosecuted for observations made in the course of their judicial duties, however much such privilege may be sometimes abused by minor magistrates, no doubt makes, in the long run, for the interests of justice. As the Law Journal well says "in the absence of such a rule our judges would be subject to constant persecution at the hands of disappointed suitors, and might grow less fearless in the discharge of their duties." It may be added that there are remarkably few cases in the books, at least in modern times, in which the immunity of the judges from prosecution for remarks made in the performance of their duties on the bench, has seriously interfered with the proper administration of the law.

In *Hope v. Brash and Another*, the English Court of Appeal passed upon an interesting question pertaining to the law of libel. This was an appeal by the defendant from an order of Bruce, J., at chambers, affirming the order of a master for production of a document. The plaintiff brought action to recover damages for a libel published in a newspaper of which the defendants were the proprietors. The defendants, in their statement of defense, admitted the publication and pleaded that the libel was inserted in the newspaper without actual malice, and without gross negligence; that before the action was commenced they had published a full apology, and that they paid into court a sum of money as sufficient to satisfy the plaintiff's claim. The plaintiff applied for an order for discovery of documents and the order was made by the master. The defendants ap-

pealed and the order was affirmed by Bruce, J., at chambers, leave to appeal being given. The Court of Appeal held that an order for production and inspection of manuscript ought not to be made because the defendant ought not to be compelled to give information as to the writer of the libel. Lord Esher, in his opinion, cited the case of *Hennessey v. Wright*, where the court had to consider the same question whether, when a libel has been published for which the defendant admits that he is responsible, he should be forced to say who gave him the materials for the published libel. The rule is, not that the court will never order that information to be given, but that, as a general rule, the court, as a matter of discretion, will not do so—in other words, there must be something very special in a case to make any exception to the rule.

#### Notes of Cases.

In *Bradford v. Clark and Thompson*, decided by the Supreme Court of Maine (90 Me. 298), it was held that no action for slander will lie when the words alleged to be defamatory are privileged communications. The plaintiff, a supervisor of schools, was present at the annual town meeting, when a proposition was pending for an appropriation of money for the purchase of more school books, and the defendants, who were voters and taxpayers, declared that "the school books had been burned" by him, one of them adding, "I can prove it," and the other, addressing the plaintiff, stated: "You, the superintendent of schools, have thrown the text-books into the stove in presence of children." It appearing that in making the imputed statements the defendants had reasonable grounds for believing they were true; that they made them in good faith, in an honest belief that they were true; that they desired definite information in regard to the charges against the plaintiff, when an explanation from him might have been entirely satisfactory; and that they were speaking to the fellow-citizens, who had a corresponding interest with themselves: *Held*, that the occasion was privileged. The court said in part: "It was a New England town meeting, held for the annual election of officers, for the necessary appropriation of money, and to consult upon the common good. The plaintiff was a public officer. His fidelity or efficiency in the discharge of his trust had been brought in question with reference to the preservation of school books. A proposition was pending for the appropriation of money for the purchase of more books. The

defendants were voters and taxpayers in the town, having an interest in the subject-matter. They had a right to know how the money raised by taxation was being expended. In making the statements imputed to them, they were speaking to their fellow-citizens, who had a corresponding interest with themselves. It was a privileged occasion. They had reasonable grounds to believe their statements to be true. They made them in good faith, in the honest belief that they were true. They had no actual malice against the plaintiff. They desired definite information in regard to the charges against him. An explanation from the plaintiff himself might have been entirely satisfactory. He seems to have preferred a lawsuit to an explanation, and he must abide the result. The statements made by the defendants were privileged."

In *Thomas Ray, an infant, by Thomas Ray, his guardian ad litem, appellant, v. James R. Keene and Foxhall Keene, respondents*, decided at the June term by the New York Appellate Division, First Department (19 App. Div. 147), it was held that the fact that an owner of racing horses employs a trainer, who employs jockeys to ride the horses, does not render such owner liable for an injury done to a jockey, under 16 years of age, whose employment for such purpose is forbidden by section 292 of the Penal Code, by reason of his being compelled, contrary to his expressed wish, by the trainer, to ride the horse of a third person. According to the evidence adduced on the trial, the boy mounted the horse, which subsequently threw him, with reluctance, and was compelled to ride by Cooper, the trainer for Keene, who, standing with a cane or stick in his hand, stated that he would knock him off if he did not ride the horse. It is conceded that such conduct on the part of Cooper was sufficient to fix a liability on Cooper and the defendants, if Cooper, in what he did, was acting within the scope of an authority conferred by defendants. If, however, Cooper was not acting as their agent in what he did, the court found it difficult to assign any principle upon which defendants are liable for injuries received by plaintiff while riding a horse in which defendants had no interest. The court said further, in part: "In this connection, it is important to recall just what Cooper's position was. The plaintiff testified that he was employed by Cooper, and that Cooper was employed by the defendants. In addition, we have but the pleadings to show just what was the extent of Cooper's authority. The complaint alleges that these 'defendants employed or caused to be employed the infant plaintiff.' And the answer is that they employed 'a proper person as trainer, to whose charge the management of such horses as these defendants desired to have trained for racing was confided, who, in the course of his employment, selected and employed

jockeys and stable boys to ride said horses,' one of whom, they are informed and believe, was the plaintiff. It will thus be noticed that Cooper's employment was the training of such horses as defendants confided to him, and he, on his part, employed the stable boys. It was, therefore, entirely competent, for aught that appears to the contrary, for Cooper to train other horses besides those of the defendants, or, as in this instance, to train Crosson's horse. Undoubtedly, if Cooper was not an independent contractor, but was in the general employment of the defendants, by whom he was given authority to employ stable boys and jockeys, then there might be some force in the suggestion that, in directing the boys as to what they should do, he was within the general scope of his employment, and that it was not for the boys to question his authority, and that for what they did for Cooper, presumably acting for the defendants, the latter could be held liable. We fail, however, to see upon what principle a boy employed by Cooper, though part of his duties consisted in exercising the defendants' horses, confided to Cooper for training, when injured while riding, under Cooper's directions, a horse in which the defendants had no interest whatever, can recover from them for such injuries."

\* \* \*

"Cooper was employed by the defendants to train such horses as they confided to his care, and the testimony shows, as the answer admits, that the plaintiff was employed by Cooper. But there is nothing to show that his employment was solely limited to riding the defendants' horses, or that he was employed by Cooper for that exclusively. The plaintiff was injured, not in riding one of the defendants' horses, but in riding by direction of Cooper, his master, a horse belonging to Crosson, without the knowledge or assent of the defendants, and Cooper, in ordering the plaintiff to ride Crosson's horse, cannot by any stretch of the pleadings or evidence be held to have instructed him to do anything which in any way could be regarded as done for the defendants. Nor could the plaintiff have understood that it was done for the defendants, because he admits that he had seen the horse on previous occasions at West Farms, and knew it belonged to Crosson, who, on the day in question, had brought it to the track, and for whom Cooper directed the boy to ride. If, however, upon any view, a jury could infer that Cooper was in complete charge and control of a stable of horses belonging to the defendants, and had authority to employ stable boys for them to exercise their horses, and had, without their authority or consent, forced the plaintiff to ride a horse which he knew did not belong to the defendants, and that the plaintiff was thus injured, then would be presented a case similar to the illustration of a foreman who, without authority, compelled an employe to enter upon a work which the

latter well knew was not one in which the master had any concern, and for injuries suffered in which the master could not be responsible."

The Supreme Court of Rhode Island has reasserted the settled rule, that when two or more persons perish in the same disaster, and there is no way of determining which died first, the presumption, as far as the right of succession to their estates is concerned, is that all died at the same moment and holds (1) that when three testatrices (sisters) die in this manner, a bequest or devise from one to another does not take effect; and (2) that as in the case in hand each left a will devising all her estate to her two sisters, directing that after the decease of the last surviving sister \$500 each should be paid to two nieces, and \$200 to one S., out of the proceeds remaining after payment of debts, the surviving niece (one having died during the lifetime of the sisters) was entitled to \$500 and S. to \$200 out of the personal estate of each of the three sisters, while their heirs were entitled to the residue of that and to the real estate, as if no will had been made. (In re Wilbor, 37 Atl. Rep. 634.)

In *Yearance v. Powell*, decided by the Court of Errors and Appeals of New Jersey, in June, 1897 (37 Atl. Rep. 735), the following is the official syllabus:

"1. A father, *in extremis*, being about to execute a will making his three children his residuary devisees, stayed such execution in order to add a bequest to another person. One of the children, without the knowledge of the others, assured him that, if he should execute the will without change, his wish with regard to the intended bequest would be fulfilled. On this assurance he did so execute the document. *Held*, that the share in the estate of the child giving the assurance must contribute a third only towards making good the intended bequest.

"2. *Quære*: Can like contribution be compelled from the shares of the other children?"

The court said: "In 1855, George D. Randell, of Newark, took into his family the respondent, who was the motherless niece of his wife. She was then about 15 years of age. She had outside employment, and paid board at a low rate. About 1862 Mrs. Randell died, leaving two children—Lillie E., aged 8 years, and Frederick L., aged 4 years. At Mr. Randell's request the respondent abandoned her employment and took charge of the children. She received no stated wages, and paid no board. In 1867 she married, but remained in the household until the next year, when Mr. Randell married the second time. Her relations with the family continued close, and in times of sickness she was called in to assist. One child, Edith, was born of Mr. Randell's second marriage, in the year 1869. Even she seems accustomed to

call the respondent 'Aunt Anna,' and, in the light of the relations of the parties, the occurrences at Mr. Randell's deathbed, hereafter to be stated, seem very natural. In March, 1889, Mr. Randell was stricken with a fatal illness, and essayed to make his will. He was then a widower, with the same three children. Lillie had been married. Her married name is Yearance. She is, and was then, childless. Frederick was married, and had, and still has, infant children. Edith was a girl of 20. She has married pending this litigation. Her married name is Hopping. A draft for a will had been prepared for Mr. Randell in the lifetime of his wife, but he had never executed it. He gave instructions to counsel to prepare a redraft, simply omitting the provisions in favor of his deceased wife, and to bring it to him at once for execution. Counsel presented such redraft at his bedside the same evening. By its terms, after giving the use of his residence to Lillie and Edith, at their option, the entire estate was, with the intervention of trustees, to go to the three children in equal parts. Lillie was to take an estate for life, with remainder to her issue, or, in default of issue, to Edith and to Frederick's children; Frederick was to take an estate for life, no provision being made for remainder; and Edith was to take an absolute estate on reaching the age of 24 years. Pending the preparation of the will, Mr. Randell determined to bestow something upon Mrs. Powell, and, when the draft was brought to him, he asked to have added a clause devising to her a house and lot on Brunswick street, in the rear of his residence. He had already conveyed that property to Mrs. Yearance, and, on being reminded of that fact, which had escaped his enfeebled memory, he directed that the clause in Mrs. Powell's favor should take the form of a money bequest of \$4,500, fixed by him as the equivalent in value of the property. Counsel was about to redraw the will, but the attending physician expressed the opinion that there ought to be no delay. Mrs. Yearance was the only one of the testator's children present. She at once said: 'Papa, that will be all right; just as you wish.' And Mr. Randell responded: 'All right; if that is so, I will execute the will as it is.' And he did so execute it. He died in the afternoon of the next day. Mrs. Yearance has always been ready to carry out her father's wish; either by permitting \$4,500 to be paid to Mrs. Powell from the residuary personalty of his estate, or by conveying to her the Brunswick street property, on receiving \$1,500 from each of the shares thereof bequeathed to her brother and sister, respectively. The matter was held in abeyance until Edith should reach the age of 24 years. When that time arrived, Edith made her consent to any settlement dependent on Frederick's concurrence, and he refused to have his share of the estate in any way diminished. In this posture of affairs Mrs. Powell filed her bill against the trustees of the will, the

three children of the testator, and the children of Frederick L. Randell. The bill prays decree for the payment by the trustees of \$4,500 from the testator's residuary estate. The decree made charges the whole \$4,500 on Mrs. Yearance alone, giving her the option to convey the Brunswick street property instead of paying that sum. From this decree she has appealed, making the complainant the sole respondent. The principle recognized by this court in *Williams v. Vreeland* (32 N. J. Eq. 734), and the precedents therein approved, warrant a decree in Mrs. Powell's favor; but not the one made. It is not necessary to recite the testimony in the case. It is well summarized by the vice-chancellor, and we differ in but one respect from his conclusion on the facts. We think that the testator could not have supposed that Mrs. Yearance meant to agree that his wishes should be fulfilled, even if it were necessary to that end that the whole of the bequest he contemplated should have to come from her share of his estate. He accepted her assurance as binding the three devisees and remaindermen, and not herself alone. The decree is wrong to the extent that it charges her with more than her share of the \$4,500. We have not considered the very interesting question of the right to compel payment of the residue of the intended bequest from the shares represented by Mrs. Hopping and Frederick L. Randell. The learned vice-chancellor assumes that this is impossible, in the absence of promises by them, respectively. There are decisions holding otherwise in cases like the present. They proceed on the theory that one of several devisees of a class represents all, and that where a testator executes his will on the faith of a promise that some trust will be performed, made by one of the class in behalf of all, it is fraud for the others to claim the devise without sharing its burdens. We are precluded from examining and determining the question because the other devisees are not before this court on the appeal of Mrs. Yearance. Should the Court of Chancery adhere to the view of the vice-chancellor, the question may be presented by Mrs. Powell by appeal.

The Maryland Court of Appeals held, in the recent case of *Hadden et al. v. Linville*, reported in the *Baltimore Daily Review*, that under no theory of implied power can a president or general manager transfer the assets of an insolvent corporation about to go into the hands of a receiver for an antecedent debt. The court said: "This case is clearly distinguishable from one where the managing officer has disposed of the property for the purpose of procuring credit for his company; there are cases when that is held to have been a proper exercise of his authority. \* \* \* But with that question we are not now called upon to deal. In this case the transfer was for the purpose of securing or paying an antecedent debt.

Chaffees' authority under the by-law, and under that he was permitted to exercise in the management of the affairs of the company, was conferred upon him for the purpose of enabling him to properly and successfully conduct the business, to keep the company a going concern, with capacity to earn a profit for its stockholders; not that he might, after the company became insolvent and was about to go into the hands of a receiver, parcel out its assets or any portion of them among such of the creditors as his caprice or interest might lead him to select. An authority like this has never been accorded, as far as we are informed, to any officer charged with the conduct of the affairs of a corporation, whether he be called president, general manager, or by any other name, unless there had been conferred upon him a prior express authority by the directors or stockholders of the company. Ordinarily, it is true, an authority to do a particular act may be inferred by persons dealing with the corporation from the fact that the officer who is acting for it has habitually assumed and exercised the power in the face of the public. \* \* \* But under no theory of implied power can either a president or general manager transfer the assets of an insolvent corporation about to go into the hands of a receiver for an antecedent debt.

#### CONCERNING "OBITER DICTA."

"OBITER DICTA," said John A. Finch at the recent banquet of the Indiana State Bar Association, "is not statutory Latin, and we have no information as to how the words would have been translated by the commissioners who prepared our first Code, had they been required to make such an attempt. The law dictionaries and the courts translate these words as a phrase, and give us rather an exegesis than a translation. 'Dicta,' says a judge of the New York Court of Appeals, 'are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point; they are not the professed, deliberate determinations of the judge himself. Obiter dicta,' he says, 'are such opinions, uttered by the way, not upon the point or question pending, as if drawn aside for the time from the main topic of the case to collateral subjects.'

"An old judge is quoted as saying: 'An obiter dictum, in the language of the law, is a gratuitous opinion, an individual impertinence.'

"I am not much of a dictionary-maker, but I believe I could improve upon either and say: 'An obiter dictum is the passing opinion of a judge expressed when it is not called for.'

"A great judge was asked: 'What is the difference between law and equity?' 'Very little in the end,' responded his lordship; 'at common law you are done for at once; in equity you are not so eas-

ily disposed of. The former is a bullet which is instantaneously and charmingly effective; the latter the angler's hook, which plays with the victim before it kills him. Common law is prussic acid; equity is laudanum.'

"Whether a man goes down with a law bullet in a vital part or is wearied out as is the fish before being landed, where he may gasp his life out; whether he dies with one convulsion after a swallow of prussic acid or dreamily passes away in the solace of an opium overdraft, is perhaps no matter in the end. In the processes there is a vast difference, but the tombstones—the reports of that court which has the last say—read very much alike. The figure is perhaps not a bad one.

"There is a deal of difference in what should be on the monument and what is on it, and there is equal difference in what should be in the opinions of the courts of last resort and what the judges speaking for the court find time to inject. The elegies and eulogies on the plain memorial slab and the massive monument are often obiter—no' meant seriously—and superfluous. The judges of the law courts in bank and the chancellors in their meditative chambers are as much given to superfluous utterances as are the post-mortem inscriptions in marble. Obiter dicta is a vice common to both.

"A child wandering in a cemetery, after reading the effusive inscriptions, all too superfluous after the statement that a dead man is below, asks where the bad people are buried. A reader of reports, searching for authority, sighs that so much is said when so much less would amply suffice.

"We are taught that we may disregard all obiter dicta, but as we are never sure what the law in a given case is until some court has given an opinion in the reports, equally are we never sure what is unnecessary law, the obiter dicta of an opinion, until some later court so informs us. That which we have for years quoted as authority is, in later expression, stripped of its conclusiveness and made simply an impertinence. Not only does the superfluous expression which has been cited or acted upon as decisive become indecisive; it becomes a reproach to the judge who wrote it.

"This sort of thing reminds one of what Artemus Ward said in his lecture on the Mormons: 'One of the principal features of my entertainment is that it contains so many things that don't have anything to do with it.' We have been succeeding or failing because of something in an opinion which turns out to have no right to a place in the judicial utterance. A man who has carefully wound up his clock every night for twenty years and then learns that it is an eight-day clock has less reason for feeling bad than a lawyer who has lost a case or been guided in advice given by something that turns out to be obiter.

"After having bowed to the supposed law, as

found in an opinion of a high court for years, we are suddenly told that the judge who wrote the opinion was 'off his base,' so to speak, and what he said was not the law at all, or, at least, he had no business to have then said it was the law.

"Take the case of the Home Insurance Company v. Morse, in which the Supreme Court of the United States held that a statute of Wisconsin requiring an insurance company of another State to agree that it would not remove a case against it to the United States Circuit Court was 'illegal and void,' and therefore not binding on the company. Then read, and rub your eyes as you read, the same court in Doyle v. The Continental Insurance Company, in which it was held that the State may prescribe any condition that it may deem proper, whether constitutional or not, upon which corporations of other States may enter its borders, using language which was long held as a sword over companies that contemplated taking a case to the United States Circuit Court in that State, or in other States having a like statute. Years afterward we have from the same court (Barron v. Burnside), in which it was held that the ominous part of Doyle v. The Continental Insurance Company was obiter dictum; holding further that no conditions can be imposed by a State upon corporations foreign to it which are repugnant to the Constitution and laws of the United States. Such an episode reminds one of the trick on Falstaff that was 'argument for a week, laughter for a month and a jest forever.'

"Borne says: 'Nothing is permanent but change.' And so we have to say of the law. We can never rest secure upon any opinion until we have searched later reports for an opinion modifying or reversing it or declaring some of its vital parts obiter dicta.

"Polonius asked Hamlet what he was reading. 'Words, words, words,' said Hamlet, and called the writer a 'satirical rogue.' Ben Butler was seen in a railroad train reading what appeared to be a law book, and was asked: 'Are you reading law, general?' 'No,' said he; 'only a volume of Massachusetts reports.'

"There are 166 volumes of Massachusetts reports, 165 volumes of United States Supreme Court reports, and hundreds and thousands of reports of other States. Every year adds to the reports of the courts of this country about 250 volumes and about 60 volumes of text-books. 'Words, words, words.' Ben Butler to the contrary notwithstanding, all of these words are law unless they have been pronounced obiter dicta.

"Does anybody believe we can allow our presses to go on forever belching out books that are of such value that every lawyer must know what is or what is not in the motley throng before he can feel safe? Nay, verily. There must, in some way, from somewhere, come relief.

"The supposed great library at Alexandria was destroyed by the men of Mohammed for the, to them, satisfactory reason that if the books in it agreed with the koran they were unnecessary, and if they did not agree with it they were unsound. Will ever some devoted advocate or some legions of such devotees of the real law—the red-eyed kind, if you please—arise and settle this question by a conflagration?"

"Oliver Wendell Holmes said he doubted not that if all the medicines in the world were dumped into the sea it would be a great deal better for the human family, though a great deal worse for the fishes. Some such remark could be made about our voluminous libraries. If something violent should happen to all the law reports now crowding our shelves, and all, or nearly all, of the books of alleged authors on particular branches of the law—such books being in the main a product of scissors, paste pot and a \$10-a-week drudge—would anybody suffer?"

"A long time ago an old man wished that his adversary would write a book. It needs no argument to prove that no lawyer ever said that; our enemies have written books, lots of them; too many of them, such as they are; and the spoiling of paper goes merrily on. 'Much study is a weariness of the flesh,' it is true, but winnowing chaff for an occasional grain of wheat is more weariness still. Are we forever to roll at the ever increasing stone of Sisyphus, or shall we make some effort to relieve ourselves and our successors?"

"I am myself a lecturer on a branch of the law in a reputable law college. At the beginning of my course, or at the end, or, mayhap, many times *ad interim*, I tell my classes there is no logical, coherent, justifiable law on the subject; that there are decisions galore, and that those decisions will control in the trial courts, not because they are right, but because they are decisions bound in calf, or sheep, or hide of some other animal. I advise them to search well these volumes in animal skins, and say that the lawyer who finds most opinions leaning his way will succeed the best. It is not a question of logic or elementary law of the sort that is the 'perfection of reason.' It is simply a question of numerical strength. 'The Lord is on the side of the heaviest battalions,' said Napoleon.

"Indiana has more courts and more judges and annually issues more reports than all England. Our reports seem to get more voluminous and contain less law. The first volume of Blackford has 432 pages and contains 504 cases. The last volume of Indiana reports has 700 pages and 179 cases. Comparison of the first and last volume of reports of any other State will show like numerical results. Does this signify? Yes, verily, it does signify. It signifies all too much. Do lawyers at the bar or judges on the bench carefully reason or copiously remember? Is the law a matter of rea-

soning or is it a matter of searching for cases in point?"

"Obiter dicta might be applied to many a volume in its entirety, to many a page of opinion for its mere prolixity.

"Men and brethren, what shall we do to be saved?"

### MARRIAGES AT SEA.

WHEN LOOKED INTO AND CONSIDERED THE CEREMONY IS VERY HOLLOW.

A LOS ANGELES father, whose daughter went through the ceremony of marriage at sea, proposes to test the legality of that form of marriage. When the marriage-at-sea business is looked into it appears to be a very hollow ceremony. It simply means that a male and a female have traveled outside of the jurisdiction of the State to go through a ceremony that has no other force than that derived from State laws. Outside the three-mile limit there is no law governing marriage, and consequently no law against any particular marriage ceremony. Parties go to sea to escape the conditions attached to the performance of the marriage ceremony within the State. Yet they expect the State to recognize as valid a ceremony performed in violation of the State's laws. The State has a purpose in providing that minors shall not marry except with the consent of their parents. That purpose is mainly to prevent young people who do not know much about each other, and whose mental and moral condition is not such as their parents regard as necessary to the assumption of marital relations, from forming the alliance for which they are unfit. This purpose, of course, is defeated when the young people slip out of a port and coax a good-natured sea captain to mumble over their joined hands some words which have no legal significance whatever. As well might the young people make certain promises to each other and then declare that they were married.

Marriage at sea is simply a contract marriage with the contract left out. It is a kind of bluff on the girl's parents, who justly consider that her prospects in life are ruined, unless the marriage is recognized. When parties desiring to marry go from a State which throws some restraint about marriage contracts to a State which asks no questions, they have the satisfaction of knowing that they are married according to the laws of the State they were married in. But when they are married at sea they have the sanction of no law whatever. They went to sea to escape law. The female party to the escapade may come back in such a plight that her parents think a real marriage her only salvation, but she might have got herself into that plight without going to sea.—San Francisco Bulletin.

**THE COURT OF APPEALS VACANCY.**

JUDGE ALTON B. PARKER THE DEMOCRATIC  
NOMINEE — JUDGE WALLACE TO BE NAMED BY  
REPUBLICANS.

**I**NTEREST on the part of the bar of the State in the choice of the successor of Chief Justice Charles Andrews, of the Court of Appeals, who, by the inexorable mandate of the Constitution, must retire at the close of the present year — although, as it happens, he is still in the prime and plenitude of his powers — grows as the time for choosing the candidates for the exalted place draws near. The position is, perhaps, the most conspicuous and honorable one to which the members of the bar of the State can aspire. It has been occupied by some of the brightest legal lights whom the Empire State has produced. By reason of the exigencies of politics, this being what the politicians term an "off" year, with no States officers to be chosen, there will be no nominating conventions, the candidates being named by the respective State committees, Republican and Democratic.

The State Democratic committee, at its meeting in New York, on the 15th inst., as had been expected, selected Supreme Court Justice Alton B. Parker, of Kingston, as the Democratic candidate. The vote of the committee was as follows: Alton B. Parker, 28; Charles F. Tabor, of Buffalo, 10; Charles J. Patterson, of Troy, 8; D. Cady Herrick, of Albany, 3. On motion of Mayor Molloy, of Troy, the nomination of Judge Parker was made unanimous. The nominee is an able, high-minded and eminent jurist, whose elevation to the bench of the highest court in the Empire State would be popular, as well as deserved. He would bring to that tribunal twenty years' experience as a successful judge, although he is but 46 years of age. Of this service, eight years were spent as surrogate of the county of Ulster, and the balance as a justice of the Supreme Court. While a justice of the Supreme Court, in 1889, he was designated as a judge of the Second Division of the Court of Appeals, and held that position until the court was dissolved, in 1892. While a member of this court, his opinions, as is well known to bench, bar and the public, were clear, concise, logical and convincing expositions of the law of the State. In 1892, in consequence of a request made by members of the judiciary of the city of New York, Judge Parker was appointed a member of the General Term of the First Department, and remained there until the creation of the Appellate Division. He was recently appointed by Governor Black to sit during the illness of Judge Barrett.

On the Republican side it appears to be settled that the State committee of that party will name as the Republican candidate United States Circuit

Court Judge William J. Wallace, now and for a number of years past a resident of Albany. Judge Wallace's circuit embraces the States of New York, Connecticut and Vermont. His career, both at the bar and on the bench, has been a long and honorable one, with no event or action to mar its symmetry, and that he would adorn the Court of Appeals, if chosen by the voters of the State to preside over the deliberations of that high and honored tribunal, is universally conceded. A native of Syracuse, where he was born in 1839. Judge Wallace has, for the past twenty-three years, served in a judicial capacity with marked and singular faithfulness. He concededly possesses the experience and high attainments essential in a candidate for presiding judge of a court than which few stand higher in public estimation and popular respect in the civilized world. It is gratifying to know that, whichever of the candidates shall be chosen by the people next November, he will prove a worthy successor of the eminent judge who, at the close of the present year, will hand down the judicial ermine as pure and spotless as it was when he first assumed it, twenty-seven years ago.

**EXPERT TESTIMONY.\***

**I**T will be remembered that a would-be facetious barrister once remarked that prevaricators might be properly arranged in an ascending series, to wit, ordinary fibbers, liars and experts; an arrangement which I fear meets with the approval of many members of the bench and bar to-day. The cause for such harsh classification is not so very far to seek. It is based upon ignorance on the part of the bar, and at times upon what is worse than ignorance on the side of the "expert." With the culpable acts of the pseudo scientist we cannot waste our time. That he merits prompt condemnation is axiomatic; but a word is wanted touching upon what may be termed the ignorance of the court.

"When I take my place upon the witness-stand," said a prominent toxicologist once to me, "I can never predict in what shape I shall be upon leaving it," a feeling with which most of us can, I fancy, sympathize pretty keenly.

Is it that we fear exposure of the weak points in our professional armor? Do we dread to say in public "I do not know?" Hardly that, I take it. We are now possessed of so very little of that which one day may be known, that no true scientist hesitates for an instant to plead legitimate ignorance. What really troubles us upon cross-examination is that the court does not speak our language, a language often quite difficult of direct translation; that it is but rarely schooled in the principles of our science; and that, in consequence,

\*Address by William P. Mason, before the Section of Chemistry, American Association For the Advancement of Science, Detroit meeting, August, 1897.



it frequently insists upon categorical answers to the most impossible kind of questions.

The hypothetical questions showered upon the expert witness are sometimes veritable curiosities, so peculiar are they in their monstrosity. Who among us but has felt that the layman, who has simply to testify to observed facts, has an easy time of it indeed, when compared with him from whom there is expected an opinion under oath?

All scientific men are willing and anxious to have their work scrutinized carefully by their peers: but to be exposed to the one-sided criticism frequently encountered at the bar is quite another matter: for it must be remembered that after the adverse counsel has opened up what appears to be a glaring inconsistency in the testimony, the re-direct-examination may utterly fail to repair the breach, because of a lack of familiarity with a technical subject on the part of the friendly attorney.

This leaves the witness in the unenviable position of disagreeing with the general drift of his own testimony, while it deprives him of suitable means of insisting upon its revision and correction.

According to the writer's view, there is but one way to escape such dilemma, and that is by direct and immediate appeal to the judge; urging that the oath taken called for a statement of the whole truth, and not the misleading portion already elicited.

To illustrate how serious a matter the partial testimony of an expert witness may be, and to show also to what extent lawyers may go who look only to the winning of their causes, permit me to refer to an already reported poison case in which I was employed by the people. It may be roughly outlined as follows:

Much arsenic and a very little zinc were found in the stomach.

The body had not been embalmed, but cloths wrung out in an embalming fluid containing zinc and arsenic had been spread upon the face and chest.

Medical testimony showed that no fluid could have run down the throat. Knowing the relative proportions of zinc and arsenic in the embalming fluid, the quantity of arsenic found in the stomach was twelve times larger than it should have been to have balanced the zinc, also there present, assuming them to have both come from the introduction of the said embalming fluid by cadaveric imbibition. Other circumstantial evidence was greatly against the prisoner.

At the time of my appearing for the people, on the occasion of the first trial of the case, my direct testimony brought out very strongly the fact that a fatal quantity of arsenic had been found in the stomach, but no opportunity was given me to testify to the presence of the zinc found there as

well, although the fact of its existence in the body was known to the prosecution through my preliminary report. Though ignorance of the nature of such report on the part of the defense, no change was made in the character of my testimony during the cross-examination, and I was permitted to leave the witness-stand with a portion of my story untold. No witnesses were called for the defense, and the case was given to the jury with the darkest of prospects for the prisoner.

For many reasons, unnecessary to recount here, I was distinctly of the opinion that murder had been committed, but I felt, nevertheless, that common justice demanded that the prisoner should have been entitled to whatever doubt could have been thrown upon the minds of the jury, no matter how far-fetched the foundations for such doubt might have been.

The first trial having resulted in a disagreement of the jury. I was pleased to learn, before the second hearing of the case began, that the defense was prepared to go into the question of the embalming fluid: for the responsibility of permitting only a part of what I knew to be drawn from me, to the entire exclusion of the remaining portion, was greater than I wished to assume. The nature of my report to the coroner having been established, and certain opinions relating thereto having been fully ventilated, the jury were possessed of "reasonable doubt," and acquitted the prisoner. What now were the duties of the expert upon the occasion of the first trial of this case, and how should he have construed the meaning of his oath?

One eminent legal light, to whom the question was referred, held that the expert was distinctly the property of the side employing him, and that his duty was simply to answer truthfully the questions put to him, without attempting to enlighten the court upon facts known to him, but not brought out by the examination, no matter how vital such facts might be.

Another held that although the above course would be proper in a civil case, yet, in a matter involving life and death, the witness should insist upon the court becoming acquainted with his whole story. Do not such differences in legal opinion make it very desirable that the expert, at least in capital cases, should be the employee of the bench rather than of the bar, in order that whatever scientific investigations are made may be entirely open to public knowledge and criticism?

Although the expert should earnestly strive to have what he has to say presented in the best form, he must remember that to secure clearness, particularly before a jury, technicalities should be reduced to a minimum. To a degree they are unavoidable, but let them be as few as possible. Illustrations should be homely and apt; capable of easy grasp by the jury's minds, and if possible

taken from scenes familiar to the jury in their daily lives.

It is an unfortunate fact that the expert must be prepared to encounter in the court-room not only unfamiliarity with his specialty, but also deep-rooted prejudices and popular notions, hoary with age and not to be lightly removed from the mind by the words of a single witness. As President Jordan has well said: "There is no nonsense so unscientific that men called educated will not accept it as science," and, let me add, they will calmly attempt to shove the burden of proof upon the scientific man who is opposed to their views. Sanitary experts, in particular, run up against all sorts of popular superstitions, and are inveighed against as "professors" by those who consider themselves the "practical" workers of the time; and, let it be noted, the burden of proof is uniformly laid upon these "professors" shoulders, while the most astounding and occult statements made by the "practical" men may be received without verification.

One source of trouble, which perhaps is peculiar to the water expert, lies in the impossibility of utilizing analytical results, such as were made years ago.

Those who are not chemists fail to grasp the fact that the examination of water may not be looked upon from the same point of view as the analysis of an iron ore. The statement that water analysis is but of recent birth, and that it is yet in its infancy, is hard for them to appreciate, holding, as they naturally do, that what was true twenty years ago must be true to-day, if science does not lie.

A pit into which many an expert witness falls is prepared for him by insidious questions leading him to venture an opinion upon matters outside of his specialty. It is a fatal error to attempt to know too much. Terse, clear answers, well within the narrow path leading to the point in question, are the only safe ones; and when the line of inquiry crosses into regions where the witness feels himself not truly an expert, his proper course is to refuse to testify outside of the boundaries of his legitimate province.

Unfortunately the expert is as often invited to take these collateral flights by the side employing him as by the opposition. Affidavits in submitted cases are commonly written by the lawyers and not by the expert, although they are, of course, based upon his reports. In the strength of his desire to win the case, the lawyer often prepares a much stronger affidavit than his witness is willing to swear to.

The writer has had no little difficulty just at this point, and has had plenty of occasion to observe the irritation displayed by counsel upon a refusal to indorse statements which have been "too much expanded."

Every expert witness, especially in his early

cases, is sure to have adverse authorities quoted against him; therefore, it behooves him to be so familiar with the literature of his subject as to be capable of pointing out that such and such a writer is not up to date, or that such and such a passage, if quoted in full, would not bear the adverse construction that its partial presentation carries. When the expert reaches a position of such prominence that he can state a thing to be so because he says it, irrespective of whatever may be written on the subject to the contrary, his course then is greatly simplified; but long before he attains that altitude he will have put himself upon record in many cases, and happy for him if the record so made be such as cannot be quoted to his disadvantage.

"If I had only not written my first book," is the reflection of many a distinguished author while one of the great masters of music, referring to an opera, said: "It is one of my early crimes."

Above all things, the expert "should provide things honest in the sight of all men."

It is well for him to be deeply interested in his case, to feel in a measure as if it were his own, but it is unwise in him to become so partisan as to let his feelings affect his good judgment, and it would be indeed criminal should he permit his interest in any way to contort the facts.

Before the case is brought to a final hearing, it may be apparent that experiments before the court are possible and they may be demanded by the counsel in charge of the case. If such experiments be striking, easy of execution, and not too long, by all means make them.

Practical illustrations, particularly such as involve some fundamental principle, have great weight with the court; but these illustrations must not be such as would turn the court-room into a temporary laboratory and involve the loss of much time in vexatious waitings.

Such experiments as are determined upon should be thoroughly rehearsed beforehand, no matter how simple they may be, for, of all failures, the court-room experiment which declines to "go off" is perhaps the most dismal.

This brings to mind a kindred topic upon which there should be a word of caution; laboratory experiments, which work to perfection, may utterly fail when expanded to commercial proportions, so that it is wise to bear in mind the danger of swearing too positively as to what will happen in large plants, when the opinion is based only upon what is observed to occur upon the smaller scale. Like conditions will, of course, produce like results, but it is marvelous how insidiously unlooked-for conditions will at times creep into one's calculations, and how hard it is even to recognize their presence.

When preparing his case for presentation, the expert often errs in not dwelling more largely upon certain points because he thinks them al-

ready old and well known. To him they may be old, but to the public they may be of the newest. Not only is the public unequally posted with the specialist, but what it once knew upon the subject may have been forgotten. It is well, therefore, to insert, in a special report, matters that would be properly omitted from a paper prepared for a professional audience.

Sanitary problems are of especial interest to the public, but the amount of ignorance, or rather false knowledge, displayed concerning them is surprising and often difficult to combat. The sanitarian is not unfrequently called upon suddenly to defend a position involving complex statistics; and, because the data cannot be forthwith produced, the inference is drawn that his points are really without facts to support them, and that they are consequently not well taken.

Long before he gets into court, particularly if the time for preparation of the case be short, the expert may well "pray to be delivered from his friends." He may receive a peremptory order by telegraph to "determine the mineral qualities of this rock," when the telegram should have read "Assay this ore for silver," and later it may be a matter of surprise that a quantitative knowledge of the copper present was not obtained while passing along the line for the determination of the silver; for it is generally not known that the complete analysis of any thing is quite rare, and correspondingly tedious and expensive.

Toxicologists who hear me may call to mind some case involving a search for the presence of an alkaloid, strychnia for example, during which search the district attorney, in his eagerness for information, may have asked to know what the indications were as to the presence of the poison, at a time when the extraneous organic matter was not nearly removed. He may have wished no final report, but only the simple probabilities, whereon to base a possible arrest. Such requests are very common, and are akin to a demand for a proof of the pudding during the early baking, when we all know that such proof comes at a much later stage of the proceedings.

Finally, "When doctors disagree, who shall decide?"

This question is often very vigorously settled by the jury, as was instanced in a recent celebrated murder trial in New York city. In that case what the experts had to say on either side was simply thrown overboard as a whole, and the finding was based upon the testimony of the remaining witnesses.

What can be said upon this question of the disagreement of expert witnesses? First, it must be noted, they are far from being the only class of people who fail to agree, and that, too, on very important subjects. Do my hearers think it would be a very difficult task to find a small army of men who would testify very variously and very

positively upon questions of politics or religion? Would it be hard to find "good men and true" who would give under oath greatly differing opinions concerning the propriety of instituting free trade or establishing an inheritance tax? Experts are subject to the same errors of judgment as befall the rest of professional humanity, and when their opinions clash, they are entitled to the same respect that we grant to the members of the bench when they hand down the decision of a divided court.

One fruitful opportunity for disagreement always arises when questions are brought into court touching upon matters newly discovered and apart from the well-beaten path of common professional knowledge. Doubt is often left upon the minds of those seeking the light, even when the testimony is given by the specialist who originally developed the new point in question, for one cannot be expected to be thoroughly educated in that which he has himself but recently discovered.

Many of us have dreaded to see the "ptomaines," or putrefactive alkaloids, make their way into court with their mystifying influences upon judge and jury and their tendency to protect crime. Now that they are in, what is to be the end? Even with no "ptomaine theory" possible, the ptomaine form of argument is not unknown. The writer was once asked in an arsenic case, whether he was willing to swear that at some future time an element would not be discovered giving the stated reactions now called arsenical. Such nonsense is, of course, instituted to impress the jury, and is suggested by similar questioning in the alkaloid cases.

A recent and somewhat amusing instance arose from an attempt to introduce the rather new conception of "degeneracy" into a murder trial. The defense sought to show that the prisoner was a "degenerate" and offered expert testimony as to the meaning of the term and as to the signs whereby such a condition was to be recognized; whereupon the prosecution called attention to the fact that the defendant's experts themselves exhibited every one of the signs in question.

Having said all that he was to say, and having stated it to the best advantage, should the expert depend upon the stenographer's so recording it as to allow of its being used in future without correction? Decidedly not.

The average stenographer is unfamiliar with technical terms, especially such as are chemical, and the witness who fails to supervise the minutes may find out later that he was sworn to a most remarkable array of "facts." The writer once discovered that he had recommended, as a very efficient method of purifying a city water, the filtering of the entire supply "through a layer of black mud." Not to take your time further, let us summarize what has thus been briefly said:

The expert witness should be absolutely truth-

ful, of course; that is assumed, but beyond that he should be clear and terse in his statements, homely and apt in his illustrations, incapable of being led beyond the field in which he is truly an expert, and as fearless of legitimate ignorance as he is fearful of illegitimate knowledge.

Mounting the witness-stand with these principles as his guide, he may be assured of stepping down again at the close of his testimony with credit to himself and to the profession he has chosen.

#### LYNCH LAW AND WHAT IT MEANS.

LAST year there were 141 persons lynched in the United States, as against 171 in 1895. Up to and including August 18, the victims of mob violence in 1896 numbered 93. During the corresponding period this year there have been 95 lynchings. This number does not include any victims of so-called "race wars," nor a negro in Louisiana and another in Georgia who committed suicide rather than be captured by mobs. Of those lynched thus far this year 75 were negro men, 16 white men, 2 white women and 2 negro women. The negro women were lynched in Alabama. The white women were killed during an attack by a mob on a disreputable house in West Virginia. The total number of victims is apportioned by States as follows: Texas 19, Alabama 16, Georgia 9, Louisiana 8, Florida 7, Mississippi and Kentucky 6 each, West Virginia, Tennessee and Arkansas 4 each, South Carolina 3, Oklahoma, Virginia and Missouri 2 each, Maryland, Ohio and North Carolina 1 each. The white victims are apportioned as follows: Arkansas 3, Texas, West Virginia, Kentucky and Oklahoma 2 each, Alabama, Georgia, Mississippi, Tennessee and Missouri 1 each.

According to the crimes charged against the victims, the classification is as follows, as regards the chief offenses: Assault on women, 24; murder, 22; murder preceded by outrage or attempted outrage of women, 10; robbery or thievery, 10; attempted assault on women, 9; arson, 4. Besides the above there were 16 lynchings for various offenses, as follows: At Sisterville, W. Va., two white men and two white women, driven out of a disreputable resort by fire and killed; in Oklahoma, two white outlaws; at Rockfield, Ky., a negro, for writing an insulting letter to a white woman; at Olney, Ala., a young negro, for eloping with a white girl; at Clinton, La., a negro, for train-wrecking; at Waynesboro, Miss., a white man, assassinated because he turned State's evidence against lynchers; at Madisonville, Ky., a disreputable white man, hanged "on general principles;" at Florence, Ala., a colored minister, who had harbored a negro charged with attempted assault on a woman, the negro having been previously lynched; at Myers, Ky., a negro, because he

had a "bad reputation;" at Elba, a white man, charged with "a number of crimes;" in Brazos county, Tex., a negro, for an unknown cause; in Lamar county, Ala., an innocent negro, who was mistaken for the real offender.

The chief argument in extenuation of lynching has been that the safety of communities calls for punishment by mobs because existing laws are inadequate to inflict the proper penalty. An analysis of the figures given above fails to bear out this argument. Of 95 lynchings this year 58 were for crimes that were legally punishable by death in the States where they were committed. There were 32 murders, 10 of them preceded by assaults on women. All of these were capital offenses. There were 24 assaults, all legally punishable by death in the States where they were committed, except one in Maryland and one in Ohio. There were two cases of arson in the first degree, one in South Carolina and one in Mississippi, the law in each State allowing the extreme penalty to be inflicted for this crime. There were thus 58 persons lynched who, if guilty, would surely have been convicted and executed in a legal manner, especially as nearly all of them were southern negroes. By taking the law into their own hands, the lynchers, therefore, unnecessarily placed themselves on the brutal level of their victims. As for the remaining 37 victims of mob violence, nearly all of them were murdered for offenses no code of law would hold to be capital crimes. They were killed simply to satisfy a desire to take life. Their slaughter is a demonstration that once the regulation of crime is taken out of the courts the line is drawn at no offense. The system of mob law, when unrestrained, enlarges the category of capital crimes until it includes the slightest misdemeanors. Finally, it is no longer lynching, but massacre, and then comes anarchy.—*Utica Herald.*

#### SOME HUMORS OF SPECIAL PLEADING.

AN entertaining article might be written on the humors of special pleading, says the London Law Journal. How Littledale, a master of the art, in drawing an indictment for murder, which had been committed with a double-barreled pistol, spent many hours in endeavoring to invent some form of words by which to cover the possibility of the fact of the ball having issued from either barrel: how another pleader lost his cause by mis-calling *vites arbores*; how an indictment for forgery was quashed because it charged the prisoner as Bartw., when he had signed the damning note as Bartholomew; how Parke (Baron Surrebutter) took a demurrer to the bedside of a sick friend, feeling sure, he said, that the sight of it would restore the invalid, it was so exquisitely drafted. But of all the wire-drawn refinement of that wonderful science, could anything astonish the honest

layman more than the case referred to in "Rolle's Reports?" In this case, an action for words, the pleading was that "Sir Thomas Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder, and the other side upon the other shoulder," but it omitted to say that the cook was dead, "*il ne averr que le cook fuit mort*," so it was bad — "*pur ceo fuit adjudge nemy bon*" — the cook's death after this splitting of his head being matter of inference only. The case in which the above is cited as an authority is itself a charming illustration of the fastidious nicety of the old pleader. "Thou art a thief," the defendant had said to the plaintiff: "thou hast stolen me a hundred of slatte." "Stolen me!" It puzzled the court where was the felony in stealing the defendant? Judgment for the defendant.

### REQUISITES OF SUCCESS AT THE BAR.

IN line with what the ALBANY LAW JOURNAL has recently published with respect to the requisites of success at the bar, a writer in the Montreal Metropolitan of recent date has something to say which is worthy of perusal. Premising that it is always well to give both sides of a question, the writer goes on to record a conversation had with a leading professional man upon the subject of the overcrowding of the profession.

This gentleman, whose opinions are entitled to the highest respect, and who has achieved his present eminence chiefly through persistent work, remarked that nothing was more erroneous than the view that, in both the medical and legal professions, there was not to-day a career for any industrious, healthy, intelligent, honest, sober young man. The difficulty is that the universities seem to produce a class of conceited young coxcombs, who imagine that the moment they are possessed of a university degree and a license to practice medicine or law, they are immediately absolved from the necessity of further study, and are fitted at once to embark on the most serious law-suits and the gravest and most delicate operations. Said this gentleman: "There is plenty of room in the professions to-day, both at the bottom and at the top, and the difficulty is to get reliable assistants. I have had a great deal of experience in my profession, and I can safely say that any properly qualified young man of gentlemanly demeanor and good habits, who is assiduous and hard working, can obtain a good place among many of the leading firms of solicitors.

"Do you think," continued this gentleman, "that (mentioning the names of four or five of our leading advocates) these men have reached the pinnacle of success merely through luck, or chance, or accident? Not at all. Each and every

one of them has struggled and worked night and day for years. As students, their anxiety was not to fritter away the day and escape from the office at the earliest possible moment, but they were on the lookout to see in how much they could help their patrons, and were eagerly looking for work to do all the time. As juniors, in their respective firms, they were bright and early at their offices. Their cases were well prepared, and clients were always able to reach them day and night. In time they began to be regarded as men who could be trusted, and if to-day they are earning large incomes, while so many of their confreres are practically starving, the result is due less to any difference in initial natural ability than to the genius of hard work, and the gift of attending to details and doing everything thoroughly.

"Thoroughness is what is lacking in our Canadian youth. Slovenly habits, inattention to the details of appearance and minor matters are grave and serious faults in our national character.

"I repeat that there is as much room for competent young men in the legal profession, at the bottom, in the middle and at the top, as there ever was, but the unreliable, pleasure-loving, untidy, indifferent men are naturally unsuccessful. The judges of our courts will tell you that they judge lawyers largely by their accuracy — by the careful way in which cases are presented, papers drawn and prepared, and to some extent by the personal appearance and deportment of the man. It can hardly be wondered at if a judge differentiates between a counsel who is late in arriving in court, has his papers in disorder, is unshaven and wears a gown and tie which are awry, and one who is spick and span, respectful and punctual, and receives the advent of the judge on the bench with his case in hand, his witnesses ready. These things count for more than most men think."

### THEY'RE JUST TOO MEAN.

NEWSPAPER MEN TRYING TO POKE FUN AT  
AMAZONIAN BLACKSTONES.

WHEN the learned assistant corporation counsel came into court yesterday, wearing "a gray skirt, narrow white leather belt, black and white check shirt waist, standing collar and black tie," it was at once apparent to the chroniclers of the proceedings that the time for a departure in the musty methods of setting down the evolution of the law had arrived, says the Chicago News.

The entrance of the learned assistant corporation counsel was, in fact, a kind of formal notification that the law is even now in the process of being invested in shirt waists, gray skirts and the other mysteries of multifarious feminine habiliments, and that due regard must be paid to that fact hereafter in the literature of the law.

The law books will in time be strewn with descriptive sentences of the sort used in reporting those present at the charity ball. Thus:

"Opinion by Juggerson, Ch. J. (Black silk, cut high in the neck, trimmed with jet.)

"Dissenting opinion by Pugsley, J. (Tailor-made gown of blue cloth, full in the skirt, pearl ornaments.)"

The journalistic account of the trial will say: "Counsel for complainant then arose to reply, wearing a lovely satin dress, trimmed with lace."

What a world of opportunity for crushing repartee the new order will afford. Thus, in the heat of forensic debate, shouts like this may be delivered: "I dissent, your honors, from the position taken by counsel for the other side, whose hat, I may remark in passing, is not on straight." Or: "May it please the court, the precedent which opposing counsel has cited no more fits this case than her jacket fits her back. Her deductions, like her front hair, are false."

### Legal Laughs.

After hearing argument in a case a rural justice said:

"I'm sorter mixed on this here matter, an' I'll preserve my decision."

"About what time, jedge," said the lawyer "will you dish out them preserves?"

"Thar's no tellin'," replied his honor. "I've got a sight o' plowin' tew do, an' erbout ten acres to fence in. Jest take the pris'n'r ter jail till fall!"

Isaac N. Arnold, in his "Reminiscences of the Illinois Bar," tells some excellent stories. Here is one which shows to the modern lawyer that contempt of court must have been a lost art in the earlier days. Speaking of Mr. Butterfield, a once famous attorney, Mr. Arnold says:

"It was on one of the northern circuits, held by Judge Jesse B. Thomas, that Mr. Butterfield, irritated by the delay of the judge in deciding a case which he had argued some time before, came in one morning and said, with great gravity: 'I believe, if your honor please, this court is called the 'Oyer and Terminer.' I think it ought to be called the 'oyer sans terminer.'" and sat down. The next morning, when counsel were called for motions, Mr. Butterfield called up a pending motion for a new trial in an important case. 'The motion is overruled,' said Judge Thomas, abruptly. 'Yesterday you declared this court ought to be called 'oyer sans terminer;' so,' continued the judge, as I had made up my mind in this case, I thought I would decide it promptly.' Mr. Butterfield seemed for a moment a little disconcerted, but directly added: 'May it please your honor, yesterday this court was a court of oyer sans terminer; to-day your honor has reversed the order;

it is now terminer sans oyer. But I believe I should prefer the injustice of interminable delay rather than the swift and inevitable blunders your honor is sure to make by guessing without hearing argument.'"

### Legal Notes of Pertinence.

The Supreme Court of Wisconsin holds, in *Randles v. Waukesha Co.* (71 N. W. Rep. 1034), that when a sheriff, having a warrant for the arrest of a person charged with larceny, takes a citizen's horse and pursues and overtakes the felon, but in so doing overdrives and injures the horse, the county is not liable for its value.

A returned letter is inadmissible to prove that the person to whom it was addressed did not live in the place to which it was directed, according to decision of the Court of Criminal Appeals of Texas, in *Dawson v. State* (41 S. W. Rep. 599).

According to the decision of the Supreme Court of Rhode Island, in *Padey v. Am. Ship-Windlass Co.* (37 Atl. Rep. 706), an infant can make a binding contract of apprenticeship to learn a useful trade, and cannot avoid that contract on becoming of age; and if he violates it he will be bound by a clause therein providing for the retention and forfeiture of part of the wages due him.

Judson Auten, of Clinton county, Mich., was charged with assault with intent to commit murder. On the trial the question of sanity was raised, and on the testimony of two examining physicians the court sent Auten to the asylum for dangerous and criminally insane, at Ionia. Later the same court ordered Auten's discharge from custody, and Dr. O. R. Long, keeper of the asylum, refused to liberate the man. The attorney-general has just upheld the keeper. In cases of this kind the Michigan law provides that the prisoner shall remain in custody until his reason is restored, when the criminal case against him shall resume. If his reason be not restored he must stay in confinement.

"While it is cheap wit for many to say sneering things of our profession, yet if you strike from Anglo-Saxon history the thoughts and deeds of her lawyers you rob it of more than half its glory. Blot from American society to-day the lawyer with all the work that he does and all the power that he exerts, and you leave society as dry and shifting as the sands that sweep over the Sahara. For the mystic force that binds our civilization and makes possible its successes and glories in the law, and they who minister at its shrine and keep alive its sacred fires, and you and I and that vast multitude of our co-workers who boast no higher title than that of lawyer." — Justice Brewer.

An Esquimo from Alaska named Edward Marsden is a student in the summer law school at the University of Michigan. He is a Christian,

graduate of the Sitka Industrial School, served as a steamboat hand on the North Pacific, saved money, and instead of going to the gold fields, has come east to educate himself in order that he may return and help his race.

Miss Lulie A. Lytle, a negress, aged 23, was admitted to the bar at Memphis on September 8. She is perhaps the only living negress in America who is licensed to practice law. Miss Lytle was born in Tennessee, but her parents moved to Topeka, Kan., where her father figured in politics and made money in business. She was given the full benefit of the local schools, and in 1892, because of her intelligence and diligence, was made engrossing clerk of the Kansas legislature. She decided then to study law, and in 1895 she entered Central College, at Nashville, which offers advantages to her race. A diploma from that school entitles the holder to admission to the bar. She finished there this year, and secured the formality of a certificate of good character from the court in Davidson county, a prerequisite to securing a license. Miss Lytle entered the criminal courthouse at Memphis in company with the well-known negro lawyer, J. F. Settle, and he introduced her to the court. Upon presentation of her certificate and diploma her name was enrolled. She will practice in Kansas.

### English Notes.

The Rt. Hon. J. S. Way, chief justice of South Australia, returned to Adelaide by the Orient steamer Oruba, which sailed September 3d.

The death of Sir Charles Lilley is announced. He was one of the three Australian chief justices who found journalism a serviceable rung in the ladder of success. Sir Charles found his way into the Queensland parliament, the attorney-generalship, and the chief justiceship via the editorial chair of the Brisbane Courier.

There is, says the Law Times, a very ancient precedent of judges going on circuit. "And he went from year to year in circuit to Bethel, and Gilgal, and Mizpeh, and judged Israel in all those places." I Sam. vii, 16.

There are now, says the Daily News, ten judges of the Supreme Court who are eligible for retirement, having completed the statutory term of fifteen years' service, entitling them to a retiring pension. The master of the rolls (Lord Esher) heads the list with a service of over twenty-nine years; Baron Pollock comes next, with a record of nearly twenty-five years, followed by Lords Justices Lindley and Lopes, Justices Hawkins, Mathew and Cave, Lord Justice Chitty and Justices North and Day, the latter of whom only completed his term in June last. Lord Justice A. L. Smith will have been on the bench fifteen

years next April. Of the foregoing ten judges Mr. Justice Cave, whose resignation will come into force at the end of the Long Vacation, is the only one at present who seems likely to avail himself of the opportunity to retire.

### Notes of Recent American Decisions.

**Criminal Law — Instructions — Rape.**— It is not a rule of law that the jury must view the offense of rape as one well calculated to create strong prejudice against the accused; nor that rape is an accusation easy to make and hard to be defended by an accused, though he be ever so innocent; nor is it a rule of law that the attention of the jury be specially directed to the difficulty growing out of the usual circumstances of the crime in defending against rape. These are merely arguments to be addressed to the jury by counsel, and the court commits no error in refusing to give them in the shape of instructions. (*Doyle v. State* [Fla.], 22 South. Rep. 272.)

**Partnership — Corporation as Partner — Ultra Vires — Accounting.**— A corporation has no authority to share its corporate management with natural persons in a partnership. While public policy demands that courts shall declare such contracts by corporations unlawful, and that they shall not make any decree which prolongs their life in fact, every principle of equity demands that the corporation receiving a benefit from such contract, shall account for what it has received from him who has fully performed. (*Boyd v. American Carbon Black Co. et al.*, Pa. Sup. Court, May 3, 1897.)

### New Books and New Editions.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions," and the "American Reports," Decided in the Courts of Last Resort of the Several States. By A. C. Freeman and the Associate Editors of the "American Reports." San Francisco: Bancroft-Whitney Company. 1897.

This is volume 55, American State Reports, and contains cases selected from 109 and 110 Ala., 114 Cal., 22 Colo., 144 Ind., 13 Ind. Ap., 48 La., 83 Md., 166 Mass., 105 Mich., 73 Miss., 58 N. J. L., 54 N. J. Eq., 150 N. Y., 177 Pa., 45 S. C., 6 S. D., and 15 Wash. There are in all 152 cases, reported in full. The annotations are, as usual, of much value, being carefully prepared and exhaustive.

We have also received a copy of the brief digest to volumes 49 to 54 of the Am. State Reports, which is presented to the patrons of the series by the Bancroft-Whitney Company.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY SEPTEMBER 25, 1897.

### Current Topics.

"WHAT is the citizenship of a person born in the United States of Chinese parents?" This question has recently arisen, as appears from a circular issued by the Secretary of the Treasury and the Attorney-General, in respect to the enforcement of the Chinese exclusion laws, and the statement is made that a case involving the question is now pending before the Supreme Court of the United States. As to the naturalization of Chinese, of course, there can be no dispute, for our laws expressly forbid it, but as to children born here of Chinese parents there is doubt. Are such children citizens of the United States, or does their Chinese parentage make them subjects of the Emperor of China? The question is not a new one, for it was passed upon as long ago as September, 1884, by the United States Circuit Court of California, in the matter of Look Tin Sing, on habeas corpus. Justice Field gave the opinion, which was concurred in by Circuit Judge Sawyer, District Judge Sabin and Judge Hoffman. While the latter did not sit on the hearing of this case, he was on the bench when the opinion was delivered, and concurred in the views expressed. The petitioner, Look Tin Sing, though a Chinese, was born in Mendocino, Cal., in 1879. In 1880 he went to China and returned to the port of San Francisco in September, 1884, claiming the right to land as a natural-born citizen of the United States. It was admitted by an

VOL. 56 — No. 13.

agreed statement of facts that his parents were, at that time, residing in Mendocino, Cal., and had resided there for twenty years prior; that they were of the Chinese race and had always been subjects of the Emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino and was not there in any diplomatic or other official capacity under the Emperor of China. The petitioner was without any certificate, under the act of 1882 or of 1884, and the District Attorney of the United States, intervening for the government, objected to his landing for the want of such certificate. The opinion of the court, which is before us, elaborately discusses the whole question, quoting the first section of the Fourteenth Amendment to the Constitution, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This language was held to be sufficiently broad to cover the case of the petitioner. The only possible doubt must arise out of the words "subject to the jurisdiction thereof," and the court held that these words except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This extra-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. It is also noted that persons born on a public vessel of a foreign country whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. The United States recognize the right of every one to expatriate himself and choose another country. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot



renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law. "But," continues the opinion, "a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all the protection which the government can extend to them wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here, is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other States."

It was held that the Fourteenth Amendment did not exclude the petitioner from being a citizen. He was not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country. Previous to the adoption of the Fourteenth Amendment, the general doctrine, except as applied to Africans brought here and sold as slaves, and their descendants, was that birth within the dominions and jurisdiction of the United States, of itself created citizenship. The amendment was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exception as to Africans and their descendants. The acts of Congress of 1882 and 1884, restricting the immigration of Chinese laborers to the United States, are not applicable to citizens of the United States though of Chinese parentage. No citizen can be excluded from the United States except in punishment for crime. This opinion seems so sound, just and well-considered that there is little probability of the United States Supreme Court reversing it. The question

whether it be possible for an alien, who could be naturalized under our laws, to renounce for his children, while under the age of majority, the right of citizenship which by those laws he could acquire for them, was not passed upon by the California Circuit Court, for no such question was then raised.

"Government by Injunction," a phrase which probably owes its origin to the labor leaders, is being much discussed nowadays in the newspapers, a section of which unite in denouncing the courts and declaring that our liberties are being rapidly subverted. We find even the Ohio Legal News declaring that "this government by injunction is the most absolute despotism and the most flagrant usurpation known to organized society." The News goes on to declare that the power of the Federal judges, as construed by themselves, is greater than the Constitution or the fundamental rights of man, suspending the freedom of speech and of the press, and destroying individual liberty. More than this, it is declared to exceed in pretensions and performance the exploded doctrine of the divine right of kings, and the declaration is solemnly made that "no greater menace to our liberties could be devised than the Federal judges' arbitrary assumption of omnipotence and infallibility." This can hardly be called a fair or temperate statement of the case. A fairer allegation is that of the careful and conservative Springfield Republican, that "constitutional liberty is invaded by the supplanting of the due process of law." It will hardly be denied that in certain cases due process of law is not an adequate remedy, and for this very reason, among others, equity was invented to correct its defects. In civil matters the law allows damages for injuries. Equity seeks to prevent injuries from being done. On the criminal side the law provides punishment for crime. Latterly the equity powers of the court have been invoked to prevent crime being committed, and this remedy has the approval of the highest court in the land. The law, it is true, provides a remedy for most wrongs, but the wrong must be committed before the remedy can be applied.

As the Philadelphia Press well observes, "the law will punish rioters, but equity, being advised of the danger, will intervene to prevent the riot." The question may well be asked: What constitutional rights are invaded by such interference? If it is well to put out a conflagration as soon as it is under way, is it not far better and wiser to prevent its being kindled? In this light the injunction, one of the oldest of remedies, becomes of the greatest importance. It is made use of, in innumerable instances, to prevent the commission of intended wrongs, and it is only objected to now by certain blatant orators because it interferes with well-laid plans of coercion and intimidation of peaceably disposed workmen who, in the exercise of their individual rights, choose to remain at work rather than join a body of strikers. The opinion of Judge John A. McIlvain, of Washington county, Pa., published in the Philadelphia Legal Intelligencer, shows clearly what the courts interfered with in these strike injunctions, and why they interfered. The injunctions were not granted against strikes nor against strikers influencing others to strike by the arts of persuasion. Judge McIlvain, in his decision, holds that working men have a right to strike, to publish the reasons for the same and to persuade others to follow their example. They may hold meetings, make speeches and parade within reasonable limits — do anything, in fact, that does not interfere with the rights of others. Strikers may march in a legitimate parade; "but a parade confined to a limited piece of a public road before a pit mouth and under a tramway, repeated two or three times a day for ten days or two weeks, loses the characteristic of legitimate parade, and when directed against the interests of the mine-owner over whose land the road passes, and indulged in contrary to his express command, it is a trespass." Being a trespass and such an interference with the rights of others as is likely to incite an outbreak, it becomes the duty of the court, on proper application, to intervene to stop this trespass and incentive to disorder before irremediable mischief has been done. The strikers may use all lawful persuasion to get

others to join them, but Judge McIlvain points out "there is a dividing line between persuasion and coercion. Language by which the working miners are called scabs, blacklegs, black sheep, etc., accompanied with threats of personal violence should they not cease work, uttered and made by individuals engaged in the common purpose of the strike, is clearly intended to coerce and not persuade, and tends to create a breach of the peace and to provoke a personal conflict between two large bodies of men, and therefore cannot be claimed to be lawful persuasion." The court will enjoin such coercion before it provokes riot and bloodshed. To march in an orderly manner in the public highway is a legitimate privilege not denied to any body of strikers.

The Philadelphia Press pertinently inquires: "Wherein do the courts err when they enjoin a parade when the evidence shows that the paraders consists of a body of 400 strikers, armed with sticks, marching and counter-marching close to the pit's mouth where non-strikers were at work and in front of their houses, where the wives and children of the working miners cowed in terror — the paraders singing 'We'll hang blacklegs on a sour apple tree,' using opprobrious epithets and threatening language toward the men who would not join them? To forbid such demonstrations and punish their repetition is to protect the peaceably disposed, prevent riot and violence by stopping a performance which is a direct provocation of disorder." The Press adds: "Thus far no harm has come from government by injunction. Some blatant and disorderly fellows have been arrested and fined for disregarding the injunction and committing a breach of the peace. These arrests have had two consequences. They afford texts on which perverse orators grow, if not eloquent, at least noisy and abusive in denouncing the courts. Another result is that the coal miners' strike has been the freest from disorder of any strike of its character and magnitude in the history of the country. Those who fear that constitutional liberty is being infringed by the courts forbidding men to do that which is unlawful under pen-

alty of summary arrest and punishment would do well to look more carefully into the special cases where the courts have used their power. That a power is capable of being abused and made oppressive if used immoderately and without the restraint of prudence is no argument against its use under a due sense of responsibility. We know of nothing that is helpful to mankind that is not hurtful in excess."

While in New York, the honored chief judge of the Court of Appeals, Charles Andrews, is, by the inexorable mandate of the Constitution, compelled to retire on reaching the age of seventy years—which, in this case, means January 1, 1898, although he is in the prime of his intellectual and physical powers—the Hon. John A. Peters, of Bangor, the distinguished chief justice of the Maine Supreme Court, enjoys the unexampled honor of reappointment to the high place he has so long honored, after having passed the age of seventy-four. The term for which Chief Justice Peters was appointed expired on the 19th, instant, and until that date no reappointment would have been necessary; but Governor Powers, who had been ascertaining the sentiment of the bar of the State and feeling the pulse of popular opinion, not only concluded to reappoint Justice Peters, but he made the appointment on August 26th, and wrote a personal announcement of the nomination to the distinguished chief justice. Here is the governor's letter:

"AUGUSTA, ME., Aug. 26, 1897.

"The HON. JOHN A. PETERS, Bangor, Me.:

"MY DEAR CHIEF.—I have this day placed your name upon the nomination book to succeed yourself in the very responsible and honorable office of chief justice of the Supreme Court of Maine. Our kindly relations and unbroken friendship during many years add unfeigned pleasure to this official act. But I also feel and know that I make this nomination in response to the universal sentiment of the bench and bar of our State, in the records of which your useful life's work and history are indelibly written.

Which request is endorsed by the people of our State whose best interests you have so long, so well, so ably and satisfactorily served. Permit me to express my congratulations, and also the hope and wish that our noble State will be honored and blessed with your keen, unerring insight and broad, conscientious, judicial learning for many years.

Sincerely your friend,

"LLEWELLYN POWERS."

To this the recipient wrote a brief reply, expressing no sentiment other than that of thanks for the unexampled honor which had been conferred upon him. Thus it is that Chief Justice Peters will enter upon, and it is to be hoped serve out, a third term as the head of the Maine judicial system. He was first appointed to the bench on May 20, 1873, as we learn from the Bangor Daily Commercial, and was reappointed to an associate justiceship in 1880. On September 19th, 1883, he was elevated to the chief-justiceship, to succeed Chief Justice Appleton, was reappointed in 1890, and now receives his third commission as the loftiest judicial dignitary of Maine. Although on the 9th day of next October, Justice Powers will be seventy-five years of age, he is as ambitious, as keen, as rapid in his mental processes and as graceful of speech as he was thirty years ago. Able, gifted and enjoying mental and physical vigor not found in many men greatly his junior, Justice Peters is still unquestionably the man for the place, and both he and the State he has so long and signally served are entitled to congratulations. In these the ALBANY LAW JOURNAL begs to join, and to express the hope that an official so ideally fitted for the high place he occupies, may be spared to complete his third consecutive term.

On the subject of the regulation of trusts, which now appears to be agitating the people of the United States, it is quite possible that something can be learned from the experience of European countries which will be of value. For example, a law has recently been adopted by the Austrian Parliament for the control of trusts, which makes illegal

and punishable by fine or imprisonment, or both, all arrangements or combinations entered into between persons or companies for the purpose of increasing prices or limiting production, unless such combinations are authorized by the general laws of the empire. For such purpose statements must be made under oath, in answer to the following questions:

1. Purpose and object of the trust.
2. Branch of trade and number of members, giving the names of each.
3. Privileges and obligations of the members, and contracts or agreements entered into by the members as to penalties, etc.
4. Office of home management.
5. Management and general features of the business done.
6. Name of foreign representatives, if there are any.
7. Duration of the agreement made by the trust members.
8. Eventual agreement as to the way of settling litigation arising from the trust.

The question of permitting the formation or continuance of trusts is left to the empire itself, such powers being by law delegated to the minister of finance, who has full supervision, and is authorized to examine the books of the trusts and the business transacted by them, and to demand from their officers or agents any information respecting such business. In addition to this the trust is compelled to give a heavy bond guaranteeing compliance with the provisions of the law. Of course the supervision referred to is of a strictly confidential nature, those making the examinations being under oath to divulge to no one except their superior officers, the information they obtain. The law, apparently, recognizes the inevitableness of combinations, and even the advisability of them, under proper restrictions, to provide which all possible efforts are made, and in effect declares that if they can be shown to be, and if experience proves them to be for the public good as well as to the interest of the parties to such combination they will be permitted. This looks like a very simple as well as

a very effectual solution of the trust regulation problem, and at least affords food for serious thought on the part of American statesmen. If, as the trusts claim, their formation and operation result in the public good and advantage, there ought to be no difficulty in demonstrating the fact, and once so demonstrated, all objection to such trusts might be expected to vanish, like mists before the sun.

“Should angels have wings?” is a question which the New York Supreme Court may be called upon to decide, in the suit which Miss Mary E. Tillinghast, a New York artist, has begun against John E. McIntosh, a resident of Syracuse, N. Y. It appears that, in January, 1896, Miss Tillinghast was commissioned by Mr. McIntosh to furnish him with a memorial window in memory of Mrs. McIntosh, deceased, the consideration therefor being the sum of \$500. The window which was to have been placed in St. Mark's church, Syracuse, depicted, among other things, a trio of angels. One of the angels was without wings, and this Mr. McIntosh is said to have considered so inartistic that he refused either to accept the window or pay the contract price. On the other hand Miss Tillinghast claims that the design for the window was submitted to and approved by Mr. McIntosh and that it is now too late for him to object to the wingless angel. In her suit Miss Tillinghast seeks to recover the \$500 for the window, \$286 for placing it in the church and \$5,000 done her professional reputation by the defendant's refusal to accept the picture.

There is, undeniably, a great deal of popular ignorance or misapprehension on the subject of copyrights and how to secure them, and, as a consequence, not a few authors who seek to protect and preserve the interest they have in articles appearing in public journals and magazines of the country, fall short of the desired object by failing to comply with the law. At the recent meeting of the Writers' Club, held in Brooklyn, a letter was read from Mr. James M.

Kerr, the well-known writer of law books, in which that gentleman threw some light on the subject. "Picking up almost any leading newspaper," says Mr. Kerr, "you will find one or more articles at the head of which, in parenthesis, is the word 'copyrighted,' or the word 'copyrighted by Sam Jones.' This does not afford the desired protection to the literary property in the article, for the reason that the law requires the notice of copyright to be given by imprint as follows: 'Copyright, 1897, by Sam Jones.' This is the form directed by the statute to be used. The use of any other form is ineffectual. The substitution of the word 'copyrighted' for the word 'copyright,' as directed by the statute, does not comply with the law, and for that reason does not afford the protection desired." Mr. Kerr adds: "It is said there is a reason in all things, particularly in all laws, and to understand a law we must get at the reason of it. The reason for the copyright law, which requires the imprint of the copyright to include the name of the author, is, first, to protect the author by showing to the public that the article is copyrighted, and, second, to point out to those who desire to make selections who the author is in order that they may make application to him and get the necessary permission."

According to the figures contained in the report of the English Commissioners of Prisons and the Directors of Convict Prisons, recently published as a Blue Book, we learn that there has been a remarkable decrease of crime in Great Britain during the past thirty years. In the five years ending in 1864 the yearly average number of persons sent to penal servitude was 2,800. In 1890-1894 the number had decreased to 858, while in 1896 it was 756. In view of the fact that since 1864 the population has increased from nineteen and one-half to thirty and three-quarter millions, the striking decrease is more clearly shown by taking the percentage to population. To each 100,000 the percentage in 1860-64 was 13.7. In 1890-94 it was 2.9. It is also a noteworthy

fact that since 1885 there has been a decrease of 25.8 per cent. in the yearly average of persons imprisoned on indictment, and of 5.5 on summary conviction. It should also be borne in mind that in that period the population has increased 16.7 per cent., and the decrease per cent. in imprisonment, with regard to the number per 100,000 of population, is 36.5 in the first case, and 19.0 in the second. The London Law Times also notes with pleasure the remarkable success of what is known as the "Star System" by which first offenders are separated from the habitual criminals. Of over 2,000 male offenders who have been placed in the "Star" class during eighteen years, only twenty have been resented to penal servitude, and of ninety females not one has returned. These facts and figures are as gratifying as they are remarkable, showing the excellent results of modern penology as exemplified in the British Islands, and affording fruit for reflection on this side of the Atlantic.

The docket for the next term of the United States Supreme Court, which will begin on the 11th of October, next, is now in preparation. It contains to date 446 cases, showing an addition of sixty-three cases since the adjournment of the court in May. Of these cases 128 are from the State court, 110 from the new Federal Courts of Appeal, forty-nine from the United States Circuit courts, forty-six from the territorial courts, thirty-two from the courts of the District of Columbia, twenty-nine from the Court of Claims, twenty-six from the Private Land Court, and seventeen from the United State District courts. There were 595 cases on the docket when the court convened in October, 1896. This year the number will be fully 100 less. The constant falling off indicates that the court will soon be quite up to date with its business. The diminution of cases coming to this tribunal has been caused principally by the creation of the United States Courts of Appeal, causing a falling off of from 1,000 to 1,500 cases per year in the cases brought to this court from the United States Circuit courts.

### Notes of Cases.

In *Ross, admr'x, v. Western Union Telegraph Company*, decided by the United States Circuit Court of Appeals, Fifth Circuit, in June, 1897, it was held that the delay of a telegraph company in delivering a message warning the person to whom it was addressed that armed men were pursuing him, is not the proximate cause of his death at the hands of his pursuers; that where there is only a bare possibility that the prompt delivery of a message warning the person to whom it was addressed that he was pursued by armed men would have enabled him to escape, it seems that the company is not, by reason of its delay in delivering the message, responsible for his death at the hands of his pursuers; that where a message addressed to one who was not a resident of the town, and which was directed to no particular street or locality in the town, warned him that he was pursued by armed men, and in a few minutes after he reached the town, and while he was proceeding to the telegraph office, he was overtaken and killed by his pursuers, the company was not negligent in not delivering the message, as it was not charged with the duty of sending out messengers to watch for his arrival.

In *W. C. Perkins v. Pendleton et al.*, decided by the Supreme Judicial Court of Maine, in April, 1897, it was held that for a person to wrongfully — that is, by the employment of unlawful or improper means — induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does, in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee; in fact, it is not confined to contracts of employment; that whenever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and the rule is the same whether by these wrongful means a contract of employment, definite as to time, is broken, or an employer is induced, solely by reason of such procurement, to discharge an employee whom he would otherwise have retained, even if the terms of the contract of service are such that the employer may do this at his own pleasure, without violating any legal right of the employee; that merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable or absurd, is not in and of itself unlawful, and the court does not decide that such interference may become unlawful by reason of the defendant's malicious

motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee whom he desired to retain, and would have retained except for such unlawful threats, is an actionable wrong.

The Supreme Court of Tennessee, in June, 1897, in *W. S. Bruce et al. v. F. J. Beall* (Chicago L. J., Vol. II [N. S.], 464), held that in an action for personal injuries alleged to consist, among other things, of spinal concussion, evidence that before plaintiff was injured he "could read, and was studying medicine, and was going to school, but that since it occurred he could not read," was competent to show the extent of his injuries, though it was not averred that such special injury resulted from defendant's negligence, where no effort was made to show any pecuniary loss on account of plaintiff's inability to study and go to school; that it was competent to submit to the jury an X-ray photograph, taken by a surgeon, showing the overlapping bones of one of plaintiff's legs, where it was broken at the time of the accident, where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and testified that the photograph accurately represented the condition of the leg at the point of fracture, and that by the aid of the X-rays he was enabled to see the fracture and overlapping as if they were uncovered to the sight; that in an action for injuries to defendants' employee, caused by the breaking of the wire cables of an elevator which have been in use over seven years, it is not competent for an expert witness to testify that it would not be prudent to keep the cables running longer than six or seven years under conditions correctly described in the question; that a ruling that an expert has the requisite qualifications will not be disregarded except in a case of clear abuse of discretion; that where the trial court fails to rule on objections to evidence, and the party objecting does not move to strike out the question and answers, errors assigned on the admission of the evidence will not be considered on appeal. It was also held that the trial court properly refused to charge that "as a general rule, when an appliance, machinery or structure not obviously dangerous has been in daily use for years, and has been uniformly found adequate, safe and convenient, it may be continued without the imputation of negligence."

The New York Supreme Court, Appellate Division, First Department, in *People v. Isaac Zucker*, decided in August, 1897, held that the fact that one knew of defendant's purpose to commit a crime, and performed an act tending to assist in the perpetration of the offense, did not, as matter of law, render him an accomplice, within the rule requiring testimony of accomplices to be corroborated.

rated, where it was in dispute whether he did the act with intent that it should aid in the commission of the crime. An insured building in New York had been condemned by the board of health, and its owner intended to destroy it by fire, so as to obtain the insurance money. He caused the bulk of the personalty therein, which he owned, to be removed to New Jersey, intending to make a fictitious transfer of it to a third person, in whose name it was to be insured, and then to cause the destruction by fire of it also. The remainder of the personalty he left uninsured in the New York building, so that the company carrying insurance on the house would not suspect incendiarism. The scheme was fully carried out, except that he had intended the two fires to take place simultaneously, and the New Jersey fire was set a few days before the other. *Held*, that evidence of the New Jersey fire was admissible on trial for arson of the New York building.

**U. S. CIRCUIT COURT, D. OF WEST VIRGINIA, AT CLARKSBURG.**

Opinion filed August 21, 1897.

CHARLES MACKALL v. M. D. RATCHFORD ET AL.  
*In Chancery.*

**CONTEMPT OF COURT — MARCHING IN STREET.**

In the matter of the contempt proceedings against Patrick Harney, Ed. L. Davis, J. L. Higginbotham et al., for violating the injunction of the court by marching and gathering in the streets, and thereby intimidating non-striking miners from working.

GOFF, Circuit Judge. — As to the law applicable to the matter now under consideration counsel have not differed, and the court had no trouble. It is concerning the facts — what they prove and their proper application to the law involved — that counsel have expressed differences, and the court is required to decide.

Many matters foreign to the issue now presented have been referred to by counsel and testified about by witnesses, but the court will exclude them from its consideration.

Matters referring to "free speech," "natural rights" and the "liberty of the citizen" are not now involved in this issue, nor are they in danger. They will survive this ordeal, and it is to be hoped that they will be further endeared to us all (if that be possible) by our mutual experience herein and the incidents connected therewith. The right of free speech has not been abridged, nor in any manner interfered with. "The organizer" has spoken to his heart's content here, there and everywhere. The "camp" has heard him and been electrified by his eloquence. City, town and hamlet have been visited by him and have given a generous welcome. Public buildings have

been thrown open, street corners utilized, the crossroads and highways called into requisition. The right of the people to assemble and discuss matters in which they feel an interest has had an exemplification during the last month in this and adjoining States, that has been pleasing to our citizenship, and as gratifying to all true lovers of republican government, as it has been unwelcome and unexpected to the agitator and the demagogue — who, it seems, delight in drawing lurid pictures of the days yet to come, when "liberty" shall have perished from the face of the earth, and "free speech" shall be but the dim remembrance of a dream long passed, recalling but faintly the days when liberty yet tarried among men and was worshiped by those who called themselves "free men."

The simple question here is, Are these defendants in contempt of this court?

On the 16th inst. this court granted an injunction restraining the defendants and all others from in any wise interfering with the management, operation and conducting of the mines in the bill mentioned, either by menaces, threats or any character of intimidation used to prevent the employes of said mines from going to or from the same, or from engaging in their usual business of mining. All persons were restrained from entering upon the property of the Montana Coal and Coke Company for the purpose of interfering with the employes of said company, either by intimidation or by the holding of either public or private assemblages upon said property, or in any way molesting, interfering with or intimidating the employes of that company so as to induce them to abandon their work in the said mines. This injunction was served on a number of the defendants early on the morning of the 17th inst. It was also served on other of the defendants, together with an additional or supplemental and construing order, on the morning of the 18th inst. If the defendants were aware that the court had passed the decree granting the injunction mentioned, if they were aware of its terms and import, and if they then interfered with or intimidated the employes of said coal company, thereby preventing them from going to or from their work, or causing them to abandon the same, then they are guilty of the contempt charged, and should be, must be, and will be punished.

The "strikers" had the right to quit work themselves, and they had the right to induce other miners, by peaceable means, by the persuasive force of public or private argument exerted in a lawful way, to also quit work and join them. But it must be kept in mind that the miner who still desired to work had the same right to do so as the miner to quit work, and also it should be remembered the owners of the mines, individual or company, had the right to operate the same; the right to employ the labor of those

willing to work; the right to use the highway leading to the mines for themselves and for their employes, even as had the strikers to quit work, the miner to go on with his work, or the agitator to indulge in the right of "free speech."

It seems from the evidence that but few of the miners employed at the Montana mines had joined the strikers. All efforts to induce them to do so had apparently failed. At this juncture a company of marching strikers, mostly from Monongah, went into camp about one mile from the Montana mines. During Monday, Tuesday and Wednesday this company, under command of its officers, with music and banners, marched and countermarched along the county road running through the property of the Montana Coal Company.

This marching was very early in the morning and in the afternoon, at times when the miners of said company were either going to or coming from their work. The marching was from the camp down to the mine opening, then back to the village to where the miners lived, thence again past the mine opening, and so on "to and fro" during certain hours of the morning and afternoon. They did not march past the property of the company for the reason, as stated by their leader, that the river stopped them. The marching was, therefore, from the camp to the river and from the river back to the camp, always by the mine opening and the miners' homes. There was an object in this, and the intent will be disclosed by the facts. These miners had refused to join the strikers, and had neglected to attend the strikers' meeting, evidently preferring to remain at work. The camp was established near them for the purpose of influencing them. Was that influence to be exerted, and was it exerted in a lawful and proper manner? The answer to that question determines the guilt or innocence of those accused. In endeavoring to influence the miners to join them, did the strikers prevent them going to or from their work, and did they use any character or intimidation in so doing?

A body of men, over two hundred strong, marching in the early hours of the morning, before daylight, halting in front of the mine opening, and taking position on each side of the public highway for a distance of at least a quarter of a mile, at the exact places where the miners were in the habit of crossing that highway, for the purpose of going from their homes to their work, is at least unusual, and in the state of excitement usually attending such occasions, neither an aid to fair argument nor conducive to the state of mind that makes willing converts to the cause thus championed. That the marching did intimidate quite a number of miners is clear, if the evidence offered is to be believed—and the court finds it uncontradicted and entitled to credence.

The court is also forced to conclude, from all the facts and circumstances detailed by the witnesses, from the object the marching men had in view, and from the locality where they marched, and its topography, that the intention of the marching strikers was to interfere with the operation of the Montana mines, with the miners engaged in working said mines, to intimidate them, and thereby induce them to abandon their work, and then secure their co-operation in closing the mines. The marching men seemed to think that they could go and come on and over the county road as they pleased, because it was a public highway. But this was a mistake. The miners working at Montana had the same right to use the public road as the strikers had, and it was not open and free to their use when it was occupied by over 200 men stationed along it at intervals of three and five feet, men who, if not open enemies, were not bosom friends. That some miners passed through this line is shown: that others feared to do so is plain; that the marching column intended to interfere with the work at the mines would be foolish to deny.

A highway is a way over which the public at large have a right of passage. It is a road maintained by the public for the general convenience. True, the strikers had a right to march over it as passengers, just the same as all other citizens; but they had no right to make it a parade-ground or stop on its sideways at frequent intervals, and by the hour, at times when other people, who had the same right to its use, were in the habit of using it for purposes connected with their daily avocations. The miners of the Montana mines, as well as the owners of that property, had the same right to use the public road as had the marching strikers. It seems to the court that the men whose work is interrupted, and the people whose property is damaged by the improper use and occupation of the highway, are the people who have the true grounds of complaint because of the improper use of what, in the early books of the law, is called the "king's highway."

The building in which we are now holding this court is located on the corner of Third and Pike streets, Clarksburg. All the citizens of that town can use those streets for purposes connected with their business. All persons properly deporting themselves can pass along and upon them for all proper business matters, or for the mere purpose of transit, and all persons, due regard being had for the public interest and safety, may parade with banners, flags and bands of music along and over said streets at reasonable times and seasonable hours, provided the same does not prevent the reasonable and seasonable use of said streets by those entitled to the same. If such use should close the business houses along said streets, by preventing employes from reaching them, then



if such parades were not prevented by the city authorities, the owners of property so affected would be entitled to the aid of the courts in protecting their rights. No one portion of the community has a right to march along those streets day after day, night after night, and station themselves along them at intervals of three or five feet, for hour after hour, thereby preventing the owners of property located thereon from reaching the same in person or by their clerks or other employees, for purposes connected with their regular business. Under such circumstances the police of the city would either move the column along out of the way of the public business, or take into custody the men who, without authority, obstruct the streets and public highways. The marching men had then no such right on the county road as they claimed.

That the parties now in custody knew that the injunction had been issued is not denied — is plain from the evidence. They spoke of it jocularly mostly — now and then resentfully and disrespectfully. Such terms as these passed along the line: "We are used to papers like that." "We will take the consequences." "I will eat mine for breakfast." The officers were careful in explaining its terms, and, I may say, in beseeching the strikers not to violate them. They told the marchers to march on and pass by if they wished to, but not to march by and countermarch "to and fro" by the mines, because such marching was prohibited by the court. But the advice was not heeded, the disregard of the court's order continued, and the conduct that constituted violation of the injunction was openly resorted to, and persistently maintained. These defendants are all guilty of the contempt charged. What should the punishment of the court be? Outside of their conduct in this particular, the demeanor of those who so marched has been most commendable. They have indulged in no threats, nor has loud, boisterous or taunting language been used. They have been sober and decent, mindful of their own interests, and with the exception noted, respectful of the rights of others, and observant of the requirements of the law.

They impress me as thoroughly honest in their claim that they had the right to march and act as they did, because they were on the "public highway." In my judgment, they were in that particular mistaken, having been badly advised thereto; but nevertheless such belief, honestly entertained by them, deprives their disobedience to the court's decree of malice, takes the sting out of the contempt found, and suggests a punishment that will be as light as due regard for the proprieties will admit of. The parties have already been in custody for three days. Let them be confined in the jail of Harrison county, West Virginia, for the further period of three days from this date. But let it not be supposed hereafter, now that at-

tention has been called to the matter and the law, that other and further infractions of the decrees and orders of this court will be so lightly punished. In this case, for reasons mentioned, justice has been tempered with mercy, but if, with the light of this investigation in their pathway, these defendants shall persist in disregarding the decrees of this court, duly entered in causes properly before it, then let it be remembered that mercy shown to contempt under such circumstances would be not only a crime, but the death of justice.

#### NOTEWORTHY CASES OF THE JUDICIAL YEAR IN ENGLAND.

ALTHOUGH to the lawyer there have been many decisions of considerable importance since the courts met on the 24th of October last, to the general body of the public, few cases have been heard which have in any way powerfully attracted notice, as did the case of *Dr. Jameson*, in the course of 1896. It need scarcely be pointed out in these columns that the true importance of a decision does not necessarily depend on the extent to which the ordinary reader of the daily press feels himself to be interested. Some of the far-reaching judgments to which allusion will be briefly made in this article have been delivered without the general public's having any cognizance whatever of the way in which their business relations were being affected.

Among the cases most directly affecting the legal profession, the following appear to be the chief deserving mention: In *Hood-Barrs v. Heriot* (76 L. T. Rep. 299; [1897] A. C. 177), the house of lords decided that when a solicitor has received payment of costs payable to his client by virtue of an order, knowing that an appeal against the order was pending, he cannot be made liable personally to repay the costs, where there is no evidence of misconduct or of any undertaking to repay. The money in question was, it should be noticed, still in the hands of the solicitor concerned. Lord Herschell points out that the inherent jurisdiction alleged to exist enabling the court to compel the personal repayment when no undertaking had been given, would, if it existed, go far to negative the need of any undertaking at all. An Irish decision in which a solicitor had to repay costs in default of the client so doing (*Fitzmaurice v. Jordan*, 32 L. Rep. Ir. 112) is therefore disapproved: *Coburn v. Colledge* (76 L. T. Rep. 608; [1897] 1 Q. B. 702) relates to the question at what time a cause of action arises upon a solicitor's bill of costs. The client went abroad about a week after the solicitor had completed his work. A few days after the bill of costs was sent to the client, but only reached him some two years later. Five years after that he returned to England, and an action was at once commenced. If

the cause of action arose at once when the work was complete, then the period of limitation had been over-stepped and the action failed. If, however, it only arose from the period of one month after the delivery of the bill of costs (Solicitors Act, 1843, sec. 37), the right of action was not barred, because the writ was served within six years of the client's return (4 & 5 Anne, c. 16, s. 19). The Court of Appeal held that the cause of action arose when the work was done, and the section of the Solicitors Act applied not to such cause of action, but merely to the procedure of enforcement. The Court of Appeal, in *Macaulay v. Polley* (76 L. T. Rep. 643; [1897] 2 Q. B. 122), have negatived a solicitor's power to compromise a claim before action brought, and in *Marsh v. Joseph* (75 L. T. Rep. 558; [1897] 1 Ch. 213) they had to consider a difficult case in which one solicitor had, without the authority of another, used the latter's name in proceedings, and by means of fraud the first named had obtained payment out of a fund in court which was eventually a partial loss. The facts are too long and complicated for review here, but a principle was laid down that for negligence, in a matter in which the court has control, a defaulting solicitor as its officer is liable to make good a loss thereby occasioned, but it cannot mulct him in damages for his misconduct. Lastly, in *Re Pomeroy and Tanner* (75 L. T. Rep. 625; [1897] 1 Ch. 284) a point of much importance was decided by Mr. Justice Stirling as to the framing of a bill of costs when a country solicitor has employed a London agent. It is now held to be essential, when the country solicitor delivers his bill of costs, to detail the charges of the London agent. Until this is done, either in the original or a supplemental bill, there is no such complete taxable bill as would warrant the solicitor to refuse taxation when twelve months have elapsed from its delivery.

In the domain of company law there have been several decisions of the utmost moment. *Salomon v. Salomon & Co.* (75 L. T. Rep. 426; [1897] A. C. 22) reversed by the judgments of the house of lords the previous decisions of the courts below with regard to "one-man" companies. A leather merchant in good business sold his concern to a company formed in his own family circle. He himself held all the shares except six and some debentures which eventually came into the possession of B, and in default of interest on which an action was brought to enforce the security. The Court of Appeal took the line that "one-man" companies were against the spirit of the Companies Acts, and that this one was merely a scheme to secure limited liability, and to obtain a preference over creditors by means of a charge on the assets through the medium of the debentures. The action was continued, B having been paid off, as between the liquidator and the leather merchant. The house of lords held that "one-man"

companies were perfectly legal, and that no liability to indemnify the company against creditor's claims could be enforced. The judgment rested on the bare words of the statute, which in no way restrict the number of shares to be held by the seven shareholders except as regards the minimum of one, nor does it inquire into motives. The house of lords also handsomely exculpated Salomon from the very serious reflections upon his proceedings which had fallen from the judges of the courts below. *Bloomenthal v. Ford* (76 L. T. Rep. 205; [1897] A. C. 156) is another house of lords case, in which a company was held to be estopped from denying that certain shares were fully paid, when such shares had been represented by it to be so paid, on faith of which allegation the holder of them had made a loan to the company. *Welton v. Saffery* (76 L. T. Rep. 505; [1897] A. C. 299) is also of extreme importance, inasmuch as it supplements the *Ooregum* case (66 L. T. Rep. 427; [1892] A. C. 125). With regard to issuing shares at a discount, the latter decides that shares must be under a liability for full payment where claims of creditors and costs of winding-up have to be met. Here the house of lords have held clearly that discount or bonus shares are altogether *ultra vires* of a company, even though authorized by the company's articles; accordingly, holders of these shares are liable for the amounts unpaid, even if the money be required merely to adjust the rights of contributories *inter se*. Lord Herschell dissented, and thought that the matter was a bargain amongst themselves. *Ernest v. Loma Gold Mines* (75 L. T. Rep. 317; [1897] 1 Ch. 1) lays it down on the authority of the Court of Appeal, that a chairman at a shareholders' meeting, where the articles permit voting by proxy, must count the vote of persons holding proxies as a single vote, and not count a vote for each of the persons whose proxy he holds. *Re Streatham and General Estates Company* (75 L. T. Rep. 574; [1897] 1 Ch. 15) has to do with debentures charging the business and all its "property, whatsoever and wheresoever, both present and future." Held, not to charge the uncalled capital. *Re Brinsmead* (76 L. T. Rep. 100; [1897] 1 Ch. 406) was decided upon the "just and equitable" provision of the Companies Act, 1862, sec. 79 (5). This was a fraudulent attempt on the part of a company to filch the business of the well-known piano manufacturers of that name. The company's capital had been misdealt with, and the court, finding most of the substratum of the concern had vanished, wound it up as the best means of enabling the shareholders to recover some of their money. The important point of the case is that the words "just and equitable" were not construed strictly *ejusdem generis* with the rest of the section, but that a wider view was taken of the expressions therein contained. *Andrews v. Gas Meter Company* (76 L. T. Rep. 132; [1897]

1 Ch. 361) sets at rest the question as to whether companies can issue preference shares when no such power is given in the memorandum or articles. The question was answered affirmatively, and the result is to overrule the decision of Hutton v. Scarborough Cliff Hotel Company (13 L. T. Rep. 57; 2 D. & Sm. 521), which has for long been regarded as of a doubtful nature. The status of auditors of companies has lately been much considered, the result of the litigation during the last few years being rather adverse to them by rendering their responsibilities exceedingly onerous. In Western Counties Steam Bakeries, Etc., Company (76 L. T. Rep. 239; [1897] 1 Ch. 617), the point cropped up again as to the liability in respect of dividends declared on the faith of the audit of a man who had never been appointed to the office of auditor, but who had examined the accounts in the same way as a formally appointed auditor would have done. The court held that, *prima facie*, auditors are not "officers" of companies, but if a man be duly appointed to the position, and act as such, his liability attaches. They accordingly exculpated the defendant on the ground that he had never been appointed to any such "office," and was therefore not an "officer." This brings the case within the exception indicated in Lord Justice Kay's judgment in London and General Bank (72 L. T. Rep. 227, 611; [1895] 2 Ch. 166). This section of the subject may be concluded by referring to a quite recent decision, viz., Kharaskhoma Exploring, Etc., Syndicate (noted *ante*, p. 292; W. N. [1897] 76). This is highly important, as it declares it not sufficient to file a sub-contract referring inquiries into the consideration for the issue of shares as fully paid to another document, but that the consideration must be set forth explicitly. The practice of filing merely a sub-contract has become rather common in spite of the warning against it in Palmer's Company Precedents.

Unquestionably no cases have received more popular attention than the series of decisions relating to betting, and in special reference to the word "place," as used in secs. 1 and 3 of the Betting Act, 1858. The last case on the subject is Powell v. Kempton Park Racecourse Company (noted *ante*, p. 244; W. N. [1897] 72). Professional bettors entered with the rest of the public paying one guinea into a fenced inclosure, in which they moved about freely without using any desk, umbrella, stool, or the like. The Court of Appeal held that this did not constitute a "place" within the meaning of the sections, but that the expression indicated something analogous to the betting-house or office. This is directly in conflict with Hawke v. Dunn (76 L. T. Rep. 355; [1897] 1 Q. B. 579), where Mr. Justice Hawkins held that Tattersall's Ring at Hurst Park, a roofed-over inclosure to which the admittance is £1, was such a "place." The bookmaker in that case,

also, had no apparatus, and was equally free in moving about. *McInaney v. Hildreth* (76 L. T. Rep. 463; [1897] 1 Q. B. 600), decided by Justices Hawkins, Cave, Wills, Wright and Kennedy, lays it down that a piece of private vacant ground in Jarrow, locally known as the Pit Heap, was a "place." It must be noted that in this case the bookmaker remained for three hours at one spot in a conspicuous position, with his back against a boarding. The last case to be mentioned refers more particularly to the expression, "betting with persons resorting thereto," used in section 1 of the act. The bookmaker here was charged with using the bar of a beer-house for the purpose thus indicated. The bets were made elsewhere, but winners were paid by him at the bar. The same five learned judges held that paying bets, which had been previously made at some other place, was not betting with "persons resorting" to the bar, within section 1 of the act of 1853.

With regard to merchant shipping, the house of lords have given some highly important decisions. The earliest case is perhaps scarcely one of merchant shipping at all, being a collision case between two first-class racing yachts, the *Satanita* and *Valkyrie*. The decision, however, of *Clarke v. Earl of Dunraven* (75 L. T. Rep. 337; [1897] A. C. 59) turned on the question whether the statutory limitation of £8 a ton of the faulty ship's tonnage imposed by the Merchant Shipping Act Amendment Act, 1862, sec. 54 (the corresponding section of the act of 1894 being sec. 503) was waived by entering the race under an agreement to be bound by the Y. C. A. rules, by the operation of which yachts fouling other yachts "shall pay all damages." The house of lords decided that the benefit of the act had been waived, and condemned the *Satanita* in the damage done and costs. The next case, *Cory Brothers v. Owners of the Mecca* (76 L. T. Rep. 579; [1897] A. C. 286) affects not only shippers, but the general community. It is there laid down, where certain dishonored bills of exchange accepted by a Turkish shipping company were in dispute, that creditors may appropriate to any item money paid on account and not already appropriated by the debtor, the application of the money being governed by the intention, express or implied, of the creditor. In the *Owners of the Edenbridge v. Green and Others* (76 L. T. Rep. 662; [1897] A. C. 333) the question arose as to section 625 (3) of the Merchant Shipping Act of 1894, which exempts vessels not carrying passengers, when "trading" from London to certain ports, from the necessity of carrying a compulsory pilot. The *Edenbridge* was on a voyage from the River Plate to Rotterdam. She called at Deptford, where she landed some sheep and cattlemen, and proceeded. On her way out she collided with the *Rutland*, both vessels being to blame, but so far as regards the *Edenbridge*, the pilot on board was negligent. If

the pilotage were compulsory, the owners would be free from liability; if not compulsory, then they would be liable for the pilot's negligence to the amount of half the damage done. It was held that she was "trading," though she took no cargo, and was therefore exempt from compulsory pilotage. The other decision, sufficiently weighty to merit review, is *Wells v. Owners of the Gas Float Whitton No. 2* (76 L. T. Rep. 663; [1897] A. C. 337). There a gas float, moored in tidal waters in the Humber, and not suited for navigating, got adrift, and was secured partly by the plaintiff's help. They brought an action for salvage services, the question being whether such a structure, though exposed to the same perils as a ship, and when loose itself a danger to shipping, could be the subject of salvage, and it was held that it was not, on the ground that it was neither a ship, or part of a ship, or of her apparel or cargo. The *Janet Court* (76 L. T. Rep. 172; [1897] P. 59) has an important bearing on the principles attending awards for the salvage of derelicts. At one time it is said to have been the practice to award a moiety of the value of the property salvaged. The case shows that, though no hard and fast proportion will now be given, the circumstances of special danger attending such salvaging, the difficulty of making fast to a wreck upon which no one is present to assist, with the consequent necessity of depleting the crew of the salvaging ship and endangering their safety by putting them on board, the hopeless straits of the derelict if not assisted, all these elements are, in Sir F. Jeune's view, reasons why the courts will remunerate generously the labors of those taking such risks. Lastly, in *Edwards v. Steel, Young & Co.* (noted *ante*, p. 293), the Court of Appeal has had to construe the meaning of the term "passage home" used in section 186 of the Merchant Shipping Act of 1894. Mr. Justice Collins thought that it merely indicated a passage to some port in the United Kingdom, not necessarily the port of shipment. The Court of Appeal held that, as the consular officer had named a sum to the master of the ship sufficient in his opinion to defray the seaman's maintenance and passage, the ship's master having paid this sum had fulfilled the statutory obligation, even if the sum paid turned out to be insufficient for the purpose. The facts of the case in the court below will be found fully reported in (1897) 1 Q. B. 712.

In the branch of ecclesiastical law there has been an important decision upon the legality of the black gown. The question in *Re Robinson; Wright v. Tugwell* (76 L. T. Rep. 95; [1897] 1 Ch. 85) arose in connection with a bequest to a church contingently upon a black gown being worn during the sermon. It was argued that this was illegal, and that the sermon was part of the communion service, during which the surplice must be used. The Court of Appeal found the warrant in law for the black gown in the constant

use of over three centuries, and consequently the condition attached to the bequest was held to be good. In *Vallancey v. Fletcher* (76 L. T. Rep. 201; [1897] 1 Q. B. 275) — a disgraceful case of vicarial brawling — it was held that the clergy, equally with the laymen, are liable to the penalties against brawling mentioned in section 2 of the Ecclesiastical Courts Jurisdiction Act, 1860.

Very recently the house of lords have set at rest all doubts as to the meaning of "legal cruelty" in regard to judicial separation. *Russell v. Russell* (noted *ante*, p. 293; W. N. [1897] 76). It is now held that false and persistent charges of gross unnatural offenses brought against one spouse by another do not constitute legal cruelty. There must be either actual danger to health or life or else reasonable apprehension of it. This case has probably more than any other, from its surrounding circumstances and the social position of the parties to it, attracted the attention of the ordinary public. Another popular decision, and one which appeals to a large body of people who reside in hotels and health resorts for long periods of time, may be recalled in *Lamond v. Richard* (76 L. T. Rep. 141; [1897] 1 Q. B. 541). The proprietor of the Hotel Métropole, at Brighton, had requested a guest to depart, after having resided for ten months, and on her refusing, had packed up and removed her goods and excluded her from the building. She had always paid her bills, and there was ample room. The Court of Appeal held that the guest had ceased to become a traveler, and could not compel the hotel to keep her there as long as she pleased, while she could leave as soon as she liked. It was held that mere lapse of time does not convert a traveler into a non-traveler, though this is an important factor, for business might detain the guest or illness might supervene.

The law relating to fixtures has also been the subject of two important cases. In *Hobson v. Gorringe* (75 L. T. Rep. 610; [1897] 1 Ch. 182), a gas engine and health resorts for long periods of time, may be recalled in *Lamond v. Richard* (76 L. T. Rep. 141; [1897] 1 Q. B. 541). The proprietor of the Hotel Métropole, at Brighton, had requested a guest to depart, after having resided for ten months, and on her refusing, had packed up and removed her goods and excluded her from the building. She had always paid her bills, and there was ample room. The Court of Appeal held that the guest had ceased to become a traveler, and could not compel the hotel to keep her there as long as she pleased, while she could leave as soon as she liked. It was held that mere lapse of time does not convert a traveler into a non-traveler, though this is an important factor, for business might detain the guest or illness might supervene.

The law relating to fixtures has also been the subject of two important cases. In *Hobson v. Gorringe* (75 L. T. Rep. 610; [1897] 1 Ch. 182), a gas engine and health resorts for long periods of time, may be recalled in *Lamond v. Richard* (76 L. T. Rep. 141; [1897] 1 Q. B. 541). The proprietor of the Hotel Métropole, at Brighton, had requested a guest to depart, after having resided for ten months, and on her refusing, had packed up and removed her goods and excluded her from the building. She had always paid her bills, and there was ample room. The Court of Appeal held that the guest had ceased to become a traveler, and could not compel the hotel to keep her there as long as she pleased, while she could leave as soon as she liked. It was held that mere lapse of time does not convert a traveler into a non-traveler, though this is an important factor, for business might detain the guest or illness might supervene.

84), it was held to be necessary to give the musician a reason for requiring him to depart, that he may satisfy himself that he is acting contrary to the provisions of the Metropolitan Police Act, 1864. On the 20th of March in this year there appeared in the Times a report of a decision of great value to those who suffer annoyance from the street organs, before one of the metropolitan magistrates, and on the 24th a letter from the society for suppressing these nuisances indicating a method of preventing neighbors encouraging their performances.

The following case is of the first importance to colliery owners and to those responsible for mining leases. The common clause in such deeds empowering the lessor to distrain for rent in arrears on the lessee's chattels on the demised colliery, "or any adjoining or neighboring collieries" does not constitute a bill of sale, and does not, therefore, require registration, but it must be construed less broadly than the words might possibly suggest, and be understood as referring only to such collieries as are connected with the colliery demised by underground workings. (Re Roundwood Colliery Company, 75 L. T. Rep. 641; [1897] 1 Ch. 373). At p. 30 of 103 L. T. will be found an article in which the subject is dealt with more fully.

With regard to settled land, in Re Montagu; Derbyshire v. Montagu (76 L. T. Rep. 485; [1897] 2 Ch. 8), the Court of Appeal has had to regret its inability to allow trustees to raise money by mortgage of the settled property—a shop in Bond street—for the purpose of pulling it down, and rebuilding under circumstances clearly pointing to an increase in the value of the hereditaments concerned. There seems room here for a short amending act whereby the court, where the evidence points to renovation being for the benefit of all parties, and where all are not *sui juris*, should be empowered to sanction a scheme of mortgaging the property, and with the money obtained dealing with it in such a way as seems to the court to be just. At present the authority is only given in cases amounting to salvage.

Amongst many important bankruptcy decisions there may be picked out the Trustee of the Property of New, France, and Garrard v. Hunting and Others (76 L. T. Rep. 741; [1897] 2 Q. B. 19), where A had made a voluntary conveyance of certain shares to be applied in making good breaches of trust of which he was guilty. He did this with the object of shielding himself so far as he could from liability to any consequent proceedings. On bankruptcy intervening, the trustee in the bankruptcy sought to invalidate the conveyance on the ground that it was revocable, and that it was a fraudulent preference, but the Court of Appeal held that it was neither the one nor the other. It has also been settled by the Court of Appeal, in Carter and Kenderdine's Contract (76 L. T. Rep.

476; [1897] 1 Ch. 776), that voluntary settlements, under section 47 of the Bankruptcy Act, 1883, do not become void *ab initio* as against the trustee in bankruptcy, but only as from the date of the act of bankruptcy; consequently *bona fide* purchasers for value buying before the last-mentioned date get a good title, whether they buy from the settlement trustees or from a volunteer claiming title under it. In other words, such settlements are voidable and not void. This decides, by overruling the former, the conflict of authority established by Re Briggs and Spicer (64 L. T. Rep. 187; [1891] 2 Ch. 127), and Re Brall; Ex parte Norton (69 L. T. Rep. 323; [1893] 2 Q. B. 381).

In regard to ordinary trustees, the recent Judicial Trustees Act has been the subject of some few decisions. The most instructive of these is Re Turner; Barker v. Ivimey (76 L. T. Rep. 116; [1897] 1 Ch. 536). Here the trustees invested on a mortgage of undivided shares in property of a very fluctuating value, and without having obtained any independent report. One of the trustees, a layman, left the whole business of the trust to his co-trustee, a solicitor. The court held that, under these circumstances, he had not acted "reasonably" or "ought fairly to be excused" under section 3 of the act. Re Roberts; Knight v. Roberts (76 L. T. Rep. 479) illustrates a case in which the protection of this statute may be successfully invoked. An executor and trustee was sought to be made liable for not getting in the assets of his testator. Both parties were solicitors. The executor honestly and reasonably believed that he had no power to maintain an action against a certain person owing money to the estate. It was then held by the Court of Appeal that the section might fairly be applied and the executor exonerated from any liability he might have incurred.

The law with regard to the sales of licensed premises has been rendered more clear by the decision of Tadcaster Tower Brewery Company v. Wilson (76 L. T. Rep. 459; [1897] 1 Ch. 705). The brewery had agreed to purchase a house with an off-beer license, on the condition that if the license should be affected before completion, the bargain might be nullified. The brewery delayed completion, and asked the magistrates to grant temporary authority to carry on the business, which was refused. They then claimed to rescind their bargain, and were opposed by the vendors. The court held that the license had not been "affected," and that there was no duty on the vendors to procure temporary authority to trade, or to do more than assist the purchasers, if asked, in making any necessary application. It is clear, and is expressed in terms, that no right exists of repudiating a contract of sale of licensed premises unless the vendor can procure a transfer of license before completion, as is stated in vol. I, p. 483, of Dart's Vendors and Purchasers.

The rights of water-works have been discussed in *Huddersfield Corporation v. Ravensthorpe Urban District Council* (noted *ante*, p. 151; [1897] 2 Ch. 121). There a local water authority had had a strip added to their area by an order of a county council, and they thereupon proceeded to extend their mains into the new area, without giving previous notice to the existing water company, whose district was thereby invaded. The question was whether or no this was a "constructing" of water-works within section 52 of the Public Health Act of 1875. Mr. Justice North held it was not, but the Court of Appeal reversed this, and held that the notice required should have been given. This case supplements a prior decision of Mr. Justice Chitty in *Cleveland Water Company v. Redcar Local Board* ([1895] 1 Ch. 168), where an extension of water-works was held not to be a "construction." But in the *Huddersfield Case* it must be observed that the water company was not merely operating in its own domain, it was actually invading the district of another company.

The foregoing, without in any way professing to be exhaustive, will be found within a limited space to contain the chief cases of the judicial year now closed. We have purposely abstained from referring in detail to cases arising under the Finance Act, for they have been touched upon in these columns on the 7th of August. Apart from sensational cases, of which there have been but few, the result of our judges' labors has been something analogous to the outcome of the legislation of the year: it has been at once unostentatious and useful. Omitting such cases as *The Log of the Mayflower* (76 L. T. Rep. 295), which raised a mild national flutter of disapproval at the decision to hand over a valuable historical document to the United States, but which, depending on rarely recurring circumstances, had but little general importance, the chief points settled have been the legality of one-man companies, the illegality of discount shares, that auditors to be "officers" must hold an "office," the meaning of "place" within the meaning of the Betting Acts, the nature of "legal cruelty," the position of the distraint clause in mining leases, the contract for sale of licensed premises with respect to the license, and the two important decisions dealing with bankruptcy. — *Law Times* (London).

### English Notes.

No further subscriptions to the Victoria Pension Fund having been received, the amount remains, as previously stated, at £8,349 9s.

Lord Ludlow — recently known as Lord Justice Lopes — assumed that title because it was his mother's name, says the *Daily Telegraph*. In a letter to Mr. Jasper More, M. P., on the subject, his lordship says: "The reason I took the name

of Ludlow was because it was my mother's name. She came of a very old Wiltshire family, with a recorded pedigree since 1400. Amongst her ancestors are to be found Edmund Ludlow, general of the forces in Ireland in the time of Cromwell, the regicide; a Sir Henry Ludlow, Bart., a Baron Ludlow, a Viscount Ludlow, and an Earl Ludlow, whose title became extinct in 1840. Edmund Ludlow retired to Vevey, in Switzerland, and lived there until his death. The Heywood property in Wiltshire I derived from my mother. I cannot, therefore, truthfully say that I took my title directly from Ludlow, in Shropshire. I learn, however, that the Ludlow family in Wiltshire originally took their name from that place. If this is so, all I can say is any connection which I can claim with the ancient, historic and most interesting town of Ludlow will give a charm to the life I have assumed of which I shall ever be proud."

The rule that ignorance of the law shall not excuse a man, or relieve him from the penal consequences of a crime, is sometimes spoken of as arising from a presumption that every person knows the law, says the *Law Times*. Mr. Justice Maule once observed that "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." (*Martindale v. Falkner*, 2 C. B. 720.) This language was characterized by Mr. Justice Blackburn as clear, and common sense. (*Reg. v. Tewksbury* [L. Rep.], 3 Q. B. 629; 37 L. J. 288, Q. B.) No principle is better established than that ignorance of the law is no excuse for its violation. On the other hand there is a class of cases in which the ignorance of facts is held to be a complete defense.

The death of Sir George Osborne Morgan terminates an eminently useful career. Although he did not attain the foremost rank in politics, he was an influential member of the house of commons, and both as chairman of committees and as an active legislator he made his mark in that assembly. In a popular sense he was chiefly known by his championship of the Burials Act, 1880, by the abolition of flogging in the army, effected by the Army Discipline Act, 1881, and by his advocacy of Welsh disestablishment.

At the North London Police Court, says the *Times*, before Mr. Cluer, Mr. W. H. Thompson, a journalist, of Leswin road, Stoke Newington, was summoned, on the 1st inst., by the North Metropolitan Tramway Company, for a penny fare. Mr. Godfrey appeared for the company, and Mr. Windsor (Young & Windsor) for the defense. The case was that on the night of the 10th of August the defendant got on a car from Seven Sisters' road corner to Dalston Junction. He paid his fare (one penny), but as the car on which he was, was, in his opinion, unduly de-

layed, he got off and ran, and caught up to a car which was going faster in front. Then another penny was demanded of him, which he refused to pay, as he had already paid his fare for the journey. Mr. Windsor argued for the defense that there was nothing on the tramway tickets to show that they were not available by any other car or on any other than the day of issue. The by-law said that the passenger must "pay for the journey," and this the defendant had done. He paid his fare, and as the car on which he was had been unreasonably delayed, he considered himself justified in changing to another one. Mr. Cluer asked the defendant whether he had a witness as to his paying for the ticket he produced. The defendant: "No; I have not." Mr. Cluer: "Then I must hold that the company must have their penny and £2 2s. costs." Mr. Windsor: "We will have a witness next time."

### Before the Final Bar.

JUSTICE JOHN SEDGWICK, of the New York Supreme Court, died at Norfolk, Conn., on the 11th inst., after a brief illness, aged 68 years. Judge Sedgwick was born in New York city on June 22, 1829, and was of old revolutionary stock. John Sedgwick was graduated from the University of the City of New York in 1847, and began to study law soon afterward. He was admitted to the bar in 1852, and in 1855 was appointed an assistant district attorney by A. Oakey Hall. He remained in the district attorney's office until 1860, and then went into private practice, forming a partnership with Francis Bangs. His devotion to his profession won for him a high reputation as a lawyer, and he was three times nominated on the Republican ticket for judgeships. His first two campaigns for a city judgeship and the recordership, respectively, were unsuccessful. The third time, however, in 1871, he was elected to a judgeship of the Superior Court, on the Apollo Hall ticket, with William E. Curtis, and in 1885 he was re-elected by a large majority on a combined ticket of Republicans and Democrats. He was considered one of the most courtly men on the bench. He entered upon his duties as a Supreme Court judge when the Superior Court was merged in that tribunal under the Constitution of 1894. Judge Sedgwick was a member of the Bar Association, the New England Society, the Century Association and the Harlem Club.

Judge Augustus H. Fenn, of the Connecticut Supreme Court, died at his home in Winsted, Conn., on the 12th inst., from Bright's disease, aged 53 years. The deceased was born in Plymouth, Conn., January 18, 1844. When 18 years of age he enlisted in the Nineteenth Connecticut Volunteers, and by his bravery rose from the rank

of first lieutenant to colonel. During an engagement at Cedar Creek he lost his right arm. He studied law, and in 1867 was admitted to the Litchfield county bar. During Governor Loundsbury's administration he was appointed judge of the Superior Court, being the youngest judge on the bench. In 1893 he was appointed associate judge of the Supreme Court of Errors by Governor Morris, which position he held up to his death.

### Legal Laughs.

Most of the witnesses who testified in the preliminary examination of Luetgert, the alleged uxoricide, required an interpreter, who translated to and from the German. Attorney Vincent, for the defense, was cross-examining a thick-headed witness.

"Where did you go?" asked the attorney in the vernacular.

"Wo gehen sie?" translated the interpreter into the witness' vernacular.

"Oopshtairs," said the witness.

"Oopshtairs," translated the interpreter, thus making it clear to everybody where the witness went. — Chicago Law Journal Weekly

### Legal Notes of Pertinence.

The Appellate Division of the New York Supreme Court has decided practically that a liquor-dealer can assign a liquor tax certificate only as security for the payment of money loaned him for the purpose of obtaining the certificate, and such assignment, even when not filed, is good as against subsequent judgment-creditors.

The tragic death of Prof. H. O. Claughton has rendered necessary several changes among the instructors in the National University Law School. Mr. Charles C. Tucker, official reporter of the Court of Appeals, will succeed Mr. J. H. Ralston as judge of the Moot Court and professor of practice. The instruction of the senior and junior classes will be divided between Prof. Eugene Carusi and Mr. Ralston, while the system which has so well succeeded in the past will be followed in the future.

Attorney-General Hancock, of New York, has written an opinion to the effect that a postmaster cannot lawfully act as an inspector of election under the Election law of this State. The statute provides that no person shall be appointed or elected an inspector of election, poll clerk, or ballot clerk, "who holds any public office or place of public trust, except notary public or commissioner of deeds, whether elected or appointed, or who is employed in any public office or by any public

officer whose services are paid for out of the public moneys, or any person who is appointed or elected to or accepts public office, or such appointment therein or by any public officer."

An interesting slander case has recently been determined by the Appellate Division of the New York Supreme Court, sitting at Rochester. The defendant was the manager of a large department store in Syracuse, in which some 300 persons were employed. The plaintiff was a young man who had charge of the bundle counter in the store. A straw hat, which had been wrapped up and placed on the bundle counter, was missed, and was finally recovered, under circumstances which directed suspicion toward the plaintiff. Two of his co-employees told the defendant that the plaintiff had admitted to them that he stole the hat. Thereupon the manager sent for the plaintiff, and in the presence of a number of persons charged him with the theft, and dismissed him. For this slander a jury awarded \$250 to the plaintiff; but the Appellate Division set aside the verdict, because there was no evidence of express malice—that is to say, no proof that the manager was actuated by personal spite or ill-will. If he made the charge in good faith, and honestly, believing it to be true, the law protects him.

The record for the transmission by long distance telephone of affidavits in an attachment case was surpassed on the 30th ult. by the sending of an affidavit from Minneapolis to New York city. The law firm of Kneeland, Thomson, Stewart & Hoelljes, 320 Broadway, received a telegraphic message from Austin, Hall & Co., of Minneapolis, stating that they had obtained an attachment against the Bank of Minneapolis for \$9,000 for money deposited. The message said the bank had suspended, and that it had a balance at the National Bank of Commerce of New York city which the firm desired to obtain. The New York attorneys saw the necessity for haste, and advised their clients by wire to assign the claim by telephone to some representative in that city. Arrangements were accordingly made, and the telephoned affidavits were written out at the New York end, and an affidavit was made as to the identity of the voice. All these papers were attested by a notary, taken into court, and, after being approved, placed in the hands of the sheriff for service. This prompt action tied up the funds of the Bank of Minneapolis on deposit with the National Bank of Commerce. A member of the law firm that transacted the business claims that there can be no question as to the legality of proceedings of this nature, provided care is taken to identify the voice as heard over the telephone as that of the maker of the affidavit. The Court of Appeals has thrown out one case in which the voice was not identified, but other cases have been indorsed by the higher courts.

During August, F. J. McGuire, a young man who lives at 2811 Calumet avenue, was summoned to appear as a juror in Judge Chetlain's court. He was out of employment then, and seemed pleased at the prospect of having an opportunity of serving the State, and earning a little money as a juror. Since then Mr. McGuire secured a position, which caused him to no longer desire to serve as a juror. He sent the following letter to Judge Chetlain:

"The Hon. Judge Chetlain, City:

"HONORED SIR.—I enclose you notice of summons from your clerk. Have just accepted position of salesman with Kinsella Company, consequently it will be impossible for me to act as a juror. Hoping you will erase my name from the list, and thanking you for your kindness, I remain,

"Yours, very respectfully,

"F. J. MCGUIRE."

As Mr. McGuire was evidently sincere, and intended no disrespect, and as he had jurors to spare, Judge Chetlain did not issue an attachment for the young man and force him to show cause why he should not be punished for contempt, but rejoiced with him that he had secured a good position. There can be no fixed rule as to just what should excuse a juror from attending court in answer to a summons to do so. It is largely discretionary with the court.—Chicago Legal News.

### Notes of Recent American Decisions.

Assignment for Benefit of Creditors—Preferences.—Mortgages made and preferences attempted by an assignor in connection with and as a part of a general assignment for the benefit of his creditors, are invalid, but they will not necessarily destroy the validity of the deed of assignment, nor affect the *pro rata* distribution of the assigned estate among the creditors. (*Sturtevant v. Sarbach* [Kan.], 49 Pac. Rep. 522.)

Attorney and Client—Privileged Communications.—Declarations made by a client to his attorney while the latter is drawing a deed of conveyance for the client as grantor, and openly in the presence of the grantee, are not privileged as to the grantee. (*Hummel v. Kistner* [Penn.], 37 Atl. Rep. 815.)

Carriers of Passengers—Round-Trip Tickets—Conditions.—1. A round-trip ticket sold at a reduced rate contained a condition that it was not valid for return unless signed by the purchaser on the day of the return, in the presence of defendant's agent, and witnessed by him; and on the face thereof was a notice to the purchaser to the effect that the return part of the ticket must be stamped, and the purchaser's signature witnessed by such agent before it would be honored for



passage. It appeared that, though defendant kept its office and station open, and its agent on duty, from 7 A. M. to 7 P. M., it maintained no night office at the place to which the ticket in question read; that the purchaser did not apply at defendant's office to have the ticket stamped, and his signature witnessed by the agent, until after the office was closed for the day and that on the return trip he tendered for his passage the ticket unsigned and unstamped, which was refused by the conductor. *Held*, that such ticket gave the purchaser no right to a return passage until he had complied with such agreement. 2. A regulation requiring the station agent at a village of less than fifty inhabitants to keep his office open for business only from 7 A. M. to 7 P. M. each day, is reasonable. (*Louisville, N. A. & C. Ry. Co. v. Wright*, Appellate Court of Indiana, June 11, 1897.)

**Constitutional Law — Liability of City for Damage by Mob.** — A State may constitutionally compel its counties and cities to indemnify against losses of property arising from mobs and riots within their limits, independently of any misconduct or negligence on the part of such city or county to which the loss can be attributed. The Illinois statute to that effect is therefore valid. (*Pennsylvania Co. v. City of Chicago*, U. S. C. C., N. D. [Ill.], 81 Fed. Rep. 317.)

**Fraudulent Conveyances — Evidence.** — A creditor of an insolvent, if necessary to secure his debt, may purchase at a fair price property of his debtor which exceeds in value the amount of his debt, and out of the purchase-money reserve enough to pay his own debt and pay the remainder to the debtor, though he may know at the time that the object of the debtor is to deprive other creditors of the means of collecting their debts. (*Fly v. Screeton* [Ark.], 41 S. W. Rep. 764.)

**Master and Servant — Wrongful Discharge — Measure of Damages.** — When suit is brought and trial is had before the expiration of the stipulated term of service to recover damages for a breach of contract by a wrongful discharge, the recovery cannot be for the whole amount of salary for the entire term, but only for the amount thereof to the date of trial, less such sum as plaintiff has earned, or might with reasonable diligence have earned, from the time of discharge to the time of trial. (*Darst v. Mathieson Alkali Works*, U. S. C. C., W. D. [Va.], 81 Fed. Rep. 284.)

**Mortgages — Satisfaction of Record.** — Without searching the records, a mortgagee accepted a quitclaim deed to the premises, and entered a satisfaction of the mortgage of record. A subsequent mortgage had been executed to secure a loan made by M as agent. M was the agent of the mortgagor in delivering the deed, and when the grantee objected to it because it was merely a quitclaim, M assured him that it was sufficient.

M did not know whether the second mortgage had been paid, but knew that the grantee was ignorant of it. *Held*, that the grantee was entitled to have his mortgage lien reinstated. (*Nommenson v. Angle* [Wash.], 49 Pac. Rep. 484.)

**Municipal Corporation — Authority — Ratification.** — It is no defense to a municipal lien for the cost of paving a street that the work was not authorized before it was done, where the council, on its completion, fully accepted it. (*City of Chester v. Eyre* [Penn.], 37 Atl. Rep. 837.)

**Office and Officers — City Treasurer — Loss of Funds.** — The Supreme Court of Montana decides, in *City of Livingston v. Woods* (49 Pac. Rep. 437), that where a city treasurer, pursuant to statute requiring him to deposit the funds of the city, exercised prudence in the selection of a bank of good standing wherein to deposit the funds, and was free from negligence in permitting them to remain there, he was not liable for loss of the funds by the failure of the bank.

**Partnership — What Constitutes — Practice — Equity.** — Parties may so act or hold themselves out to the public as to render themselves liable as partners to third persons, but as between themselves it is a question of intention, whether or not that relation exists. A, B, C and D, by agreement in writing, employed E to carry on the butchering business, appointed him their agent, and advanced him \$2,000. By the terms of this writing, A, B, C and D were to be the owners of all stock bought by E, both in its natural and manufactured state. E was to receive all the profits as his compensation and to be solely responsible for all losses. *Held*, (1) that as between themselves this agreement did not make A, B, C and D partners; (2) that a bill in equity would not lie at the suit of A against B, C and D, for an accounting as partners on A's claim that he had furnished materials to E for which he was not paid; (3) that even on the assumption that a partnership existed, A's claim was not incurred as a partner, but was founded on a simple contract for which his remedy, if any, against these parties was by an action of assumpsit. (*Krall v. Forney et al.*, Pa. Sup. Ct., xl Weekly Notes of Cases, 532.)

**Partnership — What Constitutes.** — In order to establish a firm in business, several persons executed an agreement appointing him their agent to carry on a certain business, and providing that they should advance him money up to a certain sum, and should own the stock in trade; that such agent was to repay from time to time the money advanced, was to be paid solely from the profits, and be responsible for all losses. The principals in such business did not intend to thereby become partners. *Held*, that as between themselves they were not partners. (*Krall v. Forney* [Penn.], 37 Atl. Rep. 846.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, OCTOBER 2, 1897.

### Current Topics.

THE decision of the Supreme Court of Wisconsin in the now famous Eau Claire contempt case, not only makes very interesting reading, but constitutes one of the most emphatic vindications of the rights of free speech and free criticism which we have had from the bench in a long time. It may be well to recall the salient facts of this remarkable case. Judge Bailey of Eau Claire, who was a candidate for re-election last spring, objected to certain editorials and communications in a local paper severely animadverting upon his official conduct and methods. The writer and editor having filed affidavits in contempt proceedings (instituted against them by the judge) alleging the truth of their charges of unfairness, partiality and incapacity against Judge Bailey, he angrily refused to proceed with the hearing and made an order adjudging his critics guilty of contempt. The offenders were to be committed to jail, but a writ of prohibition from the Supreme Court saved them from that punishment. The Supreme Court, in reviewing the case, points out the fact that the criticisms made upon Judge Bailey had no reference to any action of his in connection with a case then pending. Whether just or unjust, they were general in their nature, and referred to past conduct. The court says it is well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and that they do

not obstruct the administration of justice, however much they may tend to prejudice the judge against whom they are directed. While it is of the first importance that judges should perform their grave duties unimpeded, it is equally important that the right of citizens and newspapers to criticize what they deem arbitrary, unworthy and corrupt conduct should be jealously preserved. The court says: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech we do not know where to find it." This is a stinging rebuke, but justly deserved, and one needed to remind arrogant and dictatorial jurists that they are no more above proper criticism than are any ordinary individuals. To slightly paraphrase the poet: "No divinity doth hedge about a judge," least of all at a time when he is a candidate for office. The law provides adequate remedies for unjustifiable attacks upon their character, but does not permit the summary fining and imprisonment of critics, even when their criticisms go beyond what may be deemed proper limits, provided such animadversions do not clearly tend to obstruct the administration of justice in a then pending case.

Brooklyn's Grand Old Man — Benjamin D. Silliman, who enjoys the distinction of being the Nestor of the New York bar, has just passed his 92d birthday. To have reached such an advanced age is in itself extraordinary, but to this must be added the even more notable fact that Mr. Silliman's mental powers are as well preserved as his physical. In the enjoyment of excellent health and naturally proud of the fact that he has never yet had any need of eye-glasses,

he still takes the liveliest interest in men and affairs, scans as carefully as ever the columns of his favorite papers, enjoys the rare company of his books, of which he possesses a large and splendid collection, and attends to his law business in New York as methodically as he did half a century ago. By his associates at the bar Mr. Silliman is held in the highest esteem, his views on historical as well as legal questions being sought by many of the most eminent professional men in the Greater New York. It is the hope of all who know him—in which hope the ALBANY LAW JOURNAL most heartily joins—that this venerable scholar, lawyer and jurist may live to pass the century mark.

Judge Brewer, of the United States Supreme Court, as presiding judge of the United States Court of Appeals, sitting at St. Paul, recently had occasion to severely rebuke an attorney, T. A. Green, of Denver, Col., for denunciatory and abusive language toward the judiciary. Mr. Green was counsel for Thomas D. Kelley in a mining case which came before the United States Court of Appeals. At the opening of the court, referring to the argument of the previous day, in which Mr. Green had bitterly denounced District Judge Hallet of Colorado, Judge Brewer said: "The brief of T. A. Green contains page after page of denunciation and abuse of the judges. That such matter is irrelevant and scandalous is evident. No such outrage on common decency can be tolerated. The name of T. A. Green will be stricken from the record as solicitor and counsel of Thomas D. Kelley, and he will no longer be heard in this case." In other words the lawyer was practically disbarred, so far as the particular case was concerned. In order not to punish the litigant as well, however, the court gave Mr. Kelley thirty days' time within which to substitute a new brief. It is somewhat difficult to define the power of a court in respect to scandalous matter contained in the briefs of counsel. Happily, it is not often that courts find it necessary to apply so severe a

rebuke as was administered in the case of the Denver attorney.

Poll parrots are often known to talk, and are frequently noted for their garrulity, but it isn't every day that one of these feathered favorites takes the witness-stand in a court of law, and has his or her evidence recorded by a stenographer. Such an incident, however, enlivened Judge Van Wart's civil court in Williamsburg the other day, when, after the filing of heaps of affidavits and the taking of much oral testimony in the attempt to determine the ownership of a parrot, the judge finally decided to let the much-coveted bird speak for itself. "To my mind," sagely remarked his honor, "the parrot is the missing link in this chain of conflicting testimony, and its presence will decide its rightful ownership." One John Kleinholz had possession of the pet, which is described as being endowed with extraordinary intelligence and an unusually large, lurid and picturesque vocabulary. Kleinholz asseverated most positively that he had bought the bird from a shipwrecked mariner who had sailed the Spanish main. On the other hand Samuel November, the plaintiff in the action, contended that the bird was his, having strayed away from his home and been captured by his neighbor, Kleinholz. When the case was called for the thirteenth time, Judge Van Wart ordered the marshal to bring in the parrot. This was done, the bird being in a gilded cage, and Kleinholz was commanded by the court to "tell her to come out of her cage and take the stand." The wise bird, instead of complying, removed a beakful of flesh from one of the defendant's fingers and cried, in such good English as to astonish the judge: "Go away! Go away! Polly wants papa!" The plaintiff, November, then tried his luck, with far different results. As the plaintiff in the suit approached the cage, the bird is described as having smoothed her ruffled feathers, cocked her head to one side to peer into his face, and sidled along the perch confidently in his direction. When he inserted his hand in the cage she held out one foot and then

hopped blithely into his palm. The veracious chronicler of what happened in the court on this interesting occasion continues: " 'Kiss papa!' said November, in a voice choked with emotion. He lifted the bird to his face, and she pecked gently at his lips, croaking gravely, 'Polly's papa!' And when November repeated to her the judge's injunction that she should tell the truth, the whole truth and nothing but the truth, she murmured, rubbing her crest against the plaintiff's chin, 'Polly's a good Polly.' Only once thereafter did the bird show agitation, and that was when Kleinholz approached her again, at the judge's command, to see if she would talk to him. Polly uttered a screech and took wing to the window whence no one but November could coax her to descend. That settled it. November was adjudged Polly's rightful owner, and Kleinholz left the court with a threat to sue for the bird's board and lodging."

Our esteemed contemporary, the Canada Law Journal, suggests that we "should let the politicians discuss the arrangements of the Canadian government in respect to the Klondike gold mines," adding that our indignation over the blood-money tax which Canada will attempt to collect from American miners in British Columbia is entirely misplaced. Our Canadian namesake goes on to pat the Canadian government on the back, talks loftily of the maintenance of the law's supremacy in British Columbia in spite of the presence of "a large number of roughs from the United States," and feels cock-sure of the ability of the government to protect all law-abiding citizens as well as to collect all government dues without having to call in the assistance of Judge Lynch, "who still seems in all the states of the union, with the exception of those in good old New England, a necessary and much invoked official." This is all very good, as far as it goes, but it does seem somewhat singular that on the subject of the justice and propriety of the blood-money tax on the struggling miners, which is the point we

sought to emphasize, our esteemed contemporary is as silent as a Little Neck clam.

In the appointment of Mr. William N. Cohen as a justice of the New York Supreme Court, in the first department, to succeed the late Justice Sedgwick, Gov. Black has made a most excellent selection. While comparatively a young man, Mr. Cohen has had the advantages of a varied professional experience, which has included the conduct of many important cases. Mr. Cohen is a graduate of Dartmouth College and of the Columbia Law School. To an excellent academic training he adds the fruits of large experience in actual and difficult professional work, for it has been truly said of him that there are few, if any, lawyers of his age in the metropolis who have spent more time in actual court work than he. Those best acquainted with Mr. Cohen unite in declaring that he possesses, in large degree, the ability and temperament necessary to properly perform the duties of the important place to which he has been appointed. Mr. Cohen's designation will hold till January 1, 1899, and the prediction is already freely made that the performance of his judicial duties will be so satisfactory that he will be his own successor.

We observe that a number of our contemporaries are in the habit of transferring to their own columns original matter appearing in the ALBANY LAW JOURNAL without the common courtesy of indicating its source. In some other cases, one or perhaps two articles are properly credited, while several others are used bodily without credit. This is a practice which ought to be condemned and discouraged by all right-minded journalists. Apart from the questionable morality of the thing, it not infrequently leads to improper credits involving the rankest injustice. For example, the Minnesota Law Journal for August, which is before us, contains, among other very interesting matter, the story of the Albany medical expert and the manikin, original with us, but which we find credited to the Washington Law Reporter, which took it

from our columns and published it as original matter. Our esteemed Minnesota contemporary, in its desire to do justice, thus accomplished the very opposite by giving credit where it was (supposed to be) due. This is only one case of a number which have occurred within the past few months. We hope it will not be found necessary to say anything further on this somewhat unpleasant subject. Our contemporaries are entirely at liberty to help themselves and their readers to any of the good things which we are constantly publishing (except specially copyrighted matter) but we must insist that they give credit where credit belongs.

The Supreme Court of the District of Columbia, in *Woods v. James A. Gary*, Postmaster General, etc., held that the power of removal from office is incident to the power of appointment—that an act which confers upon the head of a department a power of appointment *ipso facto*, confers a power of removal as effectually as if the act expressly gave that power. In this case the complainant sought to enjoin the defendant from removing him from his office as Superintendent of the Mails at Louisville, Ky. The case has attracted considerable attention because of the fact that the validity of the regulations adopted by the Civil Service Commission restricting the power of removal from office were involved. The question of the jurisdiction of a court of equity to enjoin the head of a department from exercising the power of removal was considered and determined adversely to the existence of such jurisdiction, the court holding that the power of removal is not affected by the Civil Service act of January 16, 1883, except as to removals for refusing to contribute to partisan objects, and the rules and regulations adopted by the Civil Service Commission, which seek to further restrict the exercise of the power of removal are *ultra vires*, and void. The court (Mr. Justice Cox) thus sums up the findings: "To sum up, I conclude that, apart from the Civil Service Act, the Postmaster General had the authority to remove the complainant from office at his pleasure; that this act

makes no change in this respect, except to forbid removals for refusal to contribute to partisan objects; that the power to the commission and the President to establish rules to carry that act into effect does not authorize any rule which shall make a change in the law in this respect, and that even if this court had jurisdiction in a case like the present, the complainant is not entitled to the relief prayed."

### Notes of Cases.

In *Fisk v. City of Hartford*, decided by the Supreme Court of Errors of Connecticut in July, 1897 (37 Atl. R. 983), it appeared that a city for many years appropriated about one-half of the volume of a river, the use of the waters of which belonged to plaintiffs, who were riparian owners and mill proprietors. The greater part of the water was returned to the river in the form of sewage, so that plaintiffs sustained no substantial damages. The city thereafter, for the purpose of abating the nuisance caused by such sewage, built a sewer, diverting it from such street. It was held that as the city, under its charter, had the right to dispose of its sewage as it saw fit, a bill by plaintiffs to enjoin it from so diverting "the sewage" would not lie, whether the city had or had not the right, as against plaintiffs, to take and use the water. The court said in part:

"If the complaint could be regarded as one brought simply to enjoin the city from taking its water supply, or any part of it, from the tributaries of Park river, the case thus presented would be a very different one from the present case; but it cannot be so regarded. The complaint is not brought to have the city enjoined from diverting the water of Park river or its tributaries into the reservoirs and distributing pipes of the city or from using the water so diverted, but it is brought to restrain the city from diverting its sewage into the intercepting sewer; and this is the very gist of the complaint. The allegations of the complaint are, in effect, that this sewage has heretofore been permitted to flow into Park river; that it is available for use at the plaintiffs' mills; that the city now intends to divert it into the intercepting sewer, past the plaintiffs' mills; that this will greatly lessen the flow of the river, to the plaintiffs' damage; that the city has no right to thus divert its sewage from Park river, and should be enjoined from doing so until it has paid or satisfied the plaintiffs' damages. It is true the complaint may be fairly said to allege, in effect, that the city gets its water supply from waters which belong to the plaintiffs, and that it has no right, as against the plaintiffs, to take and use such water as it does. But the complaint does not ask

to have such taking and use enjoined against. It only asks to have the city enjoined from disposing of that water after it has become sewage.

"Now, it is quite clear that the city either has, or it has not, the right, as against the plaintiffs, to take and use the water which constitutes its supply, as set forth in the complaint; and in either case we think it is equally clear that the city has the right, as against the plaintiffs, to dispose of that water after it enters the sewerage system as sewage, under its charter, as it sees fit. In other words, the plaintiffs may or may not have the right to have the whole or a part of the water supply of the city returned as water to Park river: but in either case they have no right to have it so returned after it has become sewage, or to have it returned through the sewerage system of the city, which are in effect the rights claimed in the present case. If the city has the right, as against the plaintiffs, to take and use the water in its reservoirs, then, clearly, it has the further right, as against them, either before or after it is used, to dispose of it under its charter as it sees fit. If, on the other hand, it has no right, as against the plaintiffs, to take or use the waters in its reservoirs, which is, we think, the case stated in the complaint, this fact of itself does not give the plaintiffs a right to control the disposition of such water after it has entered the sewerage system and become sewage. That control still remains with the city, and ought to remain with it.

"As the court is bound to take judicial notice of the city charter (Gen. St., sec. 1087), we know that full control over its sewerage system, and over the disposal of sewage, is conferred upon the city; and there is nothing in the entire record which shows any loss of such control, or which shows that the plaintiffs have any rights which the city is bound to consider in dealing with its sewer system or in dealing with the disposal of sewage. In this view of the case it makes no difference whether the sewage is or is not injurious to health, or whether its open flow has or has not otherwise become a nuisance. In either case the city still has, and ought to have, full control over it and the pipes, drains and sewers through which it flows, or can be made to flow. If the city wrongfully takes and uses the plaintiffs' water, the remedy for such a wrong is ample, either by an action at law for damages, or, in a proper case in equity, by injunction: but where, as in this case, the plaintiffs apparently condone the wrongful taking and using of the water, on condition that it shall be allowed to come back to them in the form of sewage through the city sewers, and assert a right to sewage as such, and to have it flow through the sewers as it has been accustomed to flow, they cannot have the remedy which they now seek, simply because they have not shown that they possess any such right. The complaint clearly shows that it is the sewage of the city, and

not the waters of Park river or its tributaries in any proper sense, which the city is about to turn into the intercepting sewer; and it is this precise diversion and nothing else which the plaintiffs seek to have enjoined. For the reasons given, we are of opinion that they are not entitled to the injunction."

In *Union Stove Works v. Frederick Klingman*, decided by the New York Supreme Court, Appellate Division, First Department, in August, 1897, the plaintiff furnished, and set up in flats erected by defendant, several furnaces, connected with the chimneys by stovepipes, and with registers on the different floors by hot-air pipes, which were included in the contract, and were put in while the buildings were in process of erection; iron lath and tin being furnished and put in where the pipes were built into the partitions. A number of ranges, also furnished under the contract, were equipped with warming closets, water backs, boilers, pipes, etc., were set upon hearths provided for that purpose, and were connected with the chimneys and the water pipes. Defendant subsequently sold the houses, and the furnaces and ranges passed with the realty. *Held*, that the furnishing of such furnaces and ranges, with their attachments, and the work done in placing them in positions, was labor performed and materials furnished in "erecting" the houses, within the Mechanic's Lien statute. The court (Judge Alton B. Parker writing the opinion) said, in part: "We agree with the trial court that the labor performed in setting the furnaces and ranges, and the furnishing of such furnaces and ranges with the necessary pipes and appurtenances, constituted labor performed and materials furnished in the erection of the houses, within the meaning of the statute. The buildings for which these materials were furnished, and on which the labor for which recovery was had was performed, were four five-story flats, situated in the city of New York. They were built by the defendant for the purposes of sale, and they were subsequently sold, the furnaces and ranges passing into the possession of the purchaser as part of the structure. The furnaces were set in the cellars of the houses, and connected with the chimneys by stovepipes, and to the buildings by hot-air pipes running through the houses and to the different floors. The hot-air pipes, the furnishing of which constituted part of the entire contract, which included hot-air furnaces, Astor ranges, boilers and attachments, and the value of which is included in the recovery in this action, were put in by the plaintiff while the buildings were in process of construction, and while the partitions were being built. They ran to registers on the different floors, and where the pipes were built into the partition, the plaintiff furnished and put in iron lath and tin. The ranges were equipped with warming closets, water backs, boilers, pipes,

tubes and couplings, were set into position on hearts provided for that purpose, and were connected to the chimneys by the smoke pipe. They were also connected to the water pipes running through the buildings by iron-pipe connections screwed to the boilers. While it is true that some portion of the material for which recovery has been had could have been removed without difficulty, notably the ranges, the object of the erection of the buildings and the circumstances surrounding their purchase and their annexation to the freehold are sufficient to support the conclusion that it was the intent of the parties that they should be annexed to the realty and pass as fixtures. It is the general rule that fixtures of this character, whether actually or constructively annexed to the freehold, pass by conveyance or mortgage where there is nothing to indicate a contrary intention. (*Pratt v. Baker*, 92 Hun, 331; 36 N. Y. Supp. 928; *Grosz v. Jackson*, 6 Daly, 463; *Voorhees v. McGinnes*, 48 N. Y. 278, 282; *Ward v. Kilpatrick*, 85 N. Y. 413; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1; 25 N. E. 1060; *Buckley v. Buckley*, 11 Barb. 43, 63; *In re Eureka Mower Co.*, 86 Hun, 309, 312; 33 N. Y. Supp. 486; *McRea v. Bank*, 66 N. Y. 489; *Quimby v. Sloan*, 2 E. D. Smith, 594.)

In *Knight v. Tripp*, decided in the Supreme Court of California in August, 1897 (49 Pac. R. 838), it appeared that a person about to undergo a surgical operation, the result of which was uncertain, transferred all her property to defendant, real estate being conveyed by deed and personal property being transferred by bill of sale; but no physical change of possession took place. The intention was that the property should be used for the donor's benefit, and remain in her possession during her life, and in the event of her death from the operation, defendant was to distribute it according to the directions of an unsigned written memorandum. It was held that the transaction was void as a gift. The court said in part:

"Section 1147 of the Civil Code reads as follows: 'A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.' By verbal gift is meant an oral gift—one which cannot be proven by any writing. Many different transfers are shown in this case, but all purport to be sales, or they are blank indorsements. Not one of them evidences a gift. That must be proven by oral evidence. The memorandum, though made in the presence of the alleged donor, was signed by no one. The means of getting possession and control must have been given; and since the things were all capable of delivery, and there is no pretense of a symbolical delivery, it must appear that there was at the time an actual delivery of the gifts to the

donees. I think it plain that the gift was not to vest absolutely except in the event of her death from the operation. She transferred all she had, but though she knew she was in peril, she did not feel sure that her disease was mortal. She hoped to survive, but thought the issue uncertain. Had she survived she would have been without the means of support, and even though she had implicit confidence in the defendant, and may have felt sure that he would give her the use of the property, nearly all her money would have been parceled out to several donees. And then it appears that the defendant assured her that the transfers could easily be canceled, and says he would have returned everything to her had she recovered and requested it, and such was his intention. This is a complete surrender of his contention, for he could not return the property in case of her survival if the gifts were absolute, but would have been compelled to deliver them to the ultimate donees, whose bailee he was. And then the instructions taken down by him at her dictation provide for a disposition of her property only in the event of her death. The memorandum has every resemblance to a will except its execution. It provides for a disposition of all the property of Mrs. Cook in the event of her death. It directs the payment of her debts and funeral expenses. It contains a devise of her real estate, many legacies, and names a residuary legatee. Evidently Mrs. Cook expected to remain in the house and have the use of the furniture so long as she might live. This is not provided for in the instructions, and if the disposition was to take effect only at her death, it was not necessary. Of course she was to have medical aid and nursing. She had several doctors and a nurse engaged. And she directed the defendant to furnish the nurse all the money the nurse should call for. She could not know how long she might need such attention, nor what it would cost. The personal property was of the value of \$10,802.10, as the defendant testified. The cash legacies were \$8,700. The defendant has paid out \$1,800 under the instructions, and has paid none of the cash legacies or gifts. He is to erect monuments to her and her husband, and to provide for the permanent care of the cemetery lot. All the real estate and the furniture was given to the defendant. It must have seemed quite possible, when these transactions were had, that the necessities of Mrs. Cook might be so great that all these legacies could not be paid. Suppose her necessities had been such that all the personal property had been required. Certainly the defendant would have felt that she was entitled to it according to her understanding of the terms of her gift. Undoubtedly a delivery may be made to a third person for an intended donee, but the delivery and the conditions must be such that such person will at once become the bailee of the donee. The gift will still be revocable, but the possession

and present control and lawful dominion must pass from the donor to the donee. The gift may even be conditional, but one of those conditions must not be that the donor shall retain possession and the right to expend as much of it as he may require or choose to expend during life. Such a disposition is testamentary, and unless made in accordance with the Statute of Wills is void; and such, I think, was the disposition made in this case. See on this subject *Basket v. Hassell* (107 U. S. 602; 2 Sup. Ct. 415); *Daniel v. Smith* (64 Cal. 346; 30 Pac. 575)."

In *Latimer and the Irving Savings Institution v. Wm. H. Buxton and Others*, the New York Supreme Court, Appellate Division, First Department, held that a paying teller is liable to the bank for money stolen from it by co-employees who are his subordinates, with his knowledge and connivance. A defalcation having been discovered by the officers of a bank, the secretary confessed that he had appropriated a part of the missing money, which he claimed to have restored, stated his willingness to make good anything for which he was directly or indirectly responsible, and executed a mortgage to secure a written agreement that if, after further investigation, there should be found to exist any "indebtedness" from him to the bank, he would pay the same. It was held that the security covered the mortgagor's liability to the bank for money stolen by employees through his connivance or culpable negligence.

An unusual scene is reported to have taken place at an inquest held on the 1st inst., at Exmouth, by Mr. Burrows, the deputy coroner, says the *Solicitors' Journal*. One of the witnesses, a man named George Axon, refused to take the oath, and when it was suggested that he should take the Scotch oath, remarked that he objected to take God's name in vain. The deputy coroner remarked that it was not for the witness to say whether he was taking God's name in vain, and ordered him to be detained to the end of the inquiry. When the verdict had been returned the deputy coroner said he should fine the witness 40s. — first, for refusing to be sworn; and secondly, for being impudent in having remarked that he was in no hurry to leave. The deputy coroner then thanked the jury and dismissed them. Before leaving the room Mr. S. Firth, one of the jurymen, and a member of the local district council, said that the deputy coroner did not know how to administer the oath. The deputy coroner at once ordered him into custody and made out a warrant for his imprisonment during pleasure. Mr. Firth spent the night at Exmouth police station, and on the following morning was removed to Exeter prison. Later in the day he was released, having tendered an apology to the coroner.

#### NEW YORK COURT OF APPEALS VACANCY.

THE RETIRING CHIEF JUDGE AND THE TWO NOMINEES, ONE OF WHOM WILL BE HIS SUCCESSOR.

IT has been well and truly said that so far, as a rule, the policy of an elective judiciary which prevails in the State of New York has been fully vindicated in the character of the men who have been elected to serve the people in a judicial capacity. Especially is this true of the highest legal tribunal in the Empire State — the Court of Appeals — whose decisions are regarded as of as high authority as those of any other State in the Union. It may be said, indeed, without invidiousness, that the utterances of the highest court in this State are regarded by the legal profession as second only in importance to those of the Supreme Court of the United States. It is therefore a matter of more than ordinary importance when, by reason of constitutional mandate, a change is necessary in the personnel of that tribunal. With the close of the present year the honored head of the court, Chief Judge Charles Andrews, retires to private life, full of years and full of honors. Under the limitation contained in the Constitution of the State of New York, which provides that "no person shall hold the office of judge or justice of any court longer than and including the last day of December next after he shall be seventy years of age," Chief Judge Andrews must retire, he having reached the age of 70 years on the 27th of last May. Judge Andrews was one of the original members of the Court of Appeals, which was formed under the Constitution of 1868. He was elected in May, 1870, and the court commenced work on July 1, 1870. His retirement by reason of the age limit will be a loss to the State, for he is as vigorous in mind and body to-day as he was ten years ago.

Judge Andrews was elected chief judge in the fall of 1891, and assumed the duties of his office on January 1 following. He had previously served as chief judge for the term of one year by appointment by Governor Cornell, on the resignation of Chief Judge Folger to become secretary of the treasury under President Arthur. In the fall of the same year he was nominated for chief judge by the Republican party, but was defeated by Judge William C. Ruger, a Democrat, and his next-door neighbor in Syracuse. This was in 1882, when Grover Cleveland was elected governor over Folger by over 192,000 plurality. Andrews was defeated by 100,000. Judge Andrews' defeat did not affect his tenure of office as associate judge, and on the death of Judge Ruger he received the nomination of both the Republican and Democratic parties, and, of course, the election. It was the second time he had received the nomination of both parties, the first being the second



time he was a candidate for associate judge. It was provided that at the first election after the formation of the court seven judges should be chosen, and no person could vote for more than five of them. This necessarily resulted in a minority election of two judges. Andrews and Folger were the minority judges.

Charles Andrews was born in New York Mills, Whitestone, Oneida county, N. Y., May 27, 1827, and received his preliminary education in the common schools and at Cazenovia Seminary. At an early age he decided upon the law as a profession, and accordingly pursued his legal studies in the office of Sedgwick & Outwater, of Syracuse. He was admitted to the bar in January, 1849, and immediately began practice in the young and growing city. In 1851 he formed a copartnership with Charles B. Sedgwick, under the firm name of Sedgwick & Andrews, which continued until 1855, when George N. Kennedy was admitted. The firm of Sedgwick, Kennedy & Andrews continued in successful practice until the elevation of Mr. Andrews to the bench of the Court of Appeals in 1870. In 1853 Judge Andrews was elected district attorney of Onondaga county for a period of three years. He was mayor of Syracuse in 1861, 1862 and 1868, and took an active part in securing the location of Syracuse University, of which he ever since has been a trustee, being one of the original five representing the city of Syracuse. In 1867 he was elected a delegate-at-large to the State constitutional convention, which assembled at Albany in 1868. In these various capacities he won a high reputation for ability, fidelity and integrity. Hamilton and Columbia Colleges have conferred upon him the honorary degree of LL. D.

As a jurist Judge Andrews has officiated with great ability, dignity and justice, and has won the confidence and esteem of the members of the bar and the public. His opinions are models of judicial logic, and command wide attention. It may truly be said that Judge Andrews occupies a foremost position in the bar of the Empire State. The regret that the court is compelled to lose his services is well-nigh universal, as is also the hope that in his retirement from the bench to private life he may, as there is at present every indication, enjoy many years of well-earned repose.

Chief Judge Andrews' successor is to be chosen next month — November 2. As already announced in these columns, the nominations by the two great parties have been made, and they are both men of exceptional ability, learning and integrity. Both have had ample experience both at the bar and on the bench, and it is a gratifying fact that in making the nominations the State committees, Republican and Democratic, kept before them and followed in their action the highest ideals. Whichever of the nominees — Judge Wallace or Judge Parker — shall be chosen, the court will suffer no loss of that high prestige and deep respect which

it has so justly earned. Brief sketches of the nominees are appended:

#### ALTON B. PARKER.

THE DEMOCRATIC NOMINEE FOR CHIEF JUDGE OF THE COURT OF APPEALS.

ALTON BROOKS PARKER was born at Cortland, N. Y., May 14, 1851, and is the son of John Brooks Parker and Harriet F. Stratton. His ancestors for several generations were residents of Massachusetts, his great-grandfather, John Parker, having served for three years in the Revolutionary War. His grandfather, John Parker, in 1794 married Elizabeth Brooks, of Worcester, Mass., from whom the surname of the subject of this sketch is derived.

The early education of Mr. Parker was obtained in the academy and normal school at Cortland, N. Y., where his family resided. He commenced teaching at the age of 16 to get money to enable



him to continue at school, after which he adopted the law as a profession, and entered the office of Schoonmake & Hardenburgh, at Kingston, N. Y., passing thence to the Albany Law School, from which he graduated in 1872. After being admitted to the bar, he practiced in Kingston, shortly afterward forming a law partnership with W. S. Kenyon, Jr., which continued until 1878.

In 1877, Mr. Parker, at the age of 26, was elected surrogate of Ulster county. The fact that he was the only one on his ticket elected, while the others were defeated by a thousand votes, was a strong testimonial to the popular esteem in which he was held. This was more strikingly shown in 1883, when, having served six years, he was re-elected to the office by a majority of 1,400 against a competitor whose popularity, as county judge, had carried the county twice successively by large majorities. During the time he held the position of surrogate he carried on a large general law practice, and was actively at work in the trial of causes

and argument of appeals. In 1885 he was appointed a justice of the Supreme Court to fill the vacancy occasioned by the death of Hon. Theodor R. Westbrook. He entered at once on the duties of his office for the current year, at the close of which he received the unanimous nomination of the Democratic party for justice for the full term, a nomination which the Republican convention did not oppose. This was a compliment seldom, if ever, before paid to a candidate for that position in the Third Judicial District.

In January, 1889, the Second Division of the Court of Appeals was created, and Judge Parker was appointed to it, being the youngest man that ever sat in the Court of Appeals in New York State. He retained this position until the dissolution of the court in 1892. In consequence of a request made in that year by members of the judiciary of New York city, Governor Flower appointed Justices Follett and Parker as members of the General Term of the First Department, in which important and arduous judicial position Judge Parker continued to work until the creation of the Appellate Division, when he resumed the duties of the trial terms in his own district. When Mr. Justice Barrett became ill Judge Parker was designated by Governor Black to take his place temporarily on the Appellate Division in New York city.

Before his elevation to the bench, Judge Parker took an active part in politics, receiving many marks of the favor with which his party regarded his influence and his efficient service, being elected a delegate to nearly every State convention, and to the National convention of 1884, which nominated Mr. Cleveland, whom he actively supported. In 1885 he was induced by the united efforts of the Democratic candidates for State offices, against his own wishes, to accept the chairmanship of the Democratic executive committee and to conduct the campaign of that year, which resulted auspiciously for the party.

Opportunities for entry into political official life have been frequently presented to him, but always refused, for he early determined not to be turned aside from his chosen profession or positions in the line of it. He was asked to be a candidate for secretary of state in 1883 by Daniel Manning and other party leaders. President Cleveland tendered him the office of first assistant postmaster-general in 1885, which he declined, and Vice-President Stevenson shortly afterward accepted. Later in that year a number of the party leaders assembled together advised his candidacy for the office of lieutenant-governor, but he would not entertain the suggestion.

Even since he has donned the ermine, men prominent in party counsels have advised, and portions of the press have suggested, his candidacy for prominent official positions, but he has steadfastly declined.

### WILLIAM J. WALLACE.

THE REPUBLICAN NOMINEE FOR CHIEF JUDGE OF THE COURT OF APPEALS.

JUDGE WILLIAM J. WALLACE, of Albany, the nominee of the Republican party for the office of chief judge of the Court of Appeals, is now, and has been for a number of years past, a judge of the United States Circuit Court for the circuit comprising the States of New York, Connecticut and Vermont. The fact that he would willingly give up his life tenure as a circuit judge of the United States Court for a place on the New York Court of Appeals bench is eloquent proof, in itself, of the high honor and responsibility which attaches to a seat in that august tribunal.

Judge Wallace was born April 14, 1839, at Syracuse, N. Y., and is thus twelve years the senior of his Democratic opponent, who, in case of his election, would be the youngest judge ever chosen as a member of that court. For nearly a quarter of a



century — or, to be exact, for twenty-three years — Judge Wallace has been continuously on the bench, and has during all that time not only administered justice with an even hand, but upheld the best traditions of the bench. His career, though a long, active and busy one, full of hard mental labor and weighty responsibility, is naturally devoid of incident, except such as is connected with the performance of his judicial duties. Judge Wallace did not enjoy the advantages of a university education, but he improved such chances as he had to the utmost. He studied law at Hamilton College, and was admitted to the bar after a course in the law school of that institution. For several years thereafter he practiced his profession in Syracuse, with success and honor. Like the distinguished jurist whose successor he and his friends hope he may prove to be, Judge Wallace has served as the chief executive of his native city, having been chosen mayor in 1873. In 1874, upon the recommendation of Senator Conkling,

Mr. Wallace was appointed by President Grant United States district judge for the Northern District of New York, in which capacity he served until 1882, when he was appointed by President Arthur a circuit judge of the United States, which responsible office he now holds. In January, 1892, Judge Wallace removed from Syracuse to Albany, taking up his residence at No. 148 State street. The Republican nominee, it will thus be seen, has had twenty-three years' experience on the Federal bench. In character, attainments and judicial temperament he is well fitted to adorn the Court of Appeals bench. The Evening Journal says of him: "Judge Wallace was a life-long friend of the late Senator Conkling and enjoyed that leader's thorough confidence. He first became acquainted with the senator when the latter, as a young lawyer, came to Hamilton to examine a class of which Judge Wallace was a member, for admission to the bar of the State, and through the tilts that took place between the examiner and the student a cordial friendship and respect for the other's ability arose. This friendship lasted without interruption until the very close of Senator Conkling's life. It was frequently said of Judge Wallace that he was the one man who dared tell Senator Conkling when he had made a mistake."

#### NON-PARTISANSHIP IN THE SELECTION OF JUDGES.

THE removal of judicial nominations from the purely political atmosphere to the higher plane of fitness and capacity has received a notable illustration in the action taken by the Ulster county bar upon the nomination of Judge Parker for the chief judgeship.

Judge Parker began practice at Kingston in 1873, and has ever since been a resident of Ulster county. Immediately after his nomination, a call was circulated among the members of that bar, which received the signatures of substantially all the lawyers practicing in the county, and very nearly equally divided as to politics. The meeting was presided over by Reuben Bernard, who has been a Republican since 1856, is president of one of the Kingston national banks, Kingston Board of Trade, and head of one of the oldest and best-known law firms in the county. Mr. Bernard spoke in part as follows:

"A great political party has honored itself by nominating for chief judge of the Court of Appeals a brother member of the Ulster bar. No office is so desirable, so in the line of legal advancement, so fitting a crown to the lawyer and the judge as that to which Judge Parker has been nominated. The older members of the bar remember Judge Parker when he was in active practice. They know his ability, honesty, courtesy and fairness, and they know that, however excited he might become in a legal contest, he never

forgot to be a gentleman. Later in his life, in the discharge of judicial duties, he has been fair, kind, obliging and unbiassed, never affected by prejudice, passion or personal or political considerations. With large experience on the bench, in the meridian of life, with health and strength, he will, if elected, give the best years of his life to the discharge of the duties of the high office for which he has been named. It will be a personal pleasure to each one here to see Judge Parker elected, for all are united in the feeling that his promotion will be worthily bestowed."

The resolutions which follow were prepared by a committee headed by former Surrogate Carpenter, a prominent Republican, who has also served as district attorney of the county:

"The members of the bar of Ulster county, without regard to their political opinions, take this occasion to extend to Hon. Alton B. Parker their heartfelt congratulations upon his nomination to the exalted office of chief judge of the Court of Appeals. Judge Parker's career as advocate and jurist forms a bright page in the history of the legal profession in this county and in the State. Long acquaintance with him and close observation of his course at the bar and on the bench, enable us to declare that he possesses in eminent degree all the qualifications required by the exacting duties of a place in the highest court of the State. The recognition by others of his fitness for promotion to that court, the renown he has won throughout the State during twenty years of judicial service as surrogate of Ulster county and justice of the Supreme Court, and his continued and deserved advancement, are sources of personal pride to those who have been most intimately associated with him; and it is a great pleasure to place on record the high esteem in which he is held by the bar of Ulster county, the county in which he laid the foundation for his present honorable position, and where he has always lived since attaining his majority.

"Not only as lawyer and judge, but also as a man, a neighbor and a friend, Judge Parker commands the respect and confidence of his associates at the bar and of the entire community. His amiable social qualities, a kindly disposition towards all who come in contact with him, professionally or socially, his uniform courtesy and manly, dignified bearing, make him an ideal American citizen, whom all delight to honor.

"For these reasons his fellow-members of the Ulster bar have met to express to him their appreciation of the distinguished honor deservedly conferred upon him, and to extend to him their best wishes for the future."

Addresses were made by former Senator Linson and United States Commissioner Daniel B. Deyo, who was lately elected counsel for the county by the present Republican Board of Supervisors, and other lawyers of differing political views.

Especial attention is called to this unusual circumstance by reason of its being a long step in the direction of non-partisanship in the judiciary, and as indicating a rapidly growing disposition toward independence on the part of the bar in that respect, and recognition of experience and fitness as the true test for judicial position.

#### JURISDICTION OF THE UNITED STATES OVER PLACES HELD FOR PUBLIC PURPOSES.

**J**URISDICTION over territory in a State may be acquired by the United States, under the seventeenth clause of section 8 of article I of the Constitution, by the purchase of such territory, with the consent of the State, "for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." The Constitution gives congress the power of exercising exclusive legislation over such place, and this is held to mean exclusive jurisdiction. The State's consent to the purchase for any one of these constitutional purposes invests the United States with exclusive jurisdiction, and the State cannot, even by the express language of its legislation, reserve to itself any part of this jurisdiction. (The reservation of the right of serving process for causes of action arising outside such territory is not held to be an actual reservation of a part of the exclusive jurisdiction intended to be vested in the United States.) But it would seem that this is only true when the purchase is for one of the constitutional purposes. By correct construction, "other needful buildings" would mean buildings of the same character as those specified—buildings intended for military or defensive purposes. A more comprehensive meaning has, indeed, been sometimes given to the expression, but no justification for such construction is found.

In Pinckney's draft of a constitution there was this clause: "To provide such dock-yards and arsenals and erect such fortifications *as may be necessary* for the United States, and to exercise exclusive jurisdiction therein." (This draft was submitted May 29, 1787.)

"There was no corresponding provision in the Constitution reported by the committee of detail, August 6th, but the committee of eleven, by report of September 5th, recommended the adoption of the clause as it now reads, except that it did not have the words, 'by the consent of the legislature of the State.' In the debate on the proposition Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the *strongholds proposed* would be a means of awing the State into an undue obedience to the general government. Mr. King thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word 'purchased,'

the words 'by the consent of the legislature of the State.' This would certainly make the power safe." (5 Elliot's Debates, 511.)

"And in the Federalist (No. 43) it is said: 'Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it.'

So Story says (section 1224): "The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, etc., seems still more necessary for the public convenience and safety. The public money expended on such places, and the public property deposited in them, and the nature of the military duties which may be required there, all demand that they should be exempted from State authority. In truth, it would be wholly improper that places on which the security of the entire Union may depend should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable, since it can only be exercised at the will of the State; and therefore it is placed beyond all reasonable scruple. Yet it did not escape without the scrutinizing jealousy of the opponents of the Constitution, and was denounced as dangerous to State sovereignty."

"And, as observed by Judge Seaman (In re Kelly, 71 Fed. Rep. 545, 549):

"The rule thus stated, whereby legislative consent operates as a complete cession, is applicable only to objects which are specified in the above provision, and cannot be held to so operate, *ipso facto*, for objects not expressly included therein. Whether it rests in the discretion of congress to extend the provision to objects not specifically enumerated, although for national purposes, upon declaration as 'needful buildings,' and thereby secure exclusive jurisdiction, is an inquiry not presented by this legislation (see 114 U. S. 541); and I think it cannot be assumed by way of argument that such power is beyond question. In New Orleans v. U. S. (10 Pet. 662, 737), the opinion of the Supreme Court is expressed by Mr. Justice McLean, without dissent, as follows:

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction."

"And, in U. S. v. Bevens (3 Wheat. 336, 390), the claim was urged that the words 'other place' would include a ship of war of the United States lying at anchor in Boston harbor, and bring it within the statute defining murder committed 'within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the sole jurisdiction of the United States;' but it was stated by the court, through Chief Justice Mar-

shall, that 'the construction seems irresistible that by the words 'other place' was intended another place of a similar character with those previously enumerated:' that 'the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.' (See, also, *The Federalist*, No. 43, by Madison.)"

Section 355 of the Revised Statutes prescribes that no public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort fortification, navy-yard, custom-house, light-house, or other building, of any kind whatever, until the \* \* \* consent of the legislature of the State in which the land or site may be, to such purchase, has been given. This section is in part based on the clause of the Constitution referred to, and in part not. The consent of the State to a purchase, given in order to satisfy the requirement of this section, would invest the United States with exclusive jurisdiction, if the purchase be for one of the constitutional purposes; but the section provides for other purposes also, and as to these it would seem that a simple consent to the purchase (assuming that such consent, being for a purpose not falling under the clause of the Constitution, amounts to a cession of jurisdiction) would only carry with it so much jurisdiction as would be necessary for the purpose of the purchase. Probably this would be held to be concurrent jurisdiction. Taking into consideration the fact that States cannot, under any circumstances, interfere with the instrumentalities of the government of the United States, it may, indeed, be questioned whether, even under this view, unnecessary precautions have not been taken in regard to the acquisition of jurisdiction; and certainly it cannot be presumed that a State intends to part with more of its sovereignty than is necessary. A consent to the purchase, under section 355, Revised Statutes, if the purchase be for other than one of the purposes described in the clause of the Constitution, may, therefore, be accompanied with any limitations not interfering with an instrumentality of the government of the United States.

The most common way of acquiring jurisdiction, however, is by the State's expressly ceding it to the United States. In such case the State may make similar limitations, and this even if the place be used by the United States for one of the purposes mentioned in the clause of the Constitution. To bring the case under the clause there must be a purchase with consent. (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 539; *Chicago and Pacific Ry. Co. v. McGlinn*, 114 U. S. 549; *Benson v. U. S.*, 146 U. S. 331; *In re Kelly*, 71 Fed. Rep. 545; *In re Ladd*, 74 Fed. Rep. 399.)

G. NORMAN LIEBER,  
*Judge-Advocate-General, U. S. War Department.*  
WASHINGTON, D. C., Sept. 28, 1897.

#### SUNDAY LAWS.

THE absurdity of trying to enforce laws respecting Sunday observance, however satisfactory it may be to keep them on the statute book for other purposes, is shown by *Williams v. Wright* (13 Times L. R. 551). The Act 22, Geo. III, c. 49, imposes a penalty for advertising a Sunday evening concert. The advertisement appeared in the *Times*, and after stating the time, place and programme, announced, "Tickets, 1s., 2s., 3s. and 5s." The plaintiff bought a ticket, which had printed thereon, "Admission free. Reserved seat, 1s." He said in evidence that he was not in favor of the act, and did not want to restrict rational pleasure on Sunday. But it may be assumed, from his bringing the action, that he was in favor of taking the penalty of £50 if he could recover it. The action was dismissed.

The most absurd feature of the whole proceeding was the fact that this plaintiff, who desired to enforce the law for his own personal profit, had no religious belief whatever, and refused to take the oath on that ground when he went into the witness-box. The recital of the act shows that it is directed against the "encouragement of irreligion and profaneness," and it is a grim bit of satire that its enforcement should have been sought by an irreligious person, and made the attempted means of profit to himself.

Little less absurd, in another sense and from another point of view, is the reasoning which enabled the learned judge to discourage irreligion in the plaintiff by dismissing his action. The ticket declared admission to be free, but that one shilling was to be paid for a reserved seat. The act referred only to the advertisement of public entertainments "to which persons are to be admitted by the payment of money." Charging for a seat was held not to be incompatible with free admission. So the action failed.

It would be better not to have such legislation on the statute book than to keep it there with such results. — *Canadian Law Times*.

#### A UNIFORM DIVORCE LAW.

ON the much-discussed question of a uniform divorce law, the *Baltimore Sun* has the following: "The Uniform Law Commission, which is in session in Cleveland, Ohio, has before it the draft of a divorce bill submitted by a committee. This bill is modeled after the divorce law of the District of Columbia. It was urged that as this bill was enacted by a body representing every State of the Union, it would be more acceptable to the various States than any other plan which could be suggested. Of course, it is an almost hopeless task to get people of different States, having such radical differences of views regarding marriage, to agree upon any kind of law for its

regulation or dissolution. There are all sorts of views to be met from South Carolina, where marriage is treated as so solemn an obligation that it cannot be annulled except by death, and upon whose statute books there are no divorce laws; to the Dakotas and Oklahoma, where marriage is in effect merely a temporary arrangement between two persons, to be terminated at the will of either of them. If these latter States and territories confined the operation of their divorce mills to their own citizens, the rest of the country would not have so great a cause for complaint. But as it is, persons from other States flock to the free divorce courts, and after spending a short time at a hotel to get a decree of divorce, perhaps against some innocent husband or wife, who has had no notice of the proceeding. The person seeking the divorce is usually accompanied by the person who occasions the divorce, and a new marriage takes place before the ink on the scandalous decree is dry. The confusion worse confounded results. In some States the new marriage, as well as the divorce, are null and void, children born in what was supposed to be wedlock are illegitimate, bigamy has been committed, and the descent of property is confused. In other States all is recognized as legal.

"It is the object of this Uniform Law Commission to do away with all this scandal and confusion, and to have this bill enacted in each State of the Union, under which a divorce obtained in one will be legal in all. The commission, it would seem, and very wisely, does not undertake to go into or in anywise change existing laws governing causes of divorce. The bill is directed solely to procedure in court. One excellent feature is the imposition of a heavy fine and imprisonment upon any person who publishes a notice with intent to procure or aid in procuring a divorce. The court may compel the conveyance of property held by either party after a divorce, when it appears that it belongs to the other. Testimony is to be heard in open court, and a residence of two years in a State is a prerequisite to obtaining a divorce. The bill has much to commend it, but its general adoption will be a difficult task, especially in those States which are competing for the vile trade."

#### AN ARIZONA JUDGE WHO RAN HIS COURT TO SUIT HIMSELF.

**A** STORMY life it was that ended last month, when old Jim Burnett was killed in Tombstone by William Greene—a life full of experiences of the border kind that would supply material for twenty of the most thrilling of the yellow-backed novels. The end was in keeping with the life. Burnett, a justice of the peace in Pearce Camp, left his work in order to go down on the San Pedro river, fifty miles away, and blow out with giant powder the irrigating canal

dam of his enemy, Greene. Below at the time, probably unknown to Burnett, were two young girls—one a daughter of Greene, aged 18, and her friend from Bisbee. They were caught in the flood that followed the explosion and were drowned. The father learned of the presence of his foe, saddled his horse, rode over to Tombstone, found Burnett on the main street, and shot him down. The town stood behind Greene in his deed. He has been admitted to light bail, and will be acquitted if ever brought to trial.

Since Burnett's death many are the tales being raked up about him. He was a singular personality. Strong-willed and violent in temper, he especially shone in a frontier camp. It was, therefore, quite appropriate that he should have been elected justice of the peace in 1881 at Charleston, on the San Pedro, where the rich ores of Tombstone were at that time milled.

Charleston was then a howling camp, full of freighters, miners and the wooliest of cowboys. The whiskey sold wasn't of the mildest brand, and consequently tribulation sate within the community and the Justice's Court was always open. Burnett did a rushing business. At the end of three months he duly reported, as by law required, to the county supervisors, sending in his bill for the amount due him from the county. The county fathers cut the bill down one-half. Burnett swore vigorously when he got the returns, but held no further communications with the county seat. Another three months elapsing, the county treasurer wrote Burnett to furnish his quarterly statement. The reply came promptly. It was: "To blazes with you! This court after this will be self-sustaining."

And so it was, in great shape. Every time a cowboy would get exhilarated and shoot up the town the judge would fine him several hundred dollars, and would pocket what remained after paying his constables for the arrest.

One day old man Schwartz got excited and killed a man. After the justice, as *ex-officio* coroner, had finished the inquest, he had Schwartz hauled before the bar, found him guilty of the crime, and fined him \$1,000. Schwartz wanted to appeal the case, but Burnett would issue no papers on appeal. So the defendant sent up to Tombstone for Attorney Mark Smith, now delegate to congress from Arizona. Smith came down at once and heard Schwartz's tale of woe. It was a clear case of murder.

"Pay the money, you ass!" the lawyer fairly shouted, "and then go bury yourself somewhere down in Mexico."

Schwartz paid and skipped, and the case was never again heard of in court.

But the county never received any of that coin. Those who figured on the proposition said that Burnett came out \$22,000 ahead on his office in two years.—Philadelphia Times.

## EVIDENCE OF BLOOD STAINS.

**S**TAINS of blood found upon the person or clothing of the party accused have always been recognized among the ordinary indications of homicide. The practice of identifying them by circumstantial evidence and by the inspection of witnesses and jurors has the sanction of immemorial usage in all criminal tribunals. Proof of the character and appearance of the stains of those who saw them has always been regarded by the courts as primary and legitimate evidence. It is in its nature original proof, and in no sense secondary in its character.

The degree of force to which it is entitled may depend upon a variety of circumstances, to be considered and weighed by the jury in each particular case; but its competency is too well settled to be questioned in a court of law.

Science has added new sources of primary evidence, but it has not displaced those which previously existed. The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence, and though the one may be entitled to much greater weight than the other with the jury, the conclusion of either would be illegal.

Each party is at liberty to offer such proof as he can, and if it be admissible in its nature and relevant to the issue it cannot be rejected on the ground that, by greater diligence, it might have been made more satisfactory and conclusive. Either party has the right to resort to microscopic or chemical tests, but neither is bound to do it, and neither can complain of the other for the omission. (Porter, J., in *People v. Gonzales*, 35 N. Y. 61.)

Dr. Wharton, with rare felicity, touches the very pith and marrow of this entire subject in section 777 of his *Criminal Evidence*. "Scarcely a case arises where this issue is material in which experts have not appeared ready to identify dried blood as human, and by this process to supply a link on which a conviction of a capital offense may be made to rest. It is, perhaps, a minor matter that in this way enormous expenses are heaped not only on the State, but on the accused. Experts are brought from a distance at great cost, protracted experiments are made by them, afterward to be detailed to the jury; and testimony is adduced which the defendant must meet at the peril of his life. Controvert it he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it is often either unwilling or unable to do. This amounts to a perversion of justice; but this is not the chief objection.

"Supposing experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony; what then? Is there not danger that the jury may regard the question as one determined not by ascertainable physical laws, but by their own discretion, or on the authority of particular experts? It would seem, in view of these dangers, and in view of the more recent explorations of scientists who have viewed the question not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise juries in all cases in which it is proposed to rest a conviction on the identification of certain blood stains, as human, that as matter of fact no such identification can be made out beyond reasonable doubt. That stains look like blood may be proved by experts and non-experts; that they are dried human blood can be satisfactorily proved by no one." — *Exchange*.

## English Notes.

An observation made by Mr. Justice Gainsford Bruce, at the Liverpool Assizes, to a woman whom he sentenced to a month's imprisonment for contempt of court in assaulting a witness within the precincts of the court—that in former times her hand would have been cut off for the offense—illustrates the curious conservatism of English legislators, who permit a law which has long become virtually obsolete to remain unrepealed, says the *Law Times*. By the common law, a blow in the Superior Courts or Courts of Assize, whether blood be drawn or not, is punishable by the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. So far back as 1798 this punishment was regarded as too great for the offense. Thus, when in that year Lord Thanet and others were prosecuted by an information filed by the attorney-general for a riot at the trial of Arthur O'Connor and others for treason under a special commission at Maidstone, the first three counts charged (*inter alia*) that the defendants did riotously make an assault on one I. R., and did then and there beat, bruise, wound and ill-treat the said I. R. in the presence of the commissioners. When the defendants were brought up for judgment, Lord Kenyon expressed doubts whether upon this information the court was not bound to pronounce judgment of amputation of the right hand, etc., as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts the attorney-general entered a *nolle prosequi* upon the first three counts, and the court pronounced judgment of fine and imprisonment as for a common riot. (Stephen's *Blackstone*, 6th edit., vol. IV, p. 311, note.) It is curious to note that when a similar

penalty for assault was prescribed, not by common law, but by statutory enactment, that penalty has been long abrogated by statute, whereas there seems to be a superstitious disrelish to alter authoritatively and expressly similar provisions of the common law. Thus, by the statute 33 Hen. 8, c. 12, malicious striking in the king's palace wherein his royal person resides, whereby blood is drawn, was punishable by perpetual imprisonment and fine at the king's pleasure, and also with the loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length; but by 9 Geo. 4, c. 31, s. 1, the part of the act which authorized this mutilation was repealed.

An excellent system of administering justice is in force at the City of London Court as far as disputes respecting the fit of a suit or the quality of any goods are concerned. The judge does not, as is usual, rely on his own knowledge or observation, but invariably refers the matter for decision to a trader in the locality, and on his report the judgment is based. According to the City Press, no delay occurs, as the case is merely put back for a few minutes, and as soon as the expert has given his opinion judgment is delivered.

Announcement is made of the death of Mr. Justice Cave, which took place at his residence, at Epsom, as the result of a paralytic stroke. It was understood that at the close of the last sittings his resignation was placed in the lord chancellor's hands, and there was no expectation, consequently, that he would again sit on the bench. But he was only 65 years of age, and to all appearances he was destined to enjoy for a number of years the period of repose which he had so well earned. At the bar the late judge enjoyed an extensive practice, and though not an eloquent speaker, was known as a sound lawyer and a good advocate. When raised to the bench in 1881 he soon distinguished himself by his clear and direct judgments. Few more capable judges have sat on the bench of England in recent years.

In Essex, in the year ended March 31, 1897, £12,937 10s. was paid for dog licenses. This sum represents 34,500 dogs. Licenses were also paid for 5,083 guns, whilst for killing game £5,016 was received. All these items are an increase upon last year. The increase in the number of guns is 359; of dogs nearly 1,500.

Lord James of Hereford has received a very flattering acknowledgment of the services which he rendered to both parties in the Northeastern Railway arbitration. At a meeting the directors of the Northeastern Railway expressed their thanks by a special minute, and, further, resolved "That a gold pass, available during the life of Lord James, over the Northeastern Railway system be prepared with the following inscription: 'The Right Hon. Lord James of Hereford, N. E.

Railway Arbitration, 1897.'" A resolution of thanks has also been sent to Lord James from a meeting of representatives of the men.

The force of the superstitious sanction to an oath which we were commenting on recently receives many illustrations from those who live in India, says the Law Journal. A Bengal native witness, for instance, has small compunction in paltering with the truth, but there are things which even his supple unveracity shrinks from. His legal adversary knows it, and he puts it to the magistrate thus: "Let Omichund lay his hand on his son's head and swear that what he says is true, and I am content to accept it." But Omichund, though ready to swear through thick and thin by everything else, declines this test. To be forsworn so would be to bring a blighting curse on his child. The native Indian policeman knows how to turn this sort of superstition to useful effect. A theft, say, has been committed in a village. The native policeman thereupon calls all the inhabitants together, and among them comes, of course, the person wanted. If he did not his absence would be remarked. Then the policeman gives each of them a piece of stick of the same length and tells them that the stick of the man who is guilty will have grown an inch in the morning. The guilty man believes fully that this damning evidence will be forthcoming against him, and he provides for it by cutting an inch off his stick. We have, it is to be feared, become too sophisticated and sceptical for this trick to be successful in England.

At a time when the Trade Union Congress is agitating for a change in our law in the direction of allowing greater facilities for managing strikes, it is interesting to note that in at least one American State a patrol of strikers in front of a factory is held to be a private nuisance when instituted for the purpose of interfering with the business, and it is no justification that the motive or purpose of the strikers is to secure better wages. Such is the law as laid down in *Vegeahn v. Guntner* ([Mass.], 35 L. R. A. 722). — Law Journal.

### Legal Laughs.

"What time was it," asked the judge of the rural witness, "when this affair occurred?"

"Well, sir," replied the witness, "ef I don't disremember it wuz long er 'bout fodder-pullin' time."

"I mean," explained the judge, "what time of day?"

"It warn't no time of day, yer honor, fur it wuz night time."

"And what time was that?"

"Well, sir, ef it warn't bedtime it wuz mighty close ter it." — Atlanta Constitution.

"From Georgia, eh? Glad to meet you, sir. I am thinking of removing to Georgia."



"May I inquiah your business, sah?"

"I am a criminal lawyer."

"Sorry, sah, but we have no use for criminal lawyahs in Georgy, sah."—Cleveland Plain Dealer.

The late Judge Knickerbocker was a man who scrutinized the papers sent into his court with a searching eye. On one occasion a paper was handed to him containing an account in a certain estate. The account had been typewritten by a breezy Kansan, who held a clerkship in a certain lawyer's office. Wherever the lawyer had dictated the word "deceased" the Sunflower typewriter had written it out "diseased."

The judge took the account, perused its contents and pondered. Then he handed it back to the long-haired clerk. The plainsman took it and waited for the judge to speak. His dictum was as follows:

"We don't have anything to do with diseased persons in this court. As soon as this party is dead we will take charge of his affairs. Clerk, call the next case."

The gentleman from the Zephyr State stole softly out.

### Legal Notes of Pertinence.

Constructing an elevated railroad on pillars in the public street is held, in *Doane v. Lake Street Elev. R. Co.* ([Ill.], 36 L. R. A. 97), not to constitute a new servitude or unlawful use of the street.

Mr. Stephen B. Griswold, the New York State law librarian, has just prepared and published, for the use of the patrons of the State law library, a full and complete index of the ALBANY LAW JOURNAL, from Vol. I to date.

A devise over in default of surviving heirs of the body of the first taker by him begotten is held, in *Grainger v. Grainger* ([Ind.], 36 L. R. A. 186), to be valid, since it is made on a definite failure of issue, and the rule in *Shelley's Case* has no application.

The destruction of a house by an explosion of powder caused by a stroke of lightning is held, in *German Fire Ins. Co. v. Roost* ([Ohio], 36 L. R. A. 236), to be within the protection of a fire insurance policy which had a special clause covering damage by lightning, although in the printed part there was a provision against loss by explosion.

A provision for the treatment of habitual drunkards in private institutions at county expense, when they are not financially able to pay for their own treatment, is held, in *Wisconsin Keeley Institute Co. v. Milwaukee County* ([Wis.], 36 L. R. A. 55), to be outside the range of the police power, and such use of the public money is held not to be for a public purpose.

Jumping in the dark from a freight train in rapid motion on which one was riding without permission is held, in *Shevlin v. American Mut. Acc. Asso.* ([Wis.], 36 L. R. A. 52), to constitute an exposure to unnecessary danger within the meaning of an accident insurance policy which did not contain the words "voluntary," "wantonly," "wilfully," or any equivalent words.

A bequest for the maintenance of free public schools is sustained in *Re John* ([Ore.], 36 L. R. A. 242), where the will provided for a board of trustees to be appointed by the judges, who were given power to formulate rules for the government of the board, and directed that the school should never inculcate the doctrines of any religious sect or denomination one more than another.

It is with pleasure that we note the appointment by President McKinley of Charles M. Dickinson, editor and proprietor of the Binghamton Republican, to the important post of consul-general at Constantinople. Mr. Dickinson is a lawyer, a poet, a business man and an editor. In all of these capacities he has been successful. He will fill the post to which he has been assigned with credit to himself and honor to his country.

A passenger who protrudes his elbow through a window in a railway coach when passing through a tunnel so that it strikes timbers near the sides of the car is held, in *Clark v. Louisville & N. R. Co.* ([Ky.], 36 L. R. A. 123), to be guilty of such negligence that he cannot recover from the carrier, although his elbow was protruded inadvertently and did not extend more than one and one-half inches beyond the outer surface of the side of the car.

A dispatch from Topeka, Kan., says United States District Attorney Foster has made a sweeping decision, declaring the organization known as the Kansas City Live Stock Association illegal, under the provisions of the Anti-Trust law. The exchange is an organization of commission men, who control the sale of live stock in Kansas City. All stock which enters the city must pass through the hands of this organization. Judge Foster enjoins the commission from doing business, and declares it an unlawful combination.

The trial in England of a man named William Lennox Watson, for manslaughter, in causing the death of a lady, whom he assumed to treat for cancer, has resulted in the acquittal of the prisoner—greatly to the dissatisfaction of the medical profession. His treatment consisted in the application of a plaster containing arsenic. The patient died of arsenical poisoning. The defense was that she kept the plaster on longer than he directed, and that his services were wholly gratuitous. "Mr. Justice Grantham summed up strongly in favor of the prisoner," says the *Lancet*, which adds that the verdict was absolutely wrong.

**Notes of Recent American Decisions.**

**Bid to Do Certain Public Work — Mistake in Bid — Bill to Rescind Bid.** — The plaintiff presented a bid for certain public work, in which an offer to do the work for \$63,800 less than was intended was made. Immediately upon the discovery of the error the bid was sought to be repudiated, but the defendant insisted upon the execution of a contract upon the basis of the plaintiff's bid. The defendant's charter provides that neither the principals nor the sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed. In an action brought to rescind the bid, *held*: First, that the plaintiff is entitled to relief, although there was no mutual mistake. Second, that equity will not reform a written contract unless a mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of facts, material to the contract of one party only. Third. The minds of both parties had failed to meet upon the same matters, and hence the same rule that applied to individuals applied to a public letting. Fourth. The plaintiff had no adequate remedy at law, and a resort to equity was proper. (*Moffett, Hodgkins & Clarke Company v. The City of Rochester et al.* U. S. Circuit Court, N. D. of New York. Opinion filed August, 1897.)

**Copyright — Dramatic Composition — Unauthorized Copyright of — Abandonment.** — 1. A mere temporary licensee of the use of a dramatic composition, without any proprietary right or interest in it, and without special authority from the proprietor to act as his agent, has no right to take out a copyright of the manuscript, and no authority to confer upon a printer or publisher employed by him the right to take out a copyright in his own name. 2. The interest of a party as printer and publisher merely of a dramatic composition will not entitle him to obtain a copyright for the protection of that interest. 3. Where a temporary licensee of the use of a dramatic composition, without authority from the proprietor, authorized a publisher employed by him to take out a copyright in his own name, which was done, and thereafter the proprietor agreed with the publisher to defray the expenses of a suit for infringement to recover penalties provided by section 4066 R. S., the recovery to be apportioned between them, it was *held*, that the interest of the publisher was not sufficient to entitle him to a copyright, and that the proprietor could not, by retroactive adoption, constitute him a trustee so as to enable him to maintain the suit. 4. The policy of the law of copyright requires that the public should have notice, by a true and correct official registry, of the real author or proprietor entitled to the enjoy-

ment of the monopoly granted thereby as against the public. 5. Where the proprietor of a work, after filing a copy of the title, fails and neglects to perfect his copyright as originally claimed, and by such failure and neglect abandons such right, that right cannot be revived by authorizing another to apply for and obtain a copyright in a name different from that of the real proprietor, sixteen years after the filing by the proprietor himself of the title page, under section 4956 R. S. U. S. 6. To secure a copyright of a book or dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies delivered to the librarian of congress. (*Charles D. Koppel, appellant, v. Robert Downing, Court of Appeals, District of Columbia.* Opinion filed May 25, 1897.)

**New Books and New Editions.**

**Supplement to Wiltzie on Mortgage Foreclosures, Together with a New and Exhaustive Treatise on Mortgage Redemptions.** By James M. Kerr, of the New York Bar. Rochester: Williamson Law Book Company. 1897.

This is, to all intents and purposes, a new treatise on the same general plan and arrangement adopted in the enlarged edition of Wiltzie on Mortgage Foreclosures. The new matter dovetails in with the original work, and the two volumes form a consecutive and harmonious treatise. In the supplement many new cases are discussed which have come up and been adjudicated in the last decade, touching mortgage foreclosures. This new matter is incorporated in the proper places in separate sections. Not only have new questions arisen and been discussed in the last decade, but some questions upon which the authorities were conflicting have been settled. All these new questions are carefully noted and fully discussed in the supplement. All the cases in which any points touching mortgage foreclosures have been discussed or determined in the United States, and all of interest in either England, Canada or the colonies, since the new and enlarged edition was issued are carefully collected, analyzed and discussed. The chapters on redemption are entirely new, forming a systematic and exhaustive treatise on the subject. The supplement contains a full table of cases in the original work (about 11,000), as well as of the cases in the supplement (estimated at 7,000). A new and exhaustive analytic index is added, covering both the original work and the supplement, so that all the points discussed in either volume are given under one head. The author has performed the work with his customary care, conscientiousness and accuracy. Those members of the profession who have Wiltzie on Mortgage Redemptions will certainly find Kerr's supplement invaluable and indispensable.

**Statutory Revision of the Laws of New York Affecting Miscellaneous Corporations.** By Andrew Hamilton. Banks & Bros., Albany and New York. 1897.

This work, as its title indicates, contains all the statutory provisions relating to corporations, reported by the State Statutory Revision Commission, which have become laws of this State. These statutes form a complete system of law as to the kind of corporation to which they are applicable, and, as is well known to the profession, have repealed all former laws relating to the subject. The amendments of 1897 are many and important. Each law is indexed separately and fully, so that any provision therein can be easily and readily found by the practitioner. Full and accurate forms for the organization of corporations under each law, proxies, certificates, reports, etc., have been carefully prepared and placed with the law to which they are adapted. Copious notes have been added to some of the laws, and arranged under the appropriate sections, giving all the decisions of the courts of this State to the date of publication. The work will be found complete, accurate, convenient and useful to the profession. There has been added a table of contents for ready reference, which so presents in order the necessary steps for incorporation as to enable a layman to draft the papers for such purpose.

**Code of the Election Laws of the State of New York.** By William H. Silvernail. Banks & Bros., Albany and New York. 1897.

This work, a pamphlet of 252 pages, embraces the General Election Law of 1896, the Legislative and Congressional Apportionment Laws of 1892, the Town Meeting Ballot Law of 1892, Myers' Automatic Ballot acts, with amendments; the Davis Automatic Ballot act; the Elective Franchise Criminal Law of 1892, as amended in 1893, 1894, 1895 and 1896, with full index to provisions and forms relating to the duties and liabilities of inspectors, ballot clerks, poll clerks and registrars. It contains all the amendments to date, together with annotations, forms, instructions and copious index. There is also included chapter 379, amendatory of the Election Law, which became a law May 6, 1897, but does not go into effect till January 1, 1898. The annotations throughout the work are copious, and no pains have been spared to make them accurate. The volume is indispensable to all who desire to keep fully posted as to the Election Law of the State.

**Digest of the United States Circuit Court of Appeals Reports.** Including a Supplement to Danforth's United States Supreme Court Digest. October 1, 1891, to June 15, 1896. By William Draper Lewis, of the Philadelphia Bar. Banks & Bros., Albany and New York. 1897.

The two volumes of Danforth's Supreme Court

Digest are well known by the profession. They cover all the decisions of the Supreme Court of the United States from the earliest times to Volume CXXI, inclusive. Banks & Bros. have now issued a new and complete Supplemental Digest of cases decided in the Supreme Court of the United States between October 1st, 1891, and June 15th, 1896, and all cases reported in the United States Appeal Reports since the establishment of the court up to that time. This digest, while following in the main Danforth's Supreme Court Digest, with which the profession have become thoroughly familiar, and the arrangement of which has met general approval, contains many valuable improvements. Among these we may mention that there is a large increase in the number of cross-references. These are specific, referring the inquirer to every case in the digest which might by any possibility have been sought for by him under the title of the cross-reference. In all cases the date of the decision and the name of the judge delivering the opinion, together with the names of the dissenting judges, if any, are given. This will enable the reader at a glance to tell the exact weight to be given to the decision. The digest contains in short and concise language a statement of every principle of law actually decided in the case. But perhaps the most valuable feature of the digest is the insertion after each point of a case digested a succinct statement of the decision in every case in the Federal Reporter or the Reports of the Courts of Last Resort in any of the States wherein a reference has been made by the court to the case digested. A lawyer will thus be able to determine how far the case has been applied and followed by the minor Federal courts and the State courts. In other words, it gives the profession a digest which will tell everything concerning the decision of the cases covered, which the lawyer, by any possibility, would desire to know; the information being put in the smallest compass compatible with completeness and accuracy.

The ALBANY LAW JOURNAL heartily greets a newcomer in the field of periodical literature — New York Education — a handsome monthly devoted to New York State educational work and interests, whose place of publication is Albany. Judging from the contents of the first number — and we know that, like good wine, it will improve with age — the magazine will not only fill a long-felt want, but will fill it so well that educators will soon be marveling how they ever got along without it. The newcomer appears full-fledged with an easy confidence and steadiness of flight which betokens unmistakably the fact that it has come to stay. That its presence in the great field of education will prove uplifting, helpful, inspiring, there can be no manner of doubt. Editor-Manager Franklin has our congratulations and best wishes.

## The Albany Law Journal.<sup>3</sup>

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, OCTOBER 9, 1897.

### Current Topics.

THE ALBANY LAW JOURNAL will begin this month the publication of a legal romance which, we are sure, will be read with interest and profit by members of the profession. It is entitled "A Living Dead Man; or The Strange Case of Moses Scott. An Accurate and Truthful Narration of the Complications Caused by a Litigant's Return from the Lethæan Shore." The author is Mr. Phil. Skillman, an attorney now residing in Olympia, the capital of the State of Washington. The case itself is a novel one, and the MS. gives the exact record, so far as the records are quoted, from the Probate, Superior and Supreme Courts of Washington State, as well as the decision of the Supreme Court of the United States. The setting or surrounding the author has aimed to make humorous, and we can assure our readers that he has succeeded admirably. Those few favored persons to whom the MS. has been submitted are unanimous in the opinion that it ought to have a permanent place in law literature. The story will be published, in serial form, in these columns by special arrangement with the author, who has copyrighted it. Mr. Skillman is a native of Chenango county, N. Y., but left there in 1856 for Minnesota, where he lived until 1882. He then went to South Dakota, and, in 1890, became a resident of the State of Washington. The Skillman family have an honorable record in New York. We are able to assure our readers that the

story will prove worthy of careful perusal and permanent preservation.

The value of the legal profession as a stepping stone to places of high preferment is again illustrated in the matter of the nominations for the office of mayor of the Greater New York — a place, perhaps, second only in importance and responsibility to that of President of the United States. The nominees of the two great parties, Hon. Robert A. Van Wyck, Democrat, and Hon. Benjamin F. Tracy, Republican, are both prominent lawyers, as is also, we believe, the Citizens' nominee, Hon. Seth Low of Brooklyn, although the last-named has been more especially identified, for some years past, with educational work. Henry George, who is also supposed or declared by some shrewd guessers to be an important factor in the great battle now waging, knows considerable law, though he has made a special study of political and social economy. The drafts which are constantly being made upon the legal profession in the filling of places of the highest dignity and importance, other than judicial, shows to what a great extent the profession is relied upon in civil administration. Judge Van Wyck, who is at present the presiding justice of the New York City Court, comes of an old family, identified with New York's history from the beginning, his ancestors having settled in "New Amsterdam" in 1650. He is 45 years old, and a graduate of the New York Law School. He was elected a judge of the City Court in 1889. He is a member of the Holland Society, and is a brother of Supreme Court Judge Van Wyck of Brooklyn. It is a fact worth noting that the candidacy of Justice Van Wyck for the office of mayor will not compel him to resign his present position. By the terms of the State Constitution only the judges of the Court of Appeals and the justices of the Supreme Court are prohibited from holding any office or public trust, section 10 of the judiciary article containing this provision: "All votes for any of them, for any other than a judicial office, given by the legislature or the people, shall be void." The fact is noted by the New York Sun that

this provision is not new to the Constitution of 1894, and our contemporary points out that it operated curiously with reference to the constitutional convention of that year. While judges of the Superior Court or Court of Common Pleas, in New York, could be delegates, justices of the Supreme Court were not eligible. As a matter of fact, Judge Charles H. Truax of the Superior Court, and Judge Leonard A. Giegerich of the Court of Common Pleas, were members of the convention.

On Tuesday, the 28th ult., the voters of New Jersey deposited their ballots for and against several propositions to amend the State Constitution. Perhaps the most important of these, and certainly the one which excited the greatest amount of popular interest, was the one which prohibited gambling at race tracks. The proposed amendment was worded as follows:

"No lottery shall be authorized by the legislature, or otherwise, in this State, and no ticket in any lottery shall be bought or sold within this State; nor shall pool selling, book-making or gambling of any kind be authorized or allowed within this State; nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished."

The history of the anti-gambling movement may be profitably glanced at. Following the overthrow of the race-track ring, so-called, laws were passed prohibiting pool selling and bookmaking, and the strict enforcement of these laws effectually closed all the tracks in the State where races were run all the year round, simply to afford opportunities for betting. But the good people of New Jersey were not satisfied. Fearing that at some future time a legislature might be elected which would either repeal or modify the anti-betting laws in the interest of the gambling fraternity, it was proposed to insert an amendment in the Constitution which would forever prevent such a result. Such an amendment was passed twice by the legislature and then submitted to the vote of the

people. But mark how different the result from the anticipation. The amendment was lost by about 10,000 majority, and lost, without doubt, because of the failure of the good people of the State who advocated it to vote for it. Thousands of these people, while wishing for its adoption, made the fatal mistake of presuming that their vote was not needed. The race-track promoters, however, worked energetically, though not noisily, and are now celebrating their victory. But this is not all. Not only is the amendment defeated, but the gambling fraternity are already claiming, as was to have been expected, that the vote of the people should be regarded as a mandate to repeal the laws which interfere with race-track gambling, and they propose to go to work at once and storm the legislature to repeal the obnoxious statute. Thus the defeat of the amendment will compel the opponents of race-track gambling to fight afresh for all that they have gained. The moral is so obvious as hardly to need pointing out. It is supreme folly to invite a great battle and then let the enemy do all the fighting. The well-intentioned people who stayed at home on election day, complacently presuming that the battle would be won without their aid, are directly responsible for the present condition of affairs. And there is still another unfortunate feature to be noted. Two other amendments were voted upon, one of which would have permitted women to vote at school elections, and the other of which would have prevented appointments to office by the governor without the consent of the senate. Both of these excellent amendments went down with the anti-gambling proposition, and thus the responsibility of the complacent stay-at-homes is still further increased.

[Since the above was written the telegraph reports that the anti-gambling amendment may be carried by a few hundred majority, but that the woman suffrage amendment is certainly beaten.]

Benjamin M. Goldberg, the Milwaukee (Wis.) attorney who has been on trial for malpractice, has been found guilty and an order

entered by Judge Fish disbaring Goldberg forever from practicing in courts of record in Wisconsin. There have been disbarment cases in other States, and there have been disbarment proceedings in Wisconsin, but in the rest of the country, as in Wisconsin, according to the Milwaukee "Wisconsin," there never was a proceeding where an attorney stood charged with a series of such grave offenses as Judge Fish has found Attorney Goldberg guilty of. The end is not yet, however, for papers on appeal to the Supreme Court have been prepared. This is the third proceeding of the kind upon the Wisconsin records. It may be of interest to note that now-a-days there is usually no formality in the disbarment of an attorney after he has been found guilty. The mere entering of the order is all that follows. Disbarment, however, under the old common-law practice, was at times an exceedingly formal proceeding, with the pomp and ceremony that would more fittingly mark a requiem mass celebration. After a great deal of "bell, book and candle" business, the accused was summoned before the court, in the presence of the entire bar, or as many as well could be present. Then with the awful dignity marked by the court with gown and cap, the accused was made to feel the extent of his crime in words which might well have been more temperate, and then formally declared disbarred. The practice still obtains in States in which the common-law practice is followed of summoning the accused before the court, but beyond this there is no ceremony; courts of the present day having a tendency to dispatch matters more expeditiously and with less pomp and display.

Apropos of the Goldberg case, there is now pending in California, before Judge Morrow of the United States Circuit Court, a disbarment proceeding which is in many respects remarkable, not only on account of the facts, or the alleged facts, of the case, but because of its being in a Federal court, where disbarment proceedings rarely originate. Alphonso B. Bowers, a Pacific coast inventor, fought in the courts for many years

for his rights under a patent covering a dredging machine which he invented and which many contractors used without paying the royalty to which he was entitled. The commissioners of patents, the lower Federal courts, and finally the court of last resort, the United States Supreme Court, upheld him. His enemies were beaten at every point. There remained now nothing but to collect the fruits of his victory. When it is remembered that many dredging companies had been using his invention for long terms of years, and that enormous accumulated royalties were due and frequently damages as well, the financial magnitude of his victory may be appreciated. During a number of years Bowers had as his attorney John L. Boone. In 1892 differences arose between them and they separated. Bowers executed a document releasing Boone "from all rights, burdens, obligations and privileges which appertain to his said employment," and consented "that said Boone may engage his services *pro* and *con* as he may see fit." After the execution of this release, it is alleged, Boone offered his services to Lyndon Bates, who was defending a suit brought by Bowers in the Federal courts of Illinois. Boone wrote to Bates that he possessed information concerning Bowers of great value to Bates. T. A. Banning, Bates' attorney, asked for particulars. Boone then wrote to him: "The fact I refer to is not simply an important one, but it is a vital one. In my opinion it will reverse the decree already ordered, and take the sting out of Bowers' patents." The San Francisco Argonaut says of this case: "It is not surprising, in the light of these developments, that Bowers should have filed a petition in the Circuit Court of the United States, asking that Boone be disbarred. The foregoing facts are condensed from the documents filed in the court—the petition of Bowers and the answer of Boone. The answer of Boone is one of the most amazing documents we ever remember to have read. It is so extraordinary a document that Circuit Justice Morrow, after hearing it read, expressed from the bench (as reported in the Bulletin) 'doubts as to whether the release

pleaded in the answer was sufficient in law to excuse an attorney for betraying information obtained through a confidential relation.' The judge went further and requested Crittenden Thornton, Bowers' attorney, 'to raise an issue by a demurrer on that point.' This was done. The case is still on trial as we write. As the Argonaut does not believe in trying cases by newspaper, we shall refrain from commenting on this case, which is still *sub judice*. We have, in the foregoing, briefly presented the facts as shown in the records filed in court. But the belief is almost irresistible that Attorney Boone has impaled himself on one of two horns of an inextricable dilemma. He avers that he had been an attorney for Bowers for a number of years. He now avers that he had knowledge that Bowers had obtained his patents by improper or fraudulent means. If it be true that Bowers' patents were fraudulent, Boone, as an officer of the court, is liable to punishment for making accusations to that effect. Attorney Thornton read extracts from Boone's testimony, in which it appeared that Boone had concealed from the court certain facts concerning a mutilated model which he claimed constituted the fraud. Bowers, by the way, swears that this is utterly false." It has been demanded that the San Francisco Bar Association should take some action in this matter, but bar associations seem loath to concern themselves with such cases.

The opinion of Attorney-General Hancock of New York, which he wrote in response to a communication from Adjutant-General Tillinghast, holding that the National Guard of the State comes within the provision of the prison-made goods act, to the extent that the supplies of clothing, uniforms, arms, equipments, books, stationery and other articles necessary for the maintenance and equipment of the State military departments must be purchased from the penal institutions of the State, if the same are manufactured therein, is not likely to be favorably received by members of the guard generally. Granting, as we must, that the objection on the part of the guardsmen to the wearing of

prison-made uniforms is based largely, if not wholly, upon sentimental grounds, it is nevertheless a real and potent objection, and one which is not likely to be easily eradicated. The attorney-general, in his opinion, reaches the conclusion that the provision of the State Constitution abolishing the contract labor system is self-acting; that the legislature, in conforming the prison-made goods act to the constitutional provision on contract labor, clearly intended that the labor of convicts shall be for the benefit of the people of the State, and that the products of such labor shall be purchased by every State official, State department and State institution, and not elsewhere, when articles so required can be furnished on requisition to the prison authorities. As the militia of the State and the office of adjutant-general constitute a department of the State, it follows, the attorney-general says, that upon the proper officials of that department, as the term is used in connection with the law, devolves the duty of complying with it in respect to making to the commissioners of prisons an estimate of the amount of supplies required for the use of the militia and for the office of adjutant-general of articles that can be furnished by the penal institutions of the State. However much we may, from some points of view, regret the fact, the opinion of the State's legal adviser seems to be sound. That the militia of the State constitutes a department of the State government, notwithstanding the fact that it is known and designated as the "National Guard," and can, under certain conditions, be called into requisition by the National government, is beyond question. That the effect of enforcing the constitutional provision referred to upon a body of citizen soldiery, dependent wholly for reinforcements upon voluntary enlistments is likely to have a serious effect seems equally certain. There appears to us to be very little reason for supposing that the opinion of the attorney-general will be reversed.

The United States Court has finally — though none too soon — put a final stop to the peculiar antics of Insurance Commis-

sioner McNall, of Kansas, whose outrageous action with reference to insurance companies doing business, or more properly speaking, attempting to do business in that State, are well known throughout the country. A decree recently issued by Judge Williams of the United States District Court for the district of Kansas, perpetually enjoins Commissioner McNall from interfering with the affairs of the New York Mutual Life Insurance Company. This official — may his tribe decrease — based his arbitrary and unwarranted action in refusing a relicense to do business in Kansas, upon the fact that the insurance companies had refused to pay a judgment claim which there is reason to believe was founded in fraud. The case, after having been passed upon by the State tribunals, was taken into the United States Court, and there the companies have found protection in the form of an injunction restraining McNall from meddling with their interests. Of McNall's refusal to license the Mutual Life until that company had paid the disputed claim Judge Williams said it was "an assumption of authority in a ministerial officer that is startling," and his language was none too strong. That such vexatious annoyances to and menacing of the vested interests of large and beneficent corporations can occur is in itself a fact which should lead to reform in present methods, rendering such arbitrary and unwarranted action impossible.

The so-called Rogers Anti-cigarette law, which sought to prohibit the sale of cigarettes and cigarette paper in Tennessee, has just been declared unconstitutional by a Federal court. The law became operative on May 1, and a test case was arranged. W. S. Sawrie, a dealer of Nashville, sold cigarettes and was arrested, tried by a magistrate and convicted. He secured a writ of habeas corpus from the United States Circuit Court. The State contended that it had a right to prohibit the sale of cigarettes under its police power, but the court overthrows this contention, deciding that no State can interfere with the sale of cigarettes imported from another State, either by prohibition, taxation, or in any way whatsoever,

and that the commercial clause of the United States Constitution is supreme and grants protection against any form of adverse State legislation. This is regarded as an important decision and fully sustains recent decisions upon laws of West Virginia and Iowa which sought to restrict cigarette traffic.

Lowville, N. Y., claims the distinction of having the oldest ex-member of the New York Legislature in the person of ex-Judge Carlos P. Scovil. Mr. Scovil, who is now in his 94th year, was a member of the assembly in 1842, and served in the senate in 1843, being a colleague of the late Senator Henry A. Foster of Rome. Mr. Scovil is reported to be as vigorous and active as the average man at 70. John W. Labar of Lockport is also one of the oldest surviving members of the assembly, having just celebrated the 90th anniversary of his birth.

The alarming increase of the suicide mania in Europe, together with the dwindling birth-rate in certain parts of it — notably France — is most sensibly discussed in a recent issue of the London Law Journal, which inquires what attitude the law of England ought to take in the presence of this growing evil. While the law of England and of some of the States of the Union stigmatizes suicide as a felony, juries, inclining to cover the unfortunate with the broad mantle of charity, usually return a verdict of unsound mind. "Even philosophers," adds the Law Journal, "have not always been agreed as to the ethics of suicide. Englishmen have the feeling strong in them that suicide is the refuge of the coward. In old days and in small communities the loss of an able-bodied tribesman was a source of weakness and danger. To our Anglo-Saxon race, with its overflowing population, this consideration is insignificant. The seriousness of the suicide problem consists in the fact that the prevalence of suicide is symptomatic of a diseased condition of the body politic. It is to this that law and legislation must address itself, not to any fresh penalties: to promoting healthier conditions of life and inculcating a higher standard of citizenship."



### Notes of Cases.

The case of *Livingston v. Superior Court of Los Angeles County*, in the Supreme Court of California (August, 1897, 49 Pac. R. 836), affords an illustration of the exercise of the general equity powers of a court in a matrimonial action to meet a practical exigency unprovided for by express statutory regulation. Under the Civil Code of California (sections 155, 176), it is provided that a husband and wife contract towards each other "obligations of mutual \* \* \* support," and that the wife must support the husband if he is rendered incompetent by infirmity. It was held that an order of the court upon the wife to support her husband, made under such statutory authority, did not create a debt within the constitutional clause against imprisonment for debt, and that as no adequate remedy existed at law for the effectuation of the obligation, the same might be enforced by contempt proceedings. Upon the general question of jurisdiction and power the following language from the opinion of the California court will be found of interest:

"The attack made here is solely upon the power of the Superior Court to make such an order on any state of facts. This contention seems to be based upon the fact that, in section 137 of the Civil Code, provision is made for compelling the husband to support the wife, and it is provided that the final judgment in such case may be enforced by the court 'by such order or orders as in its discretion it may from time to time deem necessary.' This, it is said, authorizes such procedure when the wife is suing her husband for separate maintenance, but the statute does not authorize such orders when the husband sues the wife for his support. In *Galland v. Galland* (38 Cal. 265) this court said: 'It is within the general powers of courts of equity, independent of the statute, to decree alimony to the wife, without divorce.' The question has been variously decided in the United States, and it is said that in England courts of equity do not give such relief, except as an incident in an action seeking some other redress. It is said in 2 Story, Eq. Jur. (sec. 1422), that, to the question whether courts of equity have general authority to decree alimony to the wife when she is left without other means of maintenance, 'it can scarcely be said that, according to the results of the authorities, an answer in the affirmative can be given in positive terms.' This jurist further says, however (sec. 1423), that a broader jurisdiction over the matter has been asserted by some of our courts of equity, and it has been held that 'a court of equity may in all cases decree her a suitable maintenance and support out of his estate upon the very ground that there is no adequate and sufficient remedy at law in such a case. And there is so much good sense and reason in the doctrine that it might be wished that it were

generally adopted.' The question has been much discussed, and in many cases is very fully and elaborately considered. Among these cases, *Garland v. Garland* (50 Miss. 694) contains an able review of the English cases, and shows that even there some cases support the jurisdiction. *Prather v. Prather* (4 Desaus. Eq. 33) contains another thorough discussion of the question, and upon principle and authority the jurisdiction of courts of equity to decree alimony is maintained. A later case in which the same doctrine is held is *Milliron v. Milliron* ([S. D.], 68 N. W. 286). Such being the state of the authorities, there is no reason why we should not adhere to the doctrine announced in *Galland v. Galland*. It is in accord with the general principle that where a right exists, and there is no adequate, legal remedy, equity will take jurisdiction. If, independently of any statute, courts of equity had jurisdiction to decree alimony to a wife, although no divorce was sought, it would necessarily follow that they have jurisdiction when the husband applies for support from the wife. In each case the right comes from the same source — the obligations assumed by the marriage, as expressed in section 155 of the Civil Code: 'Husband and wife contract towards each other obligations of mutual respect, fidelity and support.' Primarily, the husband is the breadwinner, and assumes the responsibility for the support of the family, and he becomes the owner of the marital accumulations. But in the exceptional case provided in section 176 of the Civil Code, the burden of maintenance shifts to the wife. It is an obligation of the same kind, however, as that which ordinarily rests upon the husband; and the legal remedy, if it can be said that there is any, is as inadequate in the one case as in the other.

In *Hoover v. M'Chesney*, decided in the United States Circuit Court, District of Kentucky, in June, 1897 (81 Fed. R. 472), the proposition was laid down that a citizen of the United States has a property right in the use of the mails for lawful purposes, of which he cannot be deprived without due process of law. It was therefore held that congress has no power to confer authority on the head of the postal department, upon a determination on evidence satisfactory to him that a citizen is using the mail for the purpose of conducting a lottery or other fraudulent scheme, to issue an order instructing a postmaster to return or send to the dead-letter office all mail matter coming to his office directed to such person, without regard as to whether such matter is or is not nonmailable. It was further held that compliance by a postmaster with such order amounted to a violation of the fourth amendment to the Federal Constitution, securing the people against unreasonable seizure of their papers and effects. It was also decided that the Circuit Court of the

United States has jurisdiction to grant an injunction restraining a postmaster from withholding mail matter from a citizen to whom it is directed under an order of the postmaster-general, which was beyond the scope of his constitutional authority.

Margaret Maher's suit against the New York Central and Hudson River Railroad Company for injuries received from the sudden starting of a train while she was alighting at the county line station, in Orleans county, resulted, on the second trial, in judgment in plaintiff's favor, and that judgment has been affirmed by the Fourth Appellate Division. A nonsuit was directed on the first trial, it being determined, as matter of law, that the plaintiff was guilty of contributory negligence in attempting to leave the train in the manner she did. On appeal it was held that a question of fact in that regard was presented by the evidence, which should have been submitted to the jury, and a new trial was ordered. The court held, on the second appeal, by Justice Adams (Justice Green dissenting), that the evidence, which was substantially the same as upon the first trial, clearly justified the conclusion that defendant's train did not stop at the station which was plaintiff's destination a sufficient length of time to enable her to alight, and that in starting under the circumstances stated the company's employees were unmindful of the obligations they were under to the passenger. The jury's verdict holding there was no contributory negligence was upheld. The court held that a physician who examined the injured person and had testified that in his opinion she was suffering from spinal irritation, might give his judgment as to whether the difficulty would prove permanent, and what effect upon the system it would have, and might describe the probable effect, such as "nausea and vomiting, and also disturbed action of the heart, faintness, weak and irregular pulse, pallor of the skin," etc. Such evidence was not mere conjecture, but expressed the deliberate judgment of a man of science, based upon actual observation or experience, as to results and conditions which might naturally and ordinarily be anticipated. Where a witness has testified upon a subject which was material to the issue, it was held to be competent to prove prior declarations made by him which were inconsistent with and contradictory of his testimony given upon the trial, even though the impeaching evidence might incidentally have some bearing upon the main question.

New South Wales is to be put to the expense of another long Tichborne trial — a lunatic named Creswell, now in an insane hospital near Sydney, having been identified as the missing Sir Roger by persons who have influence enough to set the law's machinery in motion.

## THE REMEDY OF "QUASI CONTRACT"

INEFFICACIOUS WHEN APPLIED TO THE RECOVERY OF MONEY PAID UNDER A MISTAKE AS TO THE VALIDITY OF A PATENT RIGHT.

THE first case deciding this important and practical issue was that of *Taylor v. Hare* (1 B. & P. N. R. 260). Sir James Mansfield, the learned judge, hinted at the correct principle governing that class of cases, and Chambers, J., substantially voiced the same doctrine in language which has been the subject of severe criticism upon the part of a modern writer of superior acumen, who has generally handled the entire broad field of quasi contracts in a masterly manner.

The authorities generally agree that the proper occasion for summoning in the remedy of quasi contracts as a means of redress, where money has been paid under mistake, is a failure of consideration redounding to the plaintiff. The authorities furthermore accord in holding that there are two kinds of mistake under which a plaintiff paying money may recover upon "a contract implied in law." This classification is, viz.: (1) Mistakes of law, (2) Mistakes of fact. It is also nearly uniform law that a plaintiff *cannot* recover money disbursements under a pure mistake of law.

The misapprehension of this latter principle has given rise to all the confusion troubling lawyers and judges to-day. The author, whose treatise has been accepted largely by jurists and members of the legal profession, is Prof. Keener, dean of Columbia Law School. His analysis, lamentably enough, has in this instance only served to heighten the misunderstanding almost universally prevailing upon this subject.

In his work on "Quasi Contracts," at page 38, he has taken occasion to pass several severe strictures upon the conclusion reached by the eminent judges in the case of *Taylor v. Hare*. It may be well to recapitulate the facts of that case, alluded to *supra*.

Action for money had and received. On the 12th of September, 1791, the defendant took out a patent for the invention of an apparatus for preserving the essential oil of hops in brewing. Subsequently, by an agreement between the plaintiff and defendant, drawn regularly in form, and reciting the defendant's patent, and that it gave defendant the sole power and authority of using, exercising and vending the same for a term of fourteen years, the defendant granted to the plaintiff the privilege of making, using and exercising the said invention for the residue of the period of fourteen years, in consideration of the plaintiff giving a bond for the purpose of securing an annuity of one hundred pounds to the defendant.

The plaintiff did use the apparatus for five years next following, and during that time regular'

paid the said annuity. Afterwards it was discovered that the defendant was not the inventor of the apparatus for which he obtained his patent. *But the patent had never been repealed.* The action was brought to recover the money so paid out. But the court rightly decided for the defendant, Sir James Mansfield holding: "It is not pretended that any action like the present has ever been known. In this case two persons *equally innocent* make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent right, and the plaintiff supposing the same thing. \* \* \* In consideration of a certain sum of money, the defendant permits the plaintiff to make use of this invention, which he never would have thought of using had not the privilege been transferred to him. How, then, can we say that the plaintiff ought to recover back all that he has paid? I think there must be a judgment for the defendant."

The author of the treatise on "Quasi Contracts" fails to notice this striking language from the lips of the illustrious judge, but quotes from the less comprehensive opinion of Heath, J., and Chambers. Prof. Keener writes on page 37 of his treatise: "Notwithstanding the fact that the plaintiff, laboring under this mistake, paid for the use of an apparatus *which he had a perfect right to use without payment of a royalty*, the court held that he could not recover the money so paid, because there was not a failure of consideration."

It is submitted that the learned author is himself laboring under a mistake of law, when he maintains that "the plaintiff had a perfect right to use the apparatus without payment of a royalty." We assert that the plaintiff had no rights beyond the spirit and letter of the agreement, first, because the "letters patent" of the defendant conferred a valid *prima facie* title to his invention, which he surrendered in the contract, giving a valuable consideration for one, viz., the payment of money; secondly, even if at common law the defendant had not possessed a *prima facie* title, there was nothing in the law then enabling the plaintiff to question the defendant's title in an action upon a contract implied in law. In other words, it was against the rules of evidence as then existing to introduce facts tending to show an infringement in an action of quasi contract, and the proceedings to show infringement have only been conferred in modern times by statute. The opinion of Mr. Justice Clifford, in the case of *Blanchard v. Putnam* (8 Wall. 425-7), as also the case of *Wise v. ———* (9 Wall. 737), amply illustrate this principle. Also, United States Revised Statutes (sec. 4920) may be referred to with advantage. Accordingly, the plaintiff had no right to the use of the defendant's invention previous to the agreement being entered into, and hence should not have recovered.

Then, returning to the discussion of mistakes in the Law of Quasi Contract, we furthermore assert that the plaintiff had no remedy sounding in "Quasi Contract," because this was a mutual mistake of a pure question of law. No one can seriously believe for a moment that either the plaintiff or the defendant relied upon extrinsic facts at the time of the inception of the article of agreement. No, it was the "letters patent," as recited expressly in the contract, that the parties had in mind, and the construction of the letters patent called for an exercise of legal knowledge.

If the learned author will recall the case of an invalid deed given for a good consideration, where both the parties were acting in good faith (to which this patent case is analogous in principle), he will easily perceive that in the one, as well as the other, the action of quasi contract would be inapplicable.

All the parties were acting under a mistake of law, and hence there could be no recovery. It is evident, then, that quasi contract would be inefficacious, without the intervention of statute, in an action for money had and received under letters patent, even although the defendant were not the real inventor of his patent. Hence the case of *Taylor v. Hare* was correctly decided.

ALEXANDER HIRSCHBERG.

NEW YORK, Oct. 1, 1897.

#### REMOVAL FROM OFFICE—CIVIL SERVICE ACT—REGULATIONS—INJUNCTION.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Opinion filed Sept. 14, 1897.

*In Equity.*

JOHN G. WOODS v. JAMES A. GARY, Postmaster-General, and PERRY S. HEATH, Assistant.

1. The power of removal from office is incident to the power of appointment; and an act which confers upon the head of a department a power of appointment *ipso facto* confers a power of removal as effectually as if the act expressly gave that power.
2. The acts of congress authorizing the appointment of superintendents of mails confer upon the postmaster-general power to remove such officials at his pleasure.
3. This power of removal is not affected by the Civil Service Act of January 16, 1883, except as to removals for refusal to contribute to partisan objects; and the rules and regulations adopted by the Civil Service Commission which seek to further restrict the exercise of the power of removal are *ultra vires* and void.
4. A court of equity is without jurisdiction to enjoin the postmaster-general from removing a superintendent of mails from office.

Hearing on demurrer to bill for an injunction. Demurrer sustained.

MR. JUSTICE COX delivered the opinion of the Court:

The bill and amended bill in substance set forth that in June, 1893, the complainant was appointed superintendent of mails at the post-office in Louisville, Ky., and has ever since held the office and discharged the duties of the same, and is still in possession of it, and it is worth to him more than \$2,500; that without there having been any complaint or charges made against him, and without giving him any notice of any such charges, or an opportunity to be heard in relation thereto, the defendants have issued an order removing him from his said position of superintendent of mails, and appointed one O'Donnell in his place; that such proceeding is contrary to the civil service rules promulgated by authority of the act of January 16, 1883, known as the Civil Service Act, one of which, of the date of November 2, 1896, being clause three of rule 2, provides that "No person in the executive civil service shall dismiss or cause to be dismissed, or make any attempt to procure the dismissal of, or in any manner change the official rank or compensation of, any other person therein because of his political or religious opinions or affiliations;" another of which, dated July 27, 1893, added the following to the foregoing, viz.: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appropriate officer, and of which the accused shall have full notice and an opportunity to make defense;" that complainant's office is within the classified executive civil service of the post-office service of the United States, and subject to competitive examination, and complainant believes and, therefore, charges that the sole ground of the attempt to remove him is that he is a Democrat, and it is intended to appoint a Republican to succeed him. He therefore asks an injunction against the proposed action of the department. A demurrer was filed on the part of the defendant.

On the authority of *Ex parte Sawyer* (124 U. S. 200), and the cases therein cited, I shall be compelled to hold that I have no jurisdiction, as a court of equity, to enjoin the postmaster-general and the assistant postmaster-general from removing the complainant from his position.

There is not entire unanimity among the Federal judges on this subject. Two (if not three) of the justices of the Supreme Court dissented from the opinion as announced by Justice Gray, and ten years after that opinion was delivered we find District Judge Jackson asserting the right of a complainant to injunctive relief in a case of attempted removal from the office of deputy marshal on the very grounds of the present application.

The decision of the Supreme Court had no reference to the Civil Service Act, for the office involved in that case was held under State authority.

and only related to the form of the relief sought. It has seemed to me that it would be more satisfactory that, instead of denying relief on the ground of jurisdiction only, I should give some attention to the Civil Service Act itself, and consider whether, if jurisdiction existed, the complainant would be entitled to relief.

The Constitution of the United States, in article II, section 2, clause 2, provides: "He (the president) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present consent; and he shall nominate and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law, but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments."

There does not appear to have been any act of congress specially creating the office of superintendent of mails, but such officers evidently were appointed by the postmaster-general under his general authority to conduct the business of his department, and his authority was recognized in several appropriation acts. Thus, in the appropriation act of 1889, chapter 374, 25 Statutes, page 842, there is an appropriation for superintendents of mails, salary not exceeding 45 per cent. of the salary of the postmaster, and also for assistant superintendents. And in a previous year, 1878, there was an appropriation for nine assistant superintendents of railway mail service, who shall receive each a salary of \$2,500. (20 Stats. 140.)

It may be assumed that, under this legislation, the postmaster-general was authorized to make the appointments, and that those officers were of the class of inferior officers whose appointment could be vested by congress in the head of the department. If the complainant is not in this category, then, as he was not appointed by the president by and with the advice and consent of the senate, he is holding his place without any authority of law, and has no standing in court.

The subject of appointments and removal from office was lately discussed at length by the Supreme Court of the United States (169 U. S. R. 32). That was the case of a district attorney of the United States for the Northern District of Alabama, who had been appointed as usual for four years, but who was removed from office by the president within that term. He denied the president's right to remove him before the expiration of his term, and brought suit against the United States in the Court of Claims to recover the fees which had accrued to the office since his removal, and from an adverse judgment he appealed to the Supreme Court. The Supreme

Court, upon a review of the decisions, the debates in congress and the opinions of the attorneys-general, reiterated the doctrine repeatedly asserted in all the departments of the government, that the right of removal from office was an incident of the right of appointment, and held that although the appointment was made by and with the advice and consent of the senate, the appointing power was really with the president, and he had, in consequence, the right to remove; and, further, that the designations of four years as the term of the appointment was not intended to give a term that should, at all events, last for that time, but to restrict the term of service to that period, subject all the time to the pleasure of the appointing power.

That was the case of an appointment by the president. But the court also cite and adopt anew its former opinion in the case *In re Hennen* (13 Pet. 230), which was the case of a clerk of the District Court of Louisiana, who, after being appointed in that court, was removed from office by its order. He applied to the Supreme Court for a mandamus commanding the District Court to restore him to the office of clerk, and the whole subject of appointments and removal was discussed by counsel and the court. The court, after referring to the constitutional provision before mentioned, says: "The appointing power here designated, in the latter part of the section, was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. Congress in the exercise of the powers here given, by the act of the 24th of September, 1789, establishing the judicial courts of the United States (Story's Laws, 56, sec. 7), declares that the Supreme Court and the District Courts shall have power to appoint clerks of their respective courts; and that the clerk for each District Court shall be clerk also of the Circuit Court in such district.

Again, after advertg to the circumstances of the petitioner's appointment, they say: "Such, then, being the situation in which the petitioner stood, the question arises whether the district judge had the power to remove him and appoint another clerk in his place. The Constitution is silent with respect to the power of removal from office where the tenure is not fixed. It provides that the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerk. Congress has by law limited the tenure of certain offices to the term of four years (3 Story, 1000), but expressly providing that the officers shall, within that term, be removable at pleasure which, of course, is without requiring any cause

for such removal. The clerks of the court are not included within this law, and there is no express limitation in the Constitution or laws of congress upon the tenure of office. All offices of which the tenure is not fixed by the Constitution or limited by law must be held either during good behavior or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held for life. And if removal at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment?"

Had the opinion stopped here it would be equally applicable to the case of clerks and other employes appointed by the heads of executive departments, because the latter are placed upon the same footing with the courts in the article of the Constitution which authorizes congress to vest the appointment of inferior officers in the president alone, in the courts of law or the heads of departments. But the courts go further, and refer in express terms to the departments also.

They say: "In all these departments power is given to the secretary to appoint all necessary clerks (1 Story, 46), and although no power to remove is expressly given, yet there can be no doubt that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department. The president certainly has no power to remove. These clerks fall under the class of inferior officers, the appointment of which the Constitution authorizes congress to vest in the heads of the departments. And the Constitution has authorized congress, in certain cases, to vest this power in the president alone, in the courts of law, or in the heads of departments, and all inferior officers appointed under each, by authority of law, must hold their offices at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws under which these offices are held."

If an act of congress, presumed to be approved by the president, vests in the judges or heads of the departments authority to appoint subordinate officers, then, by constitutional authority, the power to appoint them is taken away from the president; and it follows, according to this case, that the power of removal would be equally taken away. The president might dismiss the head of a department who would refuse at his request to dis-

miss a subordinate or inferior officer, but would have no power directly to dismiss such officer himself.

It may be regarded, then, as the settled law that the power of removal is incident to the power of appointment, and, therefore, that any law which confers upon the head of a department a power of appointment, *ipso facto*, conveys a power of removal, as effectually as if that power were expressly given by that statute. The power of removal is entrenched in the law. It is created by an act of legislation, and it can only be taken away or modified by similar authority. The acts of congress, therefore, authorizing the appointment of complainant as inspector of mails of themselves gave the postmaster-general authority to remove him at pleasure, unless that or some other act of congress has imposed some limitation, condition or restriction upon that power.

The second section contains an enumeration of the objects for which the rules are to provide. They are: For competitive examination; for appointment by selection from those grading highest, as the result of such examinations; for apportionment of the appointments among the States and Territories and the District of Columbia, according to the population; for a period of probation before absolute appointment; for exemption of persons in the public service from any obligation to contribute to any political fund and from being coerced into any political action; and for non-competitive examination in certain cases, and for notice to the commission of all appointments made by the appointing power.

It would be a very irrational interpretation which would give to the words, "and among other things," which are prefixed to this enumeration, such a scope of meaning as to convey by implication an unlimited authority to establish rules having no relation to the objects of the law. If that were a proper interpretation of the law, these rules might be made to impose new conditions to the power of appointment, and even take it away from the heads of the departments and vest it in the commission itself. The absurdity of such a proceeding would be manifest, and yet it would be no more obnoxious to criticism than rules modifying the power of removal, as it existed before the act was passed, or in a manner not warranted by the law itself.

The law seems to contemplate the preparation of these rules as the joint act of the commission and the president. It directs that when promulgated they shall be observed by all the officers in the departments. It does not in terms declare by whose authority they are to be promulgated and to go into effect, but it is to be presumed that it is to be by the president. It makes no difference, however, whether they are to emanate from the president or the commission, for congress is just as incapable of surrendering its legislative author-

ity to the president as to the commission; and is just as little to be understood as intending to do so in the one case as in the other. The simple inquiry is whether the rules invoked by the complainant, whether the president or the commission, or both, be the authors of them, are such as the act of January 16, 1883, known as the Civil Service Act, authorized to be established. In my judgment they are *ultra vires* and void.

I have no doubt that the president may lay down rules for the internal policy of his administration, and may require his chief executive officers, dependent upon his pleasure for their tenure of office, to conform to them, or else to sever their official relations with him, and in that sense the rules relied on by the complainant were within his political and executive authority. But the enforcement of such rules is a matter between the president and his cabinet, and not a matter for the courts, or one in which the complainant has any legal interests. All that I mean to state in this opinion is that the rules in question were not such as the Civil Service Act authorizes, and do not derive any efficacy from that act.

I know of nothing more important to the true interests of the country than the policy which the civil service legislation was intended to initiate and promote, and it is perhaps a matter for great regret that the act of January 16, 1883, has not gone further than it does. But it is my duty to construe it as it is.

To sum up, I conclude that, apart from the Civil Service Act, the postmaster-general had the authority to remove the complainant from office at his pleasure; that this act makes no change in this respect, except to forbid removals for refusal to contribute to partisan objects; that the power to the commission and the president to establish rules to carry that act into effect does not authorize any rule which shall make a change in the law in this respect, and that even if this court had jurisdiction in a case like the present the complainant is not entitled to the relief prayed.

Mr. H. N. Low for the complainant.

Mr. Henry E. Davis, United States attorney for the District of Columbia, and Mr. John E. Boyd, assistant attorney-general of the United States, for the defendants.

#### THE TRUE TEST OF THE CRIMINAL RESPONSIBILITY OF THE INSANE.

THERE is no legal warrant either in England or America for the language, imputed to Mr. Justice Brett, in the case of *Reg. v. Blampied* (Maidstone Sum. Ass., 1895). The decision of the jury was correct and eminently proper. The *dicta* of Mr. Justice Miller (*ante*) in *Reg. v. Cockroft* more correctly states the law applicable to such cases.

1. There is a difference between an insane delusion which dominates and controls the action of

an insane person, and a mere delusion which affects the sane or the insane mind similarly. Both sane and insane minds may rest under delusions, but whether the insane delusion be of such a character as to dominate the will and action of the accused, *in reference to the act*, is the crucial test of criminal responsibility.

2. No amount of moral degeneration, or vice, which has become unresisted or irresistible, ever excuses crime. The second-nature criminal may have irresistible impulses to steal, rob and commit crime. The light of science shines upon the path and clearly marks the boundary line of crime and vice in him who, dominated by an insane delusion, which controls the conduct and dominates the will, commits an act which lacks all the essential elements of crime. Chief Justice Gibson states the law correctly when he says, in *Commonwealth v. Mosler* (4 Barr, 266): "It (insanity) must amount to a delusion or hallucination controlling his will, and making the commission of the act a duty of overruling necessity;" and again: "The law is that whether insanity be general or partial, it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action."

The knowledge of right and wrong, either in the abstract or in regard to the act committed, knowledge of its character and consequences, even, may exist, as in the case of Guiteau and possibly, though not probably, in the case of Dr. Beach (at the moment of the killing), then even, in the language of Judge Gibson, "If it (the insanity) was so great as to have controlled the will and taken from him the freedom of moral action," by the law of Pennsylvania the accused would not be responsible, and in cases of moral insanity under the law of that State, as announced by the court. Mr. Chief Justice Lewis pronouncing the opinion, "We say to you as the result of our reflections on this branch of the subject, that if the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will or subjugate his intellect, and was not actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal."

Sir James Fitz James Stephen, by far the ablest writer upon the criminal law of England, in reviewing it historically, writing as late as his treatise on the History of the Criminal Law of England (1883), says: "I know of no single instance in which the Court for Crown Cases Reserved, or any other court, sitting *in banc*, has delivered a considered written judgment on the relation of insanity to criminal responsibility, though there are several of such decisions as to the effect of insanity on the validity of contracts and wills." (Stephen's Hist. Crim. Law of Eng., Vol. II, p. 152).

The question is, or should be, How far does the delusion dominate the volition, or, in another

class of cases, as Sir James Stephen puts it, "Was the accused deprived, by a disease affecting the mind, of the power of passing a rational judgment on the moral character of the act which she meant to do?" (Bell's Medico-Legal Studies, Vol. II, p. 1.) Lord Denman said, in *Rex v. Oxford* (2 C. & P. 225), where the accused was evidently acting under the duress of a delusion probably of an insane character: "If some controlling disease was in truth the acting power within him which he could not resist, then he will not be responsible." (In *State v. Pike*, 49 N. H. 399; 50 N. H. 367.)

The opinion of Chief Justice Doe is the most masterly and instructive discussion of the Law of Criminal Responsibility of the Insane extant. (Bell's Med.-Legal Studies, Vol. II, p. 14; *vide* also *Laws on Insanity*, pp. 311, 312, and 2 *Lawson's Crim. Def.* 311 *et seq.*; also decisions in *American States*: *Kriel v. Com.*, 5 Bush [Ky.], 362; *Smith v. Com.*, 1 Duv. [Ky.] 224; in *Virginia*, *Dejarnette v. Com.*, 75 Va. 876; in *Mississippi*, *Cunningham v. State*, 56 Miss. 269; in *Connecticut*, *State v. Johnson*, 40 Conn. 136; *Anderson v. State*, 43 Conn. 514; in *Iowa*, *State v. McWhorter*, 46 Iowa, 88; *State v. Feltes*, 35 Iowa, 68; in *Illinois*, *Hopp v. People*, 31 Ill. 385; in *Indiana*, *Bradley v. State*, 31 Ind. 492; in *Texas*, *Harris v. State*, 18 Tex. Court of Appeals, 87; in *Pennsylvania*, *Coyle v. Com.*, 100 Pa. 573; in *Georgia*, *Roberts v. State*, 3 Ga. 310; in *Massachusetts*, *Com. v. Rogers*, 7 Metc. 500.)

The most complete recent statement of the law will be found in the opinion of Somerville, J., in *Parsons v. State*, given in full in Bell's Med.-Legal Studies, Vol. II, p. 16; *Medico-Legal Journal*. This holds that the inquiries to be submitted to the jury in any criminal trial where the defense of insanity is interposed should be:

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a *disease of the brain affecting the mind*, so as to be either idiotic or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge he is not legally responsible.

3. If he did have such knowledge he may, nevertheless, not be legally responsible if the two following conditions occur:

(1.) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and the wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

(2.) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

(Bell's Med.-Legal Studies, Vol. II, p. 31.

*Vide* also opinion by Dillon, C. J., in *State v. Felton*, 35 Iowa, 67 [Bell's Med.-Legal Studies, Vol. II, p. 16]). Judge Dillon held that the capacity to distinguish between right and wrong was not a safe test of criminal responsibility in all cases, and it was accordingly decided, that if a person commit a homicide, knowing it to be wrong, but do so under the influence of an uncontrollable and irresistible impulse, arising, not from natural passion, but from an insane condition of the mind, he is not criminally responsible. "If," said Chief Justice Dillon, "by the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true that there is an unsound condition of the mind, that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an *insane impulse*, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it, the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect."

In the case of *People v. Daly* (trial in Eighth District Court, at Washington, D. C., Jan. 13, 1887), Judge Montgomery charged the jury as follows:

1. Was the defendant, at the time of the act, as matter of fact, afflicted with disease of the mind? Was he wholly or partially insane?

2. If he *was* so afflicted, did he know right from wrong, as applied to the homicide in question?

If he *did* have such knowledge, had he, by reason of the duress of such mental disease, so far lost the power to choose between the right and the wrong, and to avoid doing the act in question, as that his free agency was, at the time, destroyed, and if so, was the homicide so connected with such mental disease, in the relation of cause and effect, as to have been the product of it (the mental disease) solely. If you are satisfied from the evidence that the defendant was mentally afflicted, so that he did not know right from wrong, as applied to the act, or if he *did* know, but by reason of the duress, the stress of his mental disease (if he had any), he had no power to choose, no power to avoid doing what he did, and if the homicide was the product of his mental condition solely, or if by reason of the insane delusions which the defendant had been harboring (if any), he had reached that condition of mind where the morbid impulse to kill became irresistible, and existed in such violence as to subjugate his intellect, control his will, and render it impossible for him to do otherwise than to yield and do as he *did*, then he is not to be held accountable.

"If some controlling (mental) disease was in truth the acting power within him, which he could not resist, then he will not be responsible."

"If a person commit a homicide under the in-

fluence of an unaccountable and irresistible impulse, arising *not* from natural passion, but from an insane condition of the mind, he is not criminally responsible."

—From *Advance Sheets Clark Bell's 12th Am. ed. Taylor's Medical Jurisprudence.*

#### THE LAW AND CHRISTIANITY.

CHRISTIANITY, we have often heard, is part of the common law of England, but Chief Justice Best was committing himself to a very bold proposition when he said, in *Bird v. Holbrook*, that there is no act which Christianity forbids that the law will not reach. True it is that neither the law nor Christianity will allow shipwrecked mariners, for instance, to eat a boy companion in order to save their lives; but the law does allow one shipwrecked mariner who is clinging to a spar to push another off if the spar will not suffice to support both, which certainly Christianity does not. The law, in fact, allows what, for want of a better word, we may call legitimate selfishness. It commends the higher standard of Christianity, but does not exact it. The particular instance which Chief Justice Best had in his mind was the inhumanity of setting spring guns without notice. And it is one which very well illustrates the Christian attitude of our law. The law allows a man to be vigorous in the protection of his property, but not vindictive. He could (at one time) set spring guns in his grounds with due warning, as he still may at night in his dwelling-house; saying, in effect, to trespassers, "If you come here, take the consequences." Then the trespasser coming to the danger is the author of his own wrong. This is logical. But he must not set a secret and fatal snare, as the defendant in *Bird v. Holbrook* did. A trespasser is not to pay for his trespass with his life unless he chooses to run the risk. If he does, "*volenti non fit injuria*."—Law Journal, London.

#### PRIVATE TRIAL OF DIVORCE CASES.

COMMENT is caused by an order made by Justice Dunwell, of the Supreme Court, excluding spectators, certain witnesses named and press representatives from the court-room during the taking of evidence in a sensational divorce case at Rochester, in which is involved a clergyman's good name, says the Albany Argus. To take testimony in divorce cases before a referee, in order to avoid publicity, has not been unusual. The parties in this case, however, not having pursued that course, but having, on the contrary, brought the proceedings into open court, the judicial order is somewhat of a new departure—although it is expressly authorized in such cases by the Civil Code.

As to the merits of Justice Dunwell's action, it is at once apparent that something might be said both for and against. In opposition to the exer-



cise of a wise judicial discretion to prevent the washing of domestic linen in the columns of yellow journalism, the voice of no reputable newspaper would be likely to be raised, were there no other consideration involved. The danger is that, if such a precedent be followed except in extremely indecent cases, it will afford new means of securing quietly, without public scandal, divorce by collusion—than which there is to-day no greater menace to honorable wedlock and the perpetuity of domestic relations.

It is a great pity that the filth of sensational divorce suits should be spread at great length before the community by yellow journalism. It is a great pity that there is any such thing as yellow journalism. But, just as was the case when the Ellsworth bill was proposed last winter, we must always consider whether, in consenting to press-censorship and privacy in a good cause, we are not opening the doors to a general censorship and forging fetters to bind the American free press.

### Before the Final Bar.

**T**HE Hon. Francis R. Gilbert died on Thursday last at his native place, in Stamford, N. Y., aged 67 years. He was a prominent member of the assembly from the second district of Delaware county in 1863 and 1864. In May, 1887, he was appointed by Governor Hill to fill the vacancy on the bench of the Supreme Court caused by the removal of Justice William Murray, Jr., by the legislature, for disability; and in 1890 was designated by Governor Hill to be a member of the Constitutional Commission of that year from the Sixth Judicial District. In 1892-3 he was first deputy attorney-general under Rosendale. After retiring from that office he resumed the practice of the law in partnership with the late Judge Maynard, who was his cousin. Judge Gilbert was an able lawyer and a good public speaker.

Ex-Secretary of the Navy George M. Robeson died September 27, at his home in Trenton, N. J. Mr. Robeson was 69 years of age, and had been in failing health for several months. The deceased was graduated from Princeton in 1847, studied law, and was admitted to the bar in 1850. Subsequently he moved to Camden, and in 1855 was made prosecuting attorney of that county by Governor Newell. In 1865 he was appointed attorney-general for the State by Governor Ward, and in June, 1869, was made secretary of the navy. He served in this office until the end of President Grant's second term, March, 1877. The following year Mr. Robeson was elected to congress from the First New Jersey district, and was re-elected in 1880. He was defeated for a third term by Thomas M. Ferrell. Shortly afterward he moved to Trenton and gave his attention to his law practice.

### English Notes.

Lord Herschell will deliver an address, on October 19, at the opening of the art gallery which has been added to the municipal buildings at Reading.

Sir Richard Webster is to be invited to act as captain of the parliamentary cricket team which is being organized for a tour round the empire next year.

Sir William Windeyer, LL. D., formerly senior puisne judge of the Supreme Court of New South Wales, died recently at Bologna, at the age of 63. The cause of death was paralysis of the heart.

The outrage committed last week on Mr. Parr, the senior partner in the firm of Messrs. Jeffery Parr & Hasell, solicitors, of Birmingham, by an enraged beneficiary under a will, who shot at Mr. Parr with a revolver, shows the risk solicitors may run in the discharge of their duties, and leads us rather to wonder that such events are happily so uncommon, says the *Solicitors' Journal*. Most solicitors must inevitably, on occasions, incur the keen resentment of violent persons of the class who are accustomed to settle their disputes by their fists; they must act against persons whose livelihood or reputation will be destroyed by the success of the proceedings; yet fortunately most people (except, perhaps, Welsh miners—see the reports of the Denbighshire election) in this law-abiding country understand that the lawyer is a mere agent. The stories which have reached us on this subject have usually related to difficulty in keeping the peace between persons representing hostile interests who attend at the solicitor's office. We recall a diverting case in which the whole force of the establishment was engaged in preventing the members of a working-class family from flying at each other's throats during an interview to settle certain arrangements as to the division of property. A stalwart articulated clerk is of great assistance on these occasions, and he usually performs these exceptional duties with more relish than the routine work to which he is accustomed.

The London Law Times mentions the fact, apropos of the law's delays, that in the case of *Tynte v. The Queen* (7 Q. B. 216), judgment was reversed on error, after a lapse of 116 years.

### Legal Notes of Pertinence.

Charles H. J. Taylor (colored), who was register of deeds at Washington, under President Cleveland, has been chosen dean of the Law School of Morris Brown College, Atlanta, Ga. Mr. Taylor will resume his law practice in that city.

Attorney-General Grigsby, of North Dakota, has rendered a decision in which he holds that a half-breed born of a white man and Indian woman is not an Indian in the sense of the law; that he is

not a ward of the government. The decision arose over the question of jurisdiction in the case of a half-breed held at Pine Ridge Agency for murder.

A. J. Sampson, who has just been appointed United States minister to Ecuador, lives in Phoenix, Ariz. He is a lawyer by profession, and was the first attorney-general of Colorado after that State was admitted into the Union. He was the United States consul at Paso del Norte, Mexico, during President Harrison's administration. He is a native of Ohio, and about 55 years of age.

A number of important judicial nominations have recently been made. Henry A. Childs, of Medina, has been renominated for justice of the Supreme Court in the Eighth or Buffalo district. Pardon C. Williams, of Watertown, in the Fifth or Utica district, and Willard Bartlett in the Second or Brooklyn district. These justices were originally elected in 1883, under an amendment to the Constitution providing for twelve additional Supreme Court justices.

The confinement of a prisoner in an iron or steel court-house, with a tin or zinc floor covered with ice and with broken windows, during a bitter cold winter night, in which he suffers intensely and has his feet badly frost-bitten, is held, in *Shields v. Durham* ([N. C.], 36 L. R. A. 293), to give him a right of action against the town when the authorities had long known of the condition of the prison. A note to this case collates the decisions on a prisoner's right of action for imprisonment in an unhealthy or unfit prison.

William Louis Winans, a former resident of Baltimore, has just died in England, and his personal property, nearly all of it American securities, amounting to \$12,015,000, will pay the British treasury a probate duty of \$961,200. The English papers are all commenting on the advantage of having such Americans die in England. It certainly is an advantage to the English exchequer. American taxation is more lenient. No American estate has ever paid much over a tenth of the sum levied by English law on the estate of this absentee American.

The importing handkerchief trade in New York is anxiously awaiting the ultimate decision in the case of *Jonas Bros. v. The Government*, involving the question whether "initial" handkerchiefs are to be officially and judicially designed as "embroidered." The importers brought in a certain lot of handkerchiefs and entered them at 50 per cent. ad valorem. The collector declared the goods dutiable at 60 per cent. ad valorem, and at that figure the appraisement was made. Upon appeal to the United States General Board of Appraisers, the protest of the importers was sustained. The United States Circuit Court has affirmed this decision, and now the case will be carried to the United States Supreme Court.

The first legal bout between the heirs of the

estate of the late John C. Conley, of Boone county, Mo., and the curators of Missouri University has resulted in favor of the university, when Judge Hutzler, of the County Probate Court, decided to assess the estate to the amount of \$25,000, the money to go to the university. The case has been closely watched by the authorities of other State universities. The decision to assess the estate was under the law providing for a collateral succession tax for the benefit of the State university. The law provides that if a man dies leaving no father, mother, wife or direct lineal descendants, a certain per cent. of his estate, excluding any amount left for charities or religious purposes, must go to the State university.

Justice William J. Gaynor, of New York, who has spent the summer at Great Barrington, Mass., has been a frequent visitor to the free library, in which there is much local pride. On one occasion he had occasion to consult the Bible in preparing a lecture which he delivered before the Thursday Morning Club. Miss Sheldon, the librarian, after hesitating and consulting the catalogue, told him, with an embarrassed smile, that the library did not contain a Bible. The other day the library received a Bible, with the following inscription on the fly-leaf, signed by Judge Gaynor: "I have visited many libraries which lacked many books, but only one library which lacked The Book, and to that one I send this." The incident has caused much gossip and amusement.

### Notes of Recent American Decisions.

**Cancellation of Deed — Enforcement of Lien for Purchase Money.** — Where the grantor conveyed a tract of land for the consideration, among others, that the grantee would pay or contribute one-fourth part of the sum necessary to support the grantor during his life, it was error for the court to cancel the deed upon the failure of the grantee to contribute anything toward the support of the grantor; but a sale of the land should have been adjudged to pay the amount which the grantee should, under the stipulations of the deed, have contributed to the support of the grantor, or there should have been an order entered placing the land in the hands of a receiver, to be rented out, and the proceeds applied in the discharge of that obligation. (*Powers v. Powers* [Ky. Sup. Ct.], Ky L. Rep., Sept. 1, 1897.)

**Express Messenger a Passenger for Hire — Contract Exempting Common Carrier from Liability Void as Against Public Policy.** — An express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire, and he does not lose any of his rights as a passenger, and is enti-

tled to the highest degree of care and skill from the railroad company in the management of its trains and the preservation of his safety. A contract between an express company and its messenger, in which the latter agreed to release all right of action which he might have against the railroad company for negligence, and the contract further provided that the agreement between the messenger and the express company should inure to the benefit of the railroad company: *Held*, that these two contracts are, in effect, the same as a contract made directly with the railroad company by the messenger, whereby he agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants, and are void, because against public policy, and therefore they do not constitute a valid defense to the action of the messenger to recover damages for injuries caused by the negligence of the railroad company. (Voight v. B. & O. S. W. Ry. Co., U. S. Circuit Court [Ohio], Ohio Legal News, Oct. 2, 1897.)

Infants—Deed of Trust—Disaffirmance—Return of Consideration.—1. A deed of trust of real estate executed by an infant is voidable, and may be disaffirmed by him within a reasonable time after attaining his majority. 2. It is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed, and cannot be returned. 3. But where, as in this case, the money obtained by the giving of the deed of trust is used by the infant in paying off incumbrances on the property existing at the time it was acquired by her, and in making improvements upon it of which she is in actual possession at the time of disaffirmance, a court of equity will, applying the rule that upon disaffirmance the other party is entitled to recover the consideration remaining in the infant's hands, or under his control, treat the consideration received by him for the deed of trust as still in his hands. 4. In such case, however, a decree is erroneous which decrees that the grantees in the deed of trust are entitled, upon a sale of the property, to have their entire debt paid first out of the proceeds; but should direct the application of the proceeds of sale, first to repayment of such grantees, with interest of the sums paid in removing the prior liens and taxes on the property; then in paying to the infant the value of the lot, less such prior liens and taxes at the time of suit brought to foreclose the deed of trust, but without interest; and lastly, in paying to such grantees such of the proceeds of sale as may remain, not exceeding the balance due, with interest, the last sum representing, so far as may be, the value of the improvements put upon the property. (U. S. Sup. Ct., October Term, 1896. Decided May 24, 1897.)

### The Magazines.

The Harpers announce the early appearance of a weekly journal which will be entitled *Literature*, and will be published in England by the proprietors of the London Times, and in America by Messrs. Harper & Brothers. Its first number will be issued in London and New York toward the end of October. The editor will be Mr. H. D. Traill, a well-known and able writer. Though *Literature* will consist mainly of reviews of books, it will invite correspondence on, and will itself deal with, any subject of permanent or current interest to the writing, publishing or reading world.

The current number of Harper's Weekly is the annual Sportsman's Number, which represents a full game-bag, stuffed from cover to cover with interesting and often exciting matter. There are short articles on various branches of sport, treated by experts with all the raciness and breezy enthusiasm that are characteristic of the true sportsman.

Hon. Theodore Roosevelt contributes a paper to the October Century on "The Roll of Honor of the New York Police," his article being one of the series in this magazine on "Heroes of Peace." Mr. Roosevelt incidentally describes his efforts and those of his associates to reform the police force in New York and he tells of the workings of their plan to reward heroism by promotion wherever possible. A paper by Miss Anna L. Bicknell, who wrote "Life in the Tuileries Under the Second Empire," based upon her own experiences in the palace, treats of "Marie Antoinette as Dauphine," and has many illustrations. Miss Bicknell presents much new material, drawn from the state papers in Vienna. In "Wild Animals in a New England Game Park," Mr. G. T. Ferris describes the great game preserve of twenty-seven thousand acres established by the late Austin Corbin among the abandoned farms of New Hampshire. Mr. T. Cole, the engraver, gives his attention this month, in his "Old English Masters," to Sir Joshua Reynolds, four of whose most characteristic paintings are reproduced. The accompanying text is by Prof. John C. Van Dyke. Joseph Pennell writes appreciatively of "The Art of Charles Keene," ranking Keene next to Hogarth among English artists. A number of examples of his work, from the original drawings, give point to Mr. Pennell's praise. "Letters of Dr. Holmes to a Classmate," edited by Mary Blake Morse, are for the first time printed. This number of the Century closes the volume and brings to an end the serials that have proved such successful features of the year. Gen. Horace Porter's "Campaigning with Grant" gives a vivid description of the surrender of Lee at Appomattox, and corrects some errors that have crept into the generally received history of the event. Dr. Mitchell's

novel, "Hugh Wynne," gathers together the strands of romance, after the momentous scenes of the revolution have played their part of the story. Mrs. Catherwood's romance, "The Days of Jeanne d'Arc," ends with the death of the pucelle and her squire, and is accompanied by pictures by Boutet de Monvel. There is a short story by Lucy S. Furman, entitled "The Flirting of Mr. Nickins," and one by Louise Herrick Wall, "The Heart of a Maid."

An important feature of The North American Review for October is the opening article from the pen of the Right Rev. Henry C. Potter, D. D., bishop of New York, entitled "Man and the Machine." Prescott F. Hall writes interestingly on "Immigration and the Educational Test," and a timely contribution on "College Discipline" is furnished by David Starr Jordan, president of Leland Stanford, Jr., University. Space is devoted to a consideration by Benjamin Micou, former chief clerk of the navy department, of "Torpedo Boats in Naval Warfare," and John Charlton, M. P., of the Canadian house of commons, forcibly discusses "Canada and the Dingley Bill." Starr Hoyt Nichols presents "Another View of the Union Label," while Charles H. Cramp, the well-known shipbuilder, treating of "The Coming Sea-Power," describes the phenomenal progress of Japan in the development of her power on the sea. "The Clayton-Bulwer Treaty" receives careful attention from Mayo W. Hazeltine, while in "To Abate the Plague of City Noises," Dr. John H. Girdner pursues the views and suggestions made by him last year in a Review article of similar nature. Under the caption of "The Silver Question" two valuable papers are given, dealing with this topic, viz., "Its Present Status," by the Hon. R. P. Bland, and "India's Case for Silver," by A. S. Ghosh, professor of economics in Calcutta University. "The Rejuvenation of the Jew" is eloquently dealt with by the Rev. Dr. H. Pereira Mendes, and a paper of marked significance on "Some Important Results of the Jubilee" is contributed by Mr. Andrew Carnegie. Other subjects considered are: "The Tenure of the Teacher's Office," by E. L. Cowdrick; "Health and Beauty," by Dr. Cyrus Edson, and "Shall We Tax the Human Leg?" by Wm. Everett Hicks.

The Living Age, which has appeared with never failing regularity for nearly two generations, reflects as faithfully as ever the age in which we live. It is composed of the best articles of the best periodicals, reproduced without abridgment, and is as much superior to any of them as the masterpiece of the Grecian artist was to any of the beautiful women who furnished each some particular charm for the representation of perfect beauty. Each number as it is received is a delight.

With the October number the Atlantic Monthly

completes its fortieth year, and the event is celebrated by issuing a special anniversary number. The Atlantic was named by Oliver Wendell Holmes, and James Russell Lowell was its first editor. Besides these two, the first number had among its fourteen contributors Whittier, Longfellow, Emerson, Motley, Charles Eliot Norton, J. T. Trowbridge, Mrs. Stowe and Parke Goodwin. Thus the magazine was at the very beginning committed to the highest standards in literature and politics, standards which it has maintained to the present day. The career of the magazine has always been consistent and representative of the best in everything. The variety of subjects in the contents of the birthday number of the Atlantic is as great as one number of a magazine could very well achieve.

The leading article of Harper's Magazine for October is the first instalment of "Spanish John," by William McLennan, a novel of adventure dealing with the fortunes of the Scotch pretenders to the throne of England. The illustrations, which include the frontispiece, are by Myrbach. Capt. Mahan's article on "The Strategic Features of the Gulf of Mexico and the Caribbean Sea," in the same number, is a companion and a sequel to his article in the September issue of the same magazine, in which he gave the reasons for the belief that our propinquity to the Orient even more than our interest in European affairs will force us at no very distant day to take a leading part in those great movements which shape the destinies of nations. In the present article Capt. Mahan, who is the leading authority on naval history and strategy, presents a timely discussion of the advantages which Cuba possesses over Jamaica and other neighboring islands as a basis of naval operations for the protection of the mouth of the Mississippi, and of the proposed channel of communication through the Isthmus with our ports on the Pacific. The bearing of such a paper on the Cuban question and the importance of an inter-oceanic canal is obvious.

The October number of the International Journal of Ethics opens with a charming article on Nansen, by Leslie Stephen, of London, P. E. Matheson, New College, London, writes on "Citizenship," and Edward Caird, Balliol College, Oxford, on "Prof. Jowett." "The Relation of Pessimism to Ultimate Philosophy" is discussed by F. C. S. Schiller, of Cornell University. Other leading articles are: "Our Social and Ethical Solidarity," by Edward Montgomery, Hempstead, Texas; "Some of the Leading Ideas of Comte's Positivism," by S. H. Mellone, Edinburgh, and "The History and Spirit of Chinese Ethics," by Keijiro Nakamura, Tokyo, Japan.

Walter D. Miller, Esq., is becoming famous for his writings, which are published far and near. Recently he wrote for the ALBANY LAW JOURNAL

an article on James Louis Petigru, and for the American Law Review he furnished a sketch of the life and character of John C. Calhoun. His familiarity with the career of the distinguished people (living and dead) of Abbeville county, would point him out as a suitable person to write a book on the great men of this county. Having graduated at Erskin College, and having taken a course at the Law University of Virginia, in each of which institutions he distinguished himself, and since then having been a great reader, he ought to be eminently qualified to write a book, which would be equal to "O'Neal's Bench and Bar." His literary taste and his prominence at the Abbeville bar would warrant him in undertaking the important historical work. — Abbeville (S. C.) Press and Banner.

### New Books and New Editions.\*

State Control of Trade and Commerce by National or State Authority. By Albert Stickney, of the New York Bar. New York: Baker, Voorhis & Co. 1897.

In the above-named work Mr. Stickney's aim has been to trace legally and historically the course that States have pursued in their attempted control of commerce. Many cases bearing on the subject have been cited, and no adjudicated point left undisclosed which would help to bear the author out in his individualistic conclusions. The work commences with the English Statute of Laborers, Edward III, 1349, and discusses the early conditions attending private employment. The author brings the reader down from that point in history to the recent Trans-Missouri freight case. His premises are sound; his conclusions logical and consistent. Although the reviewer does not agree altogether with Mr. Stickney in his economic views, yet he cannot help admiring the scholarly way in which the author has treated his subject. The book will be a valuable adjunct to both the lawyer and the client in the better understanding of present commercial conditions.

Handbook of the Law of Equity Pleading. By Benjamin J. Shipman. St. Paul, Minn., West Publishing Co. 1897.

This is one of the well-known Hornbook Series, and is by the author of "A Handbook of Common-Law Pleading." In it Mr. Shipman, following the general plan of his former work, has sought to state the rules and principles of equity pleading. In view of the inherent difficulties of the subject, and the fact that while the principles applicable are, in most cases, as clearly defined and established as those of the older method, very much depends, in their application, upon the facts of the particular case, Mr. Shipman has produced

a work which is not only creditable to his industry and learning, but one which will be found valuable to the student and practitioner alike.

The General Railroad Laws of New York, Including the General Incorporation Law, the Stock Corporation Law, the Railroad Law, and the Transportation Law, and All Other Laws Specially Applicable to Railroad Corporations, as Revised by the Statutory Revision Commission, Enacted by the Legislatures of 1890 and 1892, and Amended in 1893-4-5-6-7. Albany and New York: Banks & Bros. 1897.

This book is a complete code of railroad statutory law, and contains, in addition to the above, all acts governing railroads and their employes in the management of road, relating to taxation and the bonding of towns and railroad aid debts, the sections of the Penal Code applicable to railroad companies. The Rapid Transit Act, the Interstate Commerce Act, etc., fully revised and amended to date, with an index.

The Insurance Law. Consisting of the General Corporation Law, the Stock Corporation Law, the Insurance Law, and the Provisions of the Penal Code Applicable to Insurance Companies, as Revised by the Commissioners of Statutory Revision, and enacted by the Legislature of 1892, with the Amendments of 1893-4-5-6-7, and the Tax Law of 1897. Albany and New York: Banks & Bros. 1897.

This work is sufficiently described by its title. In addition, it contains copious notes of decisions and attorney-general's opinions to date, which will aid materially in construing the text of the Insurance Law, and will therefore be found very valuable to insurance companies and all who are interested in the subject of insurance.

Digest of Arkansas Reports. By T. D. Crawford, of Little Rock, Ark. Albany and New York: Banks & Bros. 1897.

Crawford's Digest of the Arkansas Reports embraces the entire series of Arkansas Reports, from volume one to volume sixty-two. It is intended to be a complete digest of all points of law decided, and has been prepared from examination of each case. An attempt has been made to recover those points of interest to the legal profession which have not found their way into the reporter's head-notes. The plan of the work is to give a synopsis of each important title at its beginning. By a liberal use of subdivisions, it has been sought to make the matter of the work as accessible as possible. The difficulty of finding matters which have been decided, arising from the want of uniformity in the system of digesting in vogue, has been obviated as far as possible by frequent cross-references. The work will be found to be comprehensive and carefully prepared.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, OCTOBER 16, 1897.

### Current Topics.

TWO somewhat notable suits against the Albany Railway, in which large damages were claimed, based upon the alleged negligence of the defendant company, have recently terminated in victories for the corporation, which, recognizing the fact that an important principle was involved, fought them strenuously. In the case of Ogier v. The Albany Railway, the Court of Appeals has just handed down a decision affirming the judgment of the Appellate Division. The case will be found reported in 88 Hun, 486. The judgment of the Supreme Court was in favor of the plaintiff, upon the verdict of a jury rendered after trial at the Albany Circuit. The evidence in the case showed that, at three o'clock in the afternoon, in the city of Albany, at a point where there was no crosswalk, the plaintiff, a lad of about five years, was struck by a motor car of the defendant company, moving at the point in question, by gravity, at the rate of from four to five miles an hour upon the south track of the railway; that a coal wagon was proceeding in the opposite direction, upon the northerly track, and was about opposite the motor when the deceased rushed from behind the wagon in a southerly direction, and came upon the southerly track at a distance of about five feet in front of the advancing motor. The motorman first applied the brake and then reversed the power, but the car passed over the child and killed it. It was held, upon the facts shown, that there was no

proof of negligence on the part of the company. The court said that, manifestly, the burden of proof was upon the plaintiff to show that some negligent act or omission on the part of the defendant was the cause of the injury, to entitle the plaintiff to recover. The unfortunate killing of the boy, if it was the result of unavoidable accident on the part of the defendant in the movement of its cars, would not create a liability so long as it appeared that the defendant was in the lawful and prudent use of the privileges conferred upon it by its franchise. The plaintiff having failed to show that some negligent or improper act or omission by the defendant produced the injury complained of, the action fails.

The other case referred to was that local *cause célèbre*, Maggie Piehl v. The Albany Railway, to recover \$25,000 for the death of her brother, John Piehl, Jr., who received injuries by the bursting of the fly-wheel, weighing some 50,000 pounds, in the powerhouse of the defendant company in November, 1895. On a re-trial on the 11th inst., after the plaintiff had rested, the motion of the defendant's attorney for a nonsuit was granted by the court (Justice Chase). The court held, in effect, that the evidence adduced by the plaintiff failed to justify a finding that the breaking of the fly-wheel was due to a want of proper care on the part of the defendant. In this, as in the case above referred to, the burden of proof rested upon the plaintiff.

This case was first tried before Justice Alton B. Parker, and resulted in a verdict of \$5,000 for the plaintiff, but the Appellate Division reversed the judgment of the lower court and sent the case back for re-trial. In doing so, the court enunciated the important principle that, to convert into evidence of negligence a mistaken act of omission or commission, based upon the actor's best judgment of the needs of the situation, it is necessary to show that the error in judgment is tracable to negligence or incompetency. In this case it appeared that the engineer, using his best judgment in a moment of peril, cut off an electric current from the generator of the engine before he shut off

the steam from the engine itself, in the belief that the automatic governor of the engine would prevent it from running dangerously fast until he should have time to reach the throttle, which was distant only twenty-four feet. Evidence to this effect, the court says, is not sufficient, even upon the assumption that the engineer made a mistake in breaking the circuit before he shut off steam from the engine, to charge his employer with responsibility for the death of a person struck by one of the fragments of the wheel. "In such a case," said the court, "to condemn his act because it was not successful, and then to condemn him because we have condemned his act, is to proceed upon speculation, or at least upon evidence which no more tends to support the verdict than to subvert it. The burden of proof is not thus maintained. \* \* \* Assuming that the engineer did make a mistake in pulling the circuit breaker before he seized the throttle, the graver question submitted by the court to the jury was whether this act of the engineer was either attributable to his negligence or attributable to his incompetency." The court was of the opinion that it was error to submit either question to the jury.

The decisions in these cases go far toward establishing important precedents governing damage suits of this nature.

At the opening of the October term of the United States Supreme Court, on Monday, the 11th inst., there were 466 cases on the docket as against 616 at the beginning of the October term in 1896, of which 383 came over from the last term, and 83 were added during the court's vacation. According to long usage, the first duty of the term was the official call upon the president, no other public business being transacted on that day. On Tuesday the argument of cases on the regular docket was begun. On the second Monday of the term, the 18th inst., the court will take up the hearing of cases advanced on the docket and assigned for that date, of which there are nineteen. The first of the assigned cases is that of the man Bram, charged with the murder of the captain, the

captain's wife and the first mate of the barkentine Herbert Fuller, in July, 1896. Then come the eight-hour law cases from Utah; the case of the Pittsburg, Cincinnati & Chicago Railroad Company v. The State of West Virginia, involving the questions of taxation; the case of the United States v. The Joint Traffic Association, and others of less general importance. The first case on the regular docket for argument was that of the City of New Orleans v. The Texas & Pacific Railroad Company. Some of the cases coming over from the last term are of considerable importance, among them being the Nebraska maximum freight rate case, involving the right of a State legislature to fix a freight rate beyond which railroads cannot go in their charges; the Southern Pacific Railroad Company v. The State of California, the disposition of which will determine the title to several hundred thousand acres of land; the Westinghouse Air Brake case, involving the validity of patents of the Westinghouse Company for applying the air brake to long trains; and the case of the Inter-State Commerce Commission v. The Alabama Midland Railroad Company, involving the long and short haul clause of the Inter-State Commerce law.

We publish in this issue the opinion delivered by Judge Wheeler in the United States District Court, District of Vermont, Oct. 6th, in re Arthur L. Weeks. The subject is one of general importance, and this particular case has excited considerable interest among lawyers and United States officials. The statement of facts, which is appended for the benefit of the profession, is from the brief of United States Attorney Senter, and we may add that it was agreed, by the State's attorney, Mr. Frederick A. Howland, who represented the other side in the controversy, to be correct. The relator is a deputy collector of internal revenue for the United States Internal Revenue Collection District of New Hampshire, assigned to the Vermont division, which division consists of the State of Vermont with the exception of the county of Windham. The collector of internal revenue for the district of

New Hampshire, which district includes Maine, New Hampshire and Vermont, is the Hon. Calvin Page, whose official residence is at Portsmouth, N. H. The internal revenue records of the district are all at the office in Portsmouth, where all the clerical force of the district is stationed. The relator was, on the 11th day of April, 1897, served with a subpoena, *duces tecum*, issued from the County Court of the county of Washington, commanding him to have before the County Court within and for the county of Washington and State of Vermont, on the 12th day of April, at two o'clock P. M., all papers, applications, books, memoranda and written and printed data in his possession, showing, or tending to show, that Henry Emmons, Norman O. McLeod, John Mooney, Clinton E. Town, Fred A. Standish and George West, and any one of them, have or had paid a tax to the United States for the sale in Montpelier, Vermont, of spiritous or intoxicating liquors during the years 1896 and 1897, or any part of said years; and, on said 12th day of April, A. D. 1897, the relator appeared as commanded in said subpoena and was sworn in said County Court as a witness on behalf of the State in a criminal action then and there being tried, in which the State of Vermont was the plaintiff and one Henry Emmons was defendant. The relator refused to answer any questions relating to said official papers, memoranda or records and also refused to disclose any information regarding the same which he had received from taxpayers in his official capacity, upon the ground that he was forbidden so to do by the instructions of his superior officers, the collector of internal revenue at Portsmouth as aforesaid, and the commissioner of internal revenue of the United States; and that the production of such papers and records and the giving of evidence as to such communications made to him in his official capacity would be the disclosure of State secrets inimical to the public service and contrary to public policy. Upon the relator's refusal to so testify the presiding judge of said County Court, the Honorable John W. Rowell, one of the

judges of the Supreme Court of the State of Vermont, ordered the relator committed for contempt of court in refusing to so testify; whereupon a petition for a writ of *habeas corpus* was presented to Judge Wheeler, in the United States District Court, the relator admitted to bail, and, finally, on June 8, 1897, the hearing on said petition was had at Montpelier. The question, which it will be seen the court decided in the negative, was whether a State court, within whose jurisdiction no United States revenue records or original papers are kept, may compel a deputy collector of internal revenue to testify, from knowledge acquired in the pursuit of his official business, as to who has paid an internal revenue tax to the United States for the retail sale of liquor. For a copy of the opinion in the case, which is now published in advance of any other journal or reporter, we are indebted to the Hon. John H. Senter, United States Attorney, Montpelier, Vt.

In the appointment of Jesse Johnson of Brooklyn to succeed the late William J. Osborne, as one of the justices of the Supreme Court in the second judicial district, Governor Black has shown excellent judgment. Mr. Johnson has long been a leading member of the Kings county bar, and has held office as assistant corporation counsel of the city of Brooklyn, United States attorney for the eastern district of New York and delegate-at-large to the Constitutional convention of 1894. In the last capacity he was chairman of the committee on cities in the convention, and had much to do with framing the provisions in reference to cities as now embodied in the Constitution of this State. He was also an active member of the committee on the judiciary, which brought about so many important changes in the judicial system, under the leadership of Mr. Elihu Root. The New York Sun calls attention to the fact that in the appointment of Mr. Johnson, Dartmouth College gains a third judicial honor, for, like United States District Judge Tenney and Mr. Justice Cohen, the successor of Judge Sedg-



wick in New York City, Mr. Johnson is an alumnus of Dartmouth.

The Pine Tree State furnishes a novel breach of promise of marriage suit, in which the plaintiff was not a deceived, heart-broken Niobe, as is usual in such actions, but a poor, jilted man, whose future was blighted by the flat, final and, as he claimed, wholly unwarranted refusal of his lady love to keep her matrimonial agreement. Arthur S. Melcher, the plaintiff aforesaid, resides in the pretty little hamlet of Auburn. He is described as a fairly well-to-do widower of highly respectable connections. A chance acquaintance with Miss Louise M. Dingley, a niece of Representative Dingley, a middle-aged lady, personally attractive and possessed of a fair supply of this world's goods, finally ripened into a more tender relation, and the outcome was an agreement on the part of Miss Dingley to marry Mr. Melcher. Whether or not the usual custom was reversed, and Miss Dingley actually "popped the question," as is alleged, accounts do not agree; but certain it is that their minds met and the happy day was named. Mr. Melcher blithely began elaborate preparations for the approaching nuptials, replenished his wardrobe, secured and furnished a "dove-cote," and, in short, made all necessary preparations, for the nuptial event. Miss Dingley also busied herself with somewhat similar preparations, but, as the event showed, they were "not for Arthur." On the eve of the approaching marriage, what was Mr. Melcher's astonishment to read in a reputable newspaper that his fiancé had gone off and got married to a presumably handsome man—one Mr. Hadley. Mr. Melcher, as soon as his first grief and disappointment had been somewhat assuaged, determined to make the lady smart, as a warning to other would-be faithless fiancés, and so he brought a suit for \$25,000 damages for breach of promise of marriage. The jury, after hearing the evidence, which included the admission in court by the defendant that Mr. Melcher desired to marry her without any regard to her worldly means, got out their pencils, figured for a few hours, and finally awarded the

plaintiff the sum of \$1,789 damages, which was quite little enough, considering the amount he had expended upon the "dove-cote" for the dove that never came, as well as the mental anguish and humiliation, not to say open guying which he must have had to bear, as a result of thus receiving the "mitten."

A statute passed by the legislature of Pennsylvania at its last session provided that the name of any candidate should not appear more than once upon the ballot to be voted at any State or municipal election, the manifest intention of the law being to prevent fusion between different parties standing in opposition to the dominant political organization. The Pennsylvania courts, however, have declared the statute in question unconstitutional, as was to have been hoped as well as expected. While it is conceivable that such a law might, in some cases, work to the public advantage, it is certain that in many other instances it would be productive of the grossest harm and injustice. For example, had the law remained in force, the Democrats would have been prevented from re-nominating judges of their own party because the Republicans had accepted them as their candidates at a convention held earlier. In New York the effect of such a law would have been not only to prevent the Republicans from making Seth Low their candidate, in case they had so desired, but would have rendered impossible the joint nomination, by the two great parties in New York, of Supreme Court Justice Charles H. Van Brunt, which has now been done, making certain that that able, fearless and conscientious jurist shall be his own successor. It is clear that the passage and enforcement of such a law as was enacted in the Keystone State would be a serious blow to the movement in favor of a purer judiciary, and in this aspect of the matter the experience of Pennsylvania ought to serve as a warning and a guide to other States of the Union.

It is a happy augury for the elevation of the bench in this State that the idea of non-

partisanship in the selection of the judiciary is becoming increasingly popular. The removal of judicial nominations from the purely political atmosphere to the higher plane of fitness and capacity, to which we recently referred, in the candidacy of Judge Alton B. Parker for the New York Court of Appeals vacancy, is again illustrated in the case of Judge Chas. H. Van Brunt of the Supreme Court, Appellate Division, first department, whose nomination by both of the great political parties in the city of New York, puts his selection as his own successor beyond question. It is all the more gratifying that this honor has fallen to such a pure, able and fearless jurist as Judge Van Brunt, whose ideal fitness for judicial duties, as will be remembered by our readers, has been already publicly attested at a meeting of the New York bar held some time since, at which the course which has now been taken was strongly urged. Not only Judge Van Brunt but the people of the City of New York are to be congratulated upon a result so auspicious for the continuance of the present high standard in the selection of judges in this State. It is also worthy of note that in the 5th district Judge Pardon C. Williams, and in the 8th district Judge Henry A. Childs have been renominated by both parties.

The New York Court of Appeals has decided against Charles Grannan, better known as "Riley" Grannon, in his suit against the Westchester Racing Association, whose board of stewards disbarred him from the track about a year ago. The decision is hailed with pleasure by officers of racing associations, inasmuch as it practically gives them the same power as to governing the attendance at their tracks that a social club has with respect to the admission of visitors. In other words, the highest court in the State holds that the badge of admission to race tracks is revocable, according to the terms usually printed upon it, at the pleasure of the governors or officers of the racing association in case the holder fails to comply with the rules. The question, it seems,

had never before been passed upon in this State at least. The Appellate Division of the Supreme Court upheld Grannan, on the ground that he had not been given a hearing. The decision is reversed and the disbarment is upheld. The court does not answer the question as to whether the stewards may discriminate as to who shall or shall not be entitled to admission to the track, but holds that it may refuse admission to persons who violate their rules. At the same time Grannan was ruled off the track, William R. Wallace, owner of a number of race horses, was denied the privilege of entering and running his horse in future races. It was announced that Grannan was ruled off for having made a present of \$500 to Jockey Fred Taral, contrary to the rules of the club. Grannan and Wallace were intimate friends, and were supposed to be partners in racing transactions, and while the Taral business was given out as the reason for Grannan's expulsion from the track, back of it all was supposed to be his connection with Wallace in the running of the horse The Commoner, who had been beaten by Cassetts in a race that created something of a scandal among race-goers. No wrongdoing was charged against Taral, it being admitted that Grannan had made the present wholly unsolicited, without any previous promise and solely because Taral had ridden several horses on which he had won very considerable sums of money. Another significant fact was that the present was made just before Grannan left for Europe, in the previous June, a fact which put all suspicion of crookedness out of the question.

#### Notes of Cases.

A summons in a suit brought by Bernard F. Martin in the Municipal Court of the city of Rochester, to recover for goods sold to David Goldstein, was served on Saturday. The defendant appeared in this action solely to object to the jurisdiction of the court, mainly upon the ground that, being a Jew, he uniformly observed Saturday as "holy time." The plaintiff set up by affidavit that the summons being made returnable on Saturday was, through inadvertence, without malice. A judgment rendered in favor of the defendant, vacating the summons and warrant of

attachment, has been reversed by the Fourth Appellate Division, which held, in an opinion by Justice Adams, Justice Ward dissenting, that section 271 of the Penal Code, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor;" when construed in view of the fact that the first and third clauses of the section contemplate that the acts therein recited should be done maliciously, and of the principle that penal statutes should always be construed in favor of civil liberty, and that the section occurs in that part of the Penal Code defining crime against religious liberty and conscience, and that to constitute a crime there must be not only the act itself, but a criminal intent must accompany it, did not apply in this case, where the summons was inadvertently issued.

An interesting and novel question was presented to the Superior Court of Cook county, Ill., in the recent case of *Allaire v. St. Luke's Hospital*. The declaration alleged, in substance, that the mother of plaintiff, several days before his birth in regular cause of nature, contracted with the defendant hospital that the latter would, for a compensation then and there agreed on, shelter, attend, treat, during confinement and care for her and her child, then *en ventre sa mere*, during the period of childbirth and convalescence thereafter; that in pursuance of said agreement the mother of plaintiff paid said compensation and was received and accepted by said defendant at its hospital, by reason whereof it became the duty of said defendant to use due care and diligence for the safety and welfare of the plaintiff; that the defendant, by its agents and servants, placed the mother of plaintiff in an elevator for the purpose of carrying her and the plaintiff *en ventre sa mere* to an upper floor of the hospital for shelter, care and treatment, and so negligently and unskillfully conducted and operated said elevator as to permanently injure the plaintiff in the manner therein more fully described.

The case was heard on demurrer to the declaration, the question raised being as to whether a child, after it is born, has a right of action for injuries sustained by it while *en ventre sa mere*, or, in other words, whether a child unborn is a person in being, so as to be entitled after its birth to maintain such an action. The case is reported in a recent number of the *Chicago Legal News*, from which we take the opinion of the court (by Chetlain, J.), as follows:

"The question of law applicable to the facts of this case has never been decided in this country or in England, so far as counsel, and, I might

add, the court, after diligent search, have been able to discover. While many cases were cited and argued by counsel, only two, cited by counsel for defendant, were directly in point: *Deitrich v. Inhabitants* (138 Mass. 14), and *Walker v. Great Northern Ry. Co.* (28 L. R. [Ireland] 69).

"In the former case it was decided that if a woman, by reason of a defective highway, is delivered of a child who survives a few minutes, such child is not a person within the meaning of the statutes, for the loss of whose life an action may be maintained by his administrator against the town. In the latter case, where a woman *enccinte* was received as a passenger four months before her child would have been born in the usual course of nature, to be safely carried for reward, and, by the negligence of the railway company in operating its train, the plaintiff *en ventre sa mere* was injured and crippled, and the child after its birth sought to hold the company liable, it was held that the statement of the claim disclosed no cause of action.

"I am aware that in both these cases the principle was announced that a child unborn was not a person '*in esse*' so as to enable it to sue for injuries received while *en ventre sa mere*, and that a contrary rule, from the difficulties of proof and other considerations, would be attended with danger. Mr. Justice Holmes, in *Deitrich v. Inhabitants*, *supra*, says that no case can be cited to show that a legal duty has ever been held to arise toward one not *in esse*, one who has only a fictitious existence in law, so as to render a negligent act a breach of duty. The language used should be held only to apply to the facts of those cases. They need not necessarily be applied to all cases.

"From a careful reading of those cases and the many authorities cited in them, it will be found that the general principle is announced that a child *en ventre sa mere* is considered as born or *in esse* when it is for its benefit, and especially so when the application of the doctrine will work no hardship. Lord Coke, in the *Earl of Bedford's* case, said, '*filius in utero matris est pars viscerum matris*,' but he also added, 'yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth.'

"There are two classes of cases where it would seem just and reasonable that the rule here announced, though usually but not universally applied, in equity, where property rights are involved, should also obtain so far as personal actions are concerned.

"*First*. Where a person wilfully inflicts an injury upon a woman with child, knowing her to be such, and for the purpose of inflicting an injury upon her unborn child, whereby such child suffers permanent injuries; and.

"*Second*. Where a mother or other person contracts, upon a valuable consideration for, in reference to, or on behalf of the child *en ventre sa mere*,

for care and attention, or otherwise for the benefit or safety of the child, or of both the mother and child, where the duty arises out of contract and from the relative situation and circumstances of the parties at the time of the occurrence of the acts of negligence.

"In this case the allegations of the declaration, which must be admitted to be true, we find a contract made by the mother of plaintiff upon a valuable consideration, not only in reference to herself, but also in reference to the plaintiff *en ventre sa mere*. It was made by her for and on behalf of the plaintiff and for his benefit and with the defendant, with a full knowledge by it of the condition of the mother and the existence of the plaintiff, then *en ventre sa mere*. By that contract a duty was imposed on the defendant to use due care and diligence for the safety of the plaintiff as well as of the mother of the plaintiff.

"The fact that the plaintiff *en ventre sa mere* was in the elevator, and known to be by the defendant, in itself might not be sufficient to cast a duty upon the defendant to use due care and diligence toward the plaintiff, but where, in addition, such duty is imposed upon defendant by its own contract, based upon a valuable consideration, should not the plaintiff after his birth be permitted to maintain this action for the breach of the duty? The court is of the opinion that it should, and that the plaintiff in his declaration has stated a good cause of action, and is entitled to maintain it.

Albert A. Manda shipped certain plants by Adams Express Company from Lenox, Mass., to Orange, N. J. At New York city the plants were transferred to Wells, Fargo & Co. as a connecting carrier. The property was tendered by that company to Manda at Orange, but he refused to receive it, because the tender was accompanied with a demand for payment of exorbitant charges as a condition of delivery to him, he having offered to pay at the alleged agreed charges. On the trial in the New York City Court of Manda's suit against Wells, Fargo & Co. for alleged conversion, the complaint was dismissed for want of jurisdiction, the defendant company being a Colorado corporation and the plaintiff a resident of Orange at the time of the commencement of the action. The Appellate Term of the Supreme Court has affirmed judgment of the General Term of the City Court, affirming the judgment below. The plaintiff's contention was that the contract of carriage, so far as concerned the defendant, was within this State; that the property alleged to have been converted was situated within this State when the contract was made, and that the cause of action arose within this State. Justice Bischoff, giving the opinion, holds that neither contention is to be upheld. "As we view the facts," the court says, "there was no conversion until the defendant as-

serted its right to detain the plants upon the plaintiff's refusal to pay more than the proper charges. This was concededly at Orange. Hence the cause of action arose there."

#### JURISDICTION OF FEDERAL AND STATE COURTS—STATE COURTS WITHOUT POWER TO COMPEL DEPUTY INTERNAL REVENUE COLLECTOR TO TESTIFY AS TO WHO HAS PAID TAX TO THE U. S.

UNITED STATES DISTRICT COURT—DISTRICT OF VERMONT.

IN RE  
ARTHUR L. WEEKS. } *Habeas Corpus.*

WHEELER, J.—The laws of the United States provide that the secretary of the treasury shall prescribe "rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws," and "give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law" (Rev. Stat., sec. 251); that "the commissioner of internal revenue, under the direction of the secretary of the treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue, and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps and other matters pertaining to the assessment and collection of internal revenue" (sec. 321); for a special one, among others, retail dealers in liquors (sec. 3244); to be paid by stamps (sec. 3238); that collectors shall place and keep in their offices, for public inspection, an alphabetical list of the names of all persons who have paid such special taxes within their districts, with the time, business and place of business for which such taxes have been paid (sec. 3240); that every person engaged in such business shall place and keep conspicuously, in his establishment or place of business, all stamps denoting the payment of such tax (sec. 3239). The laws of the State provide for punishing common liquor sellers and for abating and enjoining places of sale as common nuisances, and that:

"The payment of the United States special tax as a liquor seller shall be held to be *prima facie* evidence that the person paying the same is a common seller, and that the premises so kept by him are a common nuisance." (Vermont Statutes, sec. 4476.)

The collector's office for this district is kept at Portsmouth, N. H. The commissioner of internal

revenue, presumably with approval of the secretary of the treasury, issued, on March 31, 1888, instructions to this collector containing, among others, those which have not been modified, but rather extended:

"A special taxpayer is required, under severe pains and penalties, to make his return under oath. The information is extorted from him. It is largely in the nature of a privileged communication which he is required to make to revenue officers, *for revenue purposes and for those alone*. It is not believed the courts will require a disclosure of evidence thus obtained for use in a criminal prosecution of him who furnished it. It is respectfully insisted that neither the return itself nor the information derived from it should be admitted on trial, especially if objected to by the accused.

In the case of *Gardner v. Anderson*, United States Circuit Court, District of Maryland, before Judges Bond and Giles (22 Int. Rev. Rec. 41), although the point involved was as to official communications between officers of the government, the court made a remark which is applicable to the question now under consideration, viz.: "That the communication was in its nature an official communication, relating to public business, which it was sought to prove by means of a witness whose only knowledge of it was derived from his official employment, which was contrary to public policy and not to be permitted."

You and your deputies should, of course, respond to the subpoenas of the court, but should respectfully decline to produce either the alphabetical list or the returns on form 11. (34 Int. Rev. Rec. 261.)

The relator is deputy collector in Vermont, and was summoned to attend as a witness at the trials of several persons in a court of this State for selling liquor, and to produce and exhibit all books and papers in his possession showing, or tending to show, that the respondents had paid any special tax for the sale of liquors in 1896 or 1897 at Montpelier. In the trial of one he was asked whether the respondent had ever paid him any money for the purpose of obtaining a retail liquor dealer's special tax stamp, and answered that he could not remember, but supposed he had means of ascertaining; whereupon he was asked to ascertain and state the fact, which he declined to do, because his means of knowledge of it had come to him solely in his official capacity and of the instructions from the treasury and internal revenue department; and for this refusal he was adjudged guilty of contempt. This writ is brought for relief from commitment on this judgment.

That the National and State governments have each a separate jurisdiction for their operations, although within the same territory, seems to be well and clearly shown in many cases in the Supreme Court of the United States, whose authority must be paramount, and especially by *In re*

*Neagle* (135 U. S. 1), where the relator was released from a charge of murder in a State court for a killing done in protecting a United States judge traveling on his official business. This killing was held to be as much without the jurisdiction, although within the limits, of the State as if it had been done without its limits. The Federal government could doubtless lay these internal taxes upon liquor dealers, and provide for their collection by collectors and deputies, or otherwise, and by methods open or secret, accessible or inaccessible, or accessible only in prescribed ways, for evidence of its own, or the State courts. It did provide that the fact of the payment of the tax should be open to all, and that proof of it should be accessible to all by examination of the authentic alphabetical list of the taxpayers and their places of business, for public inspection, in collectors' offices, and by the stamps conspicuously to be kept by sellers in the places of business. The provision of these open and convenient methods of proof of this fact somewhat exclude the use of any government agencies otherwise for that purpose. The Federal law is to be resorted to for ascertaining whether the instructions or directions are contrary to law, and they do not appear to be, in any respect, opposed to it, but rather to be in accordance with it. The relator, as Federal officer, was in duty bound to obey them. This fact of payment of the special tax, of which the Federal law provides such convenient proof, is exactly what the State statute makes evidence of being a common seller and of keeping a nuisance. When the State lays hold of a Federal officer and his doings for proof contrary to his duty in respect to the tax, instead of resorting to the evidence provided by that government, it interferes with the lawful operations of the Federal government in laying and collecting its taxes. The State has no right to Federal instruments of purely Federal character for proof unless they are left within its reach, and these are not, but are put without that reach. This is somewhat as if a Federal district attorney, or grand juror, should be imprisoned to compel disclosure of proceedings before the grand jury, which might be very material in a trial elsewhere. This disclosure would be contrary to legal duty as that would be, and such imprisonment would seem to be quite clearly contrary to the laws of the United States.

This case differs from *In re Hirsch* (74 Fed. Rep. 928) in respect to the proof required, and the regulations, instructions and directions shown, where the relator was remanded, and is similar to *In re Huttman* (70 Fed. Rep. 699), where the relator was discharged.

Relator discharged.

John H. Senter, United States attorney, for relator; Fred A. Howland, State's attorney, for State.

## WHAT SHOULD LAWYERS READ?

THE technical training necessary for admission to the bar and practice in the courts afterwards opens up an attractive and interesting subject for thought and discussion. As to this matter the profession itself seems to be somewhat at sea. An interesting and spirited discussion along this line is now going on in the pages of the American Law Review. At the very outset, I desire to premise that the perspective of this article is different from that immediately before this outlined. The professional reading necessary for lawyers, technically considered, we do not propose to discuss at all, however interesting it might prove itself to be. Nor do we propose to treat of religious books (with one exception) and papers which educate the conscience and improve the morals of lawyers and other professional men alike. First and foremost among the books which a lawyer should read comes the Bible. Here he will drink from the well of English undefiled. From it he will learn to handle words in the strongest and most forcible way. From it he will learn how to express his thoughts in the simplest and most natural manner. From it he will gain a keen insight into human nature and the motives which influence mankind. From it he will acquire those grand fundamental principles which underlie all forms of government and every system of laws. In the Bible we find spread out before us the finest code of morals the world has ever seen, one which never has been and never will be improved upon. Nor can the laws which it promulgates and inculcates be surpassed. From it we have derived the very cream of the common law. And then in arguing before a jury, what an inexhaustible storehouse is it from which to draw examples and illustrations to touch the conscience and enforce truth. The lawyer who fails to study his Bible will find himself unable to cope with the master minds of his profession. After the Bible, the grandest of all books, appropriately comes that masterpiece of human composition, Shakespeare. With it, too, should lawyers be familiar. It is amazing what a treasure house of knowledge Shakespeare contains. He seems to treat of almost every phase of life. He seems to have searched the secret springs of the heart, and to have analyzed every motive which influences the soul. He possessed a knowledge of human nature equaled by that of no other author. He was a master in the use of words and a model in point of style. From him a lawyer can obtain quotations to clinch his arguments and sway the juries which he addresses. Nor should he fail to be familiar with Milton, Byron, Burns, Pope, Tennyson and the other great poets. From all of them can he learn much which will polish his style, broaden his ideas, stimulate his intellect and widen his knowledge.

He should by all means be a student of history.

He should know much of the history of the world at large, of the great events which have taken place, and of the distinguished men and women who have figured in them. And more especially should he know well the history of his own times and his own country. Ignorance here is inexcusable. He should be well read, too, in literature, both ancient and modern. He should be fairly well acquainted with all the great writers of the day. He should study the sciences, and should devote a good deal of attention to the study of logic and mental philosophy. Books of this kind will discipline his mind and make him a profounder thinker and a more skilful reasoner. With the standard novels he should be familiar. The names of Dickens, Walter Scott, Thackeray and other novelists of that rank should be to him as household words. From them can he obtain many beautiful illustrations to ornament his style and improve his composition. Not only is it a great advantage for a lawyer to have read the leading novels, in his addresses before juries, but in a variety of other ways also. Lawyers are expected to be informed on topics of this kind, and when they betray their ignorance it affects their reputation. It is well, too, for them to keep up with the new novels that come out. It makes them more interesting in conversation, and adds to their reputation in society. By doing so they will save themselves from many an awkward blunder and embarrassing situation. Besides, the novel is getting to be the popular form for the inculcation of new and advanced ideas.

Of course it goes without saying that lawyers should read the newspapers and leading periodicals of the day. In no other way can they keep up with current thought. The newspapers tell us what is going on around the world. They give us the history of our own times. They tell us what the nations of the world are doing. They sketch for us the lives of people small and great. They tell us what discoveries are being made and what great events are happening. In fact, every day they give us a synopsis of the world's history for the last twenty-four hours.

The magazines and periodicals give us an elaborate and exhaustive treatment of men and affairs. They tell us all about the great writers — how they live, what they read and what they earn. They discuss the leading issues of the day, political, religious, educational and scientific. They tell us who are the leaders of the American congress and of the British parliament, and who mold public opinion in France, Germany, Austria, Spain and other great nationalities. They tell us all about the war in Cuba and what the English are doing in India.

Every lawyer who wishes to amount to anything either in society or at the bar must read the papers and magazines. Those who confine themselves exclusively to law books are likely to be

narrow and contracted in their ideas. The more liberal-minded members of the profession exert a greater influence upon courts and juries. Mr. Webster was himself an admirable illustration of this fact. His vast information served him well at the bar. If I wanted another example I might appropriately cite Hugh S. Legare, the polished scholar and distinguished lawyer whom my own State produced. The history of the American and English bars abounds with examples. Indeed, the leading influential members of the profession are very likely to be men of broad views and wide reading.

WALTER L. MILLER.

ABBEVILLE, S. C., Oct. 9, 1897.

### MASTER AND SERVANT.

#### FELLOW-SERVANT.

NEW YORK SUPREME COURT — APPELLATE DIVISION — FOURTH DEPARTMENT.

July, 1897.

Present: Hons. George A. Hardin, P. J., and David L. Follett, William H. Adams, Manly C. Green and Hamilton Ward, JJ.

PATRICK CUNNINGHAM v. SYRACUSE IMPROVEMENT COMPANY.

Plaintiff, while in the employ of a third party as a teamster, was temporarily hired by him to defendant, and set to hauling stone under the direction of defendant's foreman, and with the assistance of his servants, and while performing such service for defendant, was injured through the negligence of one of his assistants. *Held*, that as defendant was plaintiff's master at the time of such injury, and was also the master of the person whose negligence caused the injury, such person and plaintiff were fellow-servants.

Appeal from Trial Term, Onondaga county.

The plaintiff was a teamster in the employ and pay of one John W. Gee. On the 13th of August, 1895, Gee agreed with the defendant to furnish it a team, wagon and man to haul stone for \$3.50 per day, and he thereupon directed the plaintiff to take a team and perform whatever work was required of him by the defendant. In obedience to these instructions, the plaintiff, on the following morning, went with his team to the canal near what is known as the "wide waters," in the city of Syracuse, at which place a boat loaded with stone was moored to the bank. He reached the canal at about half-past 6 o'clock, and waited "until the boss and his men came." At 7 o'clock the "boss" stationed his men, called to the plaintiff to drive forward, told him where to place his wagon, and directed him to help load stone thereon. He also instructed him as to the number of stones to draw at a time and as to the proper

method of placing them on his wagon. The plaintiff followed the instructions thus given, and proceeded to load his wagon. The stones were swung from the boat onto the wagon by means of a derrick, and while the plaintiff was occupied in placing them in proper position, one of the defendant's servants negligently permitted a large stone to be swung towards the wagon without any warning to the plaintiff, in consequence of which the latter was hit and quite severely injured. It is to recover damages for the injury thus received that this action is sought to be maintained.

Walter N. Magee for appellant; W. S. Andrews for respondent.

ADAMS, J. — At the close of the plaintiff's evidence a nonsuit was directed by the learned trial court, upon the ground that the injury of which the plaintiff complains was inflicted by the negligence of a fellow-servant, and the determination thus reached presents the sole question which this court is called upon to review. It is, of course, not to be denied that at the time of the accident the plaintiff and the person whose negligence caused his injury were engaged in a common occupation. But it is insisted, nevertheless, that they were in no legal sense co-servants, for the reason that they were not in the employ of the same master. And if this contention is well founded, it is needless to say that the direction which was given to the case at the trial was unwarranted, for it must be assumed for the purpose of this review that the person in charge of the derrick was negligent, and as the relation of master and servant existed between him and the defendant, it necessarily follows that the latter was liable for the negligence of the former, unless he and the plaintiff were fellow-servants. It must be our endeavor, therefore, to determine whether the position assumed by the defendant is tenable in the face of the undisputed facts of the case, and in making this attempt it is of primary importance to find some test by which the plaintiff's relation to the defendant can be definitely ascertained. It is well settled that, in order to establish the relation of master and servant, it is necessary that the employer shall not only select the workman, but that he shall also possess the right to direct him in the performance of his work, as well as to discharge him for incompetency or misconduct. (*Butler v. Townsend*, 126 N. Y. 105-108; 26 N. E. 1017.) When the relation is thus established, the doctrine of respondeat superior applies as between the master and third parties. And this doctrine is founded upon the power which the master has the right and is bound to exercise over the acts of his subordinate for the prevention of accidents. (*Blake v. Ferris*, 5 N. Y. 48-53.) We think it is quite apparent, therefore, that the real test of relationship is, first, employment, and second, power and control over the person employed. Or, as it

has been tersely stated by a text writer of recognized ability: "In all such cases the test is whether, at the time of the injury, the servant was subject to the master's control." (Wood, Mast. & S., sec. 424.)

Subjecting, then, the facts of the case in hand to an application of this test, we find that the element of power or control is pretty conclusively established; for it is undisputed that the plaintiff, while engaged in drawing stone for the defendant, was under the absolute control of the latter; that he received directions from the defendant's foreman as to where he should station his wagon while it was being loaded, as to the manner of loading the stone, and where to unload the same, and that he obeyed these instructions. In all these respects, therefore, he occupied precisely the same relation towards the defendant as did the other workmen who were associated with him. But it is urged that there is still lacking the element of employment which is essential to the creation of the relation of master and servant, and in one sense this contention is true, for unquestionably, at the time of the accident, Cunningham was, generally speaking, in the employ of Gee, and was working only temporarily for the defendant, by permission of his general employer. But did this circumstance affect Cunningham's relation towards his fellow-laborers? That is, as to them, did it constitute him a stranger instead of a co-servant? In order to obtain a satisfactory solution of this question it must be borne in mind that the principle invoked by the defendant, and which has thus far been applied to this case, is one which has secured recognition in this country for more than half a century. (Murray v. Railroad Co., 1 McMul. 385; Farwell v. Railroad Co., 4 Metc. [Mass.] 49.) Briefly stated, this principle is that, when a person accepts employment in a business in which others are engaged with him, there is an implied agreement upon his part to assume all the ordinary risks attending such business, including accidents which result from the carelessness of his co-employees; and the foundation upon which it rests is unity of service and control. In a case, therefore, where unity of service and control is found to exist, the natural deduction would appear to be that, if a person is injured by the carelessness of another, and at the time of the accident they are both subject to the orders and control of a common master, they are co-servants as to the particular employment in which they are engaged, although one of them may at the same time happen to be in the general service of a third party. Or, to state the proposition more concisely, a person who is temporarily employed while in the general service of another must be treated, as to that particular employment, as the servant of the person thus employing him, and the person who has the right to direct and control his conduct in that particular business must likewise be regarded as his master,

for it is quite clear that the existence of the general relation of master and servant does not exclude a like relation between the servant and a third party to the extent of the special service in which the servant may be actually engaged.

The rule as thus stated has long been recognized and adopted in Massachusetts. In the case of Kimball v. Cushman (103 Mass. 194) it was deemed applicable as to liability to a stranger for the negligence of one employed in a special service, and in the more recent cases of Johnson v. City of Boston (118 Mass. 114), Hasty v. Sears (157 Mass. 123; 31 N. E. 759), Morgan v. Smith (159 Mass. 576; 35 N. E. 101), and Coughlan v. City of Cambridge (166 Mass. 268; 44 N. E. 218), it was applied where, as in the present case, the general employer had temporarily loaned his servant to another for some particular purpose. In this State the decisions upon this question appear to be somewhat conflicting. In a comparatively early case it was held by the General Term of the Fourth Department that where a servant was loaned by his general employer to a third party for some special service, and while engaged in the performance thereof carelessly drove into and injured the wagon of a stranger, the general and not the special employer was liable. (Michael v. Stanton, 3 Hun, 462.) And in the more recent case of Murray v. Dwight (15 App. Div. 241; 44 N. Y. Supp. 234) the Appellate Division in the Third Department, in reviewing some of the authorities to which we have adverted, as well as several leading English cases involving the same question, lays much stress upon the fact that in the case which it was considering a horse was loaned by the general employer with his servant, and seems to regard this fact as calling for the application of a different rule from the one which would obtain if the servant only had been loaned. Why this should be so, especially in a case where the servant, and not a stranger, is the party injured, we must confess our inability to understand. But as the decision in the case last cited appears to rest mainly upon the fact that the accident to which the plaintiff attributed his injury did not occur during the course of his actual employment, what is said in the prevailing opinion as regards the question here under consideration may perhaps be treated as *obiter*. But however this may be, we think that the Court of Appeals in at least two instances has very clearly indicated the rule which should govern in cases of this character. (Wyllie v. Palmer, 137 N. Y. 248; 33 N. E. 381; McInerney v. Canal Co., 151 N. Y. 411; 45 N. E. 848.) In the case first cited the defendant sold a quantity of fireworks to a committee of the citizens of the city of Auburn, and at the time fixed upon for their exhibition sent a man and a boy to Auburn to assist the committee in managing the display. The expenses of these two persons were paid by the committee, under whose directions and contr-



they acted while in Auburn. A rocket which was discharged by the boy struck and injured one of the plaintiffs, and in an action against the general employer to recover damages for such injury it was held that:

"The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct."

When we come to apply the rule as it is thus stated to the present case, we are unable to see why it does not necessarily dispose of the question we have been considering; for, as has already been stated, the plaintiff, at the time he received his injury, was engaged in performing services for the defendant, who had the right, and did actually assume, to control his conduct. For any misconduct or inability to perform the service required of him the defendant could undoubtedly have discharged him and returned him to his general employer. The defendant was, therefore, at that time the plaintiff's master, and as it was also the master of the person whose negligence caused the injury, it follows that this person and the plaintiff were co-servants in the same common employment, and that no action lies against the defendant for the injury sustained by the plaintiff. (*Rozelle v. Rose*, 3 App. Div. 132; 39 N. Y. Supp. 363.) The judgment appealed from should therefore be affirmed.

Judgment affirmed, with costs.

All concur.

---

### WILLS.

---

#### MARRIED WOMEN.

---

#### NEW YORK COURT OF APPEALS.

October 5, 1897.

In the matter of the probate of the last will, etc., of MARY E. McLARNEY, deceased.

A will made by a married woman is not revoked by the death of her husband and her subsequent remarriage.

Appeal from a judgment of the General Term, First Department, affirming a decree of the surrogate of New York county.

Joseph Campbell for appellant; Abel Crook for respondents.

O'BRIEN, J. — The decree of the surrogate admitting the will of the deceased to probate is questioned upon one ground only, and that is, that the will was revoked prior to the death of the testatrix.

The will was made on the 23d of July, 1884, and the deceased was then a married woman, the wife of one Brophy, who died on the 29th of January, 1889. On the 5th of February, 1894, the testatrix, being then a widow, married the contestant, James E. McLarney, and she died on the 19th of April following the marriage. There was no issue of either marriage.

When the will in question was made the deceased was a married woman living with her husband, and the contention is that as she subsequently became a widow and remarried, her last marriage operated to revoke the will previously made.

That the deceased made a valid will in writing is not disputed, and in order to show a revocation the burden was upon the contestant to bring the case within some provision of the statute which defines the cases in which written wills are deemed to be revoked. The statute provides that "a will executed by an *unmarried* woman shall be deemed revoked by her subsequent marriage." (Section 44.) The deceased was not an unmarried woman when she made the will. She was a married woman who subsequently became a widow and remarried. The case is not, therefore, within the rule or the reason of the rules that the will of an unmarried female is revoked by her subsequent marriage. The statute on this subject is simply declaratory of the common law. The marriage as a general rule vested the husband with the title to the property of the wife, and she lost her capacity to dispose of it by will or otherwise. Since a testamentary instrument from its very nature can operate only after death, and is subject to change during life, it was wholly inconsistent with the relations of husband and wife as they existed at common law when made by the wife before marriage. An instrument which disposed of her property after death, and which she was incapable of changing or revoking during coverture, could not legally exist under the rules of law that governed the marriage relations. It was supposed to be destructive of that complete unity of husband and wife, which was the theory of the common law, and, therefore, upon her marriage it was deemed to be completely revoked. The reason of the rule was very clearly stated by Lord Chancellor Thurlow in *Hodsdon v. Loyd* (2 Bro. Ch. 534), as follows: "It is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix, and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void." This rule was incorporated in our statute law (2 R. S. 64, sec. 44) at a time when a married woman was incapable of making a will, and, of course, it was not intended to have any application whatever to testamentary instruments made during coverture. Since the disabilities of married women to dispose of property by will have been removed in

this State by legislation, the reason of the rule no longer exists, though it remains a part of the statute law. It has been held by this court that it was not abrogated by the subsequent legislation conferring testamentary capacity upon married women, and removing the reason of the rule at common law. The courts cannot dispense with a statutory rule merely because it appears that the policy upon which it was established has ceased. The legislature might very properly remove it from the statute book by repeal, but in the meantime it cannot be disregarded by the courts. (*Brown v. Clark*, 77 N. Y. 369.)

But it would seem to be clear that we ought not to extend the operation of an ancient rule when all the reasons upon which it was founded have passed away, or apply it to a case which was not originally within its terms or its general policy. After the long struggle in the courts, where it was assailed as a useless relic of the past that had been swept away in the current of modern legislation, there is no good reason for giving it new life and vigor by deciding that it is still not only potent enough to annul the will of an unmarried female, but that of a married woman as well.

The courts of this State, when dealing with the subject of wills and their revocation, have always adhered closely to the terms of the statute. This is illustrated not only by the case above cited, but by others, notably where it was held that the provision of the statute which revokes a will in favor of an after-born child had no application to the will of a married woman under the act of 1849. (*Cotheal v. Cotheal*, 40 N. Y. 405.) So, also, in a more recent case it was held that a will made by a widow was the testamentary act of an unmarried woman and revoked by her subsequent marriage. (*In re Kaufman*, 131 N. Y. 620.)

In the case at bar the testatrix could have revoked her will at any time before her death, or could have made a new will, and hence none of the reasons upon which the statute was based have any application to this case.

The learned counsel for the contestant admits that he cannot succeed in this appeal unless the language of the act of 1849 removing the disabilities of married women sustains his contention. By that statute a married woman is enabled "to convey and devise real and personal estate \* \* \* in the same manner and with like effect as if she were unmarried." The argument is that since the will of a married woman is to be made in the same manner and with like effect as if she were unmarried, the instrument must carry with it all the incidents and qualities that pertain to the will of a *feme sole*, including the possibility of revocation by a subsequent marriage.

This, we think, would be straining the words of the statute to engraft upon it an ancient rule of revocation that never had any application to the class of wills therein mentioned. The purpose of

the act was to enable a married woman to make a will, and it had no reference to methods of revocation. A will has no effect whatever until death, and the words "like effect" relate to the instrument after it becomes effective by death. The meaning of the words is that when the will of a married woman becomes operative by her death it shall have the same effect, that is, the same disposing power and legal operation as an instrument for the transfer of the title to property that it would had she never been married. Nothing was said or implied with respect to revocation. That subject was left to the general rules of law applicable to all wills. If the legislature intended that her will should be deemed revoked in case of a second marriage, it would, no doubt, have said so. In the absence of some positive law such a result cannot be engrafted upon a statute, the primary purpose of which was to remove the common-law disabilities of marriage.

The judgment below was right, and should be affirmed, with costs.

AM concur, except GRAY, J., absent, and HAIGHT, J., dissenting.

Judgment affirmed.

#### THE LAW AND THE LAYMEN

LAYMEN do not take as much interest in law as they ought. Is it the fault of the lawyers or of the laymen themselves? Law is not, like astronomy or pure mathematics, an extra-mundane subject which does not concern ordinary mortals. On the contrary, it is peculiarly one which comes "home to men's business and bosoms," to use Lord Bacon's phrase, which concerns them vitally; for law is ubiquitous, and penetrates into every corner of our lives. There was a time when it was a jargon, though even then every gentleman had a tincture of it; but it is a jargon no more. It is a rational science which any plain man of intelligence can comprehend, if it is intelligently presented to him. What is wanting—the great desideratum of to-day—is a lucid presentation of legal principles. "Law so dry!" said Lord Bramwell. "To my mind, the first three volumes of 'Blackstone' are most agreeable reading." Lord Bramwell, no doubt, was a lawyer with a keen logical instinct, to which law appealed; but any impartial reader, lawyer and logician or not, will indorse his sentiment about Blackstone, and the reason is that Blackstone, beyond all other writers on law, succeeds in rationalizing law for us—he shows us the sense of the thing. If this could be done more commonly, if the legal principles which regulate, for instance, the relations of husband and wife, of criminal liability, the right of free speech, the disposal of property by will or otherwise, negligence, nuisance, and a score more topics, could be intelligently and agreeably set forth and

illustrated, as they might well be, from the decided cases in which English law is so rich, a new and salutary interest would be awakened which would make Englishmen better citizens and abler administrators, not to speak of the mental discipline gained. It was Burke's opinion — one worthy to be remembered — that there is no study which does more to brace and invigorate the mind than that of law. — *Law Journal* (London).

### GERMAN CRIMINAL COURTS.

IN Germany the criminal courts are of three different grades, each having a different jurisdiction, says a writer in the *Detroit Free Press*. The lowest is the police court ("Schoeffen Gericht"), having jurisdiction of the same kinds of petty offenses as other police courts the world over. This court is composed of three persons — one police magistrate and two citizens — who sit together and hear the cases: the judge, in his official gown, in the center, and the citizens, one on each side of him, in ordinary civilian dress. The court next higher in rank, called the criminal court ("Criminal Gericht"), is composed of five judges. The highest criminal court ("Landes Gericht") is composed of three judges and a jury of twelve. In a general way the methods of procedure are similar in all the courts. When there is a jury the jurymen sit at desks, with writing materials before them, and most of them make voluminous notes.

Contrary to a widespread popular belief, the penalties inflicted in criminal cases in Germany are much less severe than in like cases in this country, and in some respects the methods are much more favorable to the accused. They are certainly better adapted to discovering the exact truth, a great advantage to the innocent, as well as to the community. An American lawyer, in seeking to defend a guilty client, would find himself embarrassed by being deprived of the benefit of some of those stumbling blocks in the path of justice which still prevail among us under the name of constitutional rights.

The criminal prosecution is begun by complaint to an examining magistrate. The complainant and all the witnesses who can be discovered are immediately, separately, examined by the examining magistrate, and their narratives are reduced to writing. On this examination the witnesses are not sworn, and the widest latitude of inquiry is used. If the accused is to be tried he is usually notified when to appear. It is rare that a warrant is issued in the first instance, except for a serious offense or in the case of a hardened offender. In the course of frequent visits to the criminal courts I never saw the accused come into or leave the court in the custody of an officer, although, in the great majority of cases, the accused was not under bail. This will appear strange to the American

reader, and therefore deserves a word of explanation.

Everybody in Germany has a continuous public record from the time he comes into Germany, whether he comes from a foreign shore or it is his first appearance in this mundane sphere. In this record is to be found every detail necessary to personal identification. In addition, if he ever commits a transgression the circumstance is noted in his record. If he moves he must be made matter of record in the place to which he moves. In the case of travelers lodging in known hotels, the requirements of law are satisfied by entering upon the register of the hotel name, age, residence and occupation. The police visit the hotels every day and make copies of the registers, and make such further inquiries with regard to the guests as they may think necessary. By reason of this system, and because, also, at every frontier persons leaving the country are subjected to careful official scrutiny, though in the case of foreigners usually without their knowledge, the German authorities feel a good deal of confidence that if a man does not appear for trial or to serve out his sentence at the appointed time, they will be able to lay hands upon him without much trouble.

Because of this condition arrests are comparatively rare, and even after conviction and judgment of imprisonment has been pronounced the accused is generally given his choice of whether he will serve out his term of imprisonment at once or postpone it until he has made necessary arrangements so as to cause as little hardship as possible to himself and friends. I remember one occasion when a boy, apparently about 12 or 13 years of age, was convicted of larceny in the criminal gericht, and was sentenced to one month's imprisonment. The little fellow broke down and wept bitterly, and on being asked by the presiding judge if he would serve his sentence, merely shook his head and left the court in company with a sister, also in tears, who had watched the proceedings with painful solicitude. It was a very clear case and a second offense. As I recall the circumstances, the penalty in America would probably have been much more severe.

The trial proceeds in this way: Copies of the complaint and of the testimony taken by the examining magistrate have been furnished in advance to the judge, to the attorney for the government and to the attorney for the accused. At the appointed time the accused enters and takes his place in the prisoners' dock and remains standing during the trial.

Then follows the summoning of the witnesses. They come in from the adjoining corridor, and if all the important witnesses are found to be present it is announced that the trial will proceed. The presiding judge then usually announces to the witnesses collectively that when called upon to testify they will be under obligation to speak the

truth, and if they do not, or speak any falsehood, they will be liable to a penalty of fine and imprisonment. The witnesses are then told to retire to the adjacent corridor and remain there until they are again called into court to give their testimony, if it shall be required. Then the presiding judge reads to the accused the formal accusation, and this being done he reads to him piecemeal the statements made by the witnesses on the preliminary investigation, and questions him (in open court) upon the salient points of these statements. His method of examination is severe and searching. After this the witnesses are called, one by one, and examined by the presiding judge in the same manner. At the conclusion of the questioning by the presiding judge, the prosecuting attorney and the counsel for the accused are offered an opportunity.

But our constitutional doctrine that "no man shall be required to give evidence against himself" is an impassable barrier to what would be, in most cases, the best place to look for the absolute truth, the examination of the accused himself. This doctrine, and what has seemed to our courts its logical consequences, was in one case carried so far that it was held to be a violation of a respondent's constitutional rights to turn up his shirt sleeve in order to ascertain whether his arm was tattooed in the way that a witness to his identity had testified.

In one case which I saw tried in Berlin I was interested in observing that the court drew the same distinction between a lodger and a tenant which would be drawn under our law. The prosecution was for an assault and battery committed upon the agent of a houseowner while ejecting a lodger who had not paid his room rent. In another case, which was a prosecution for obtaining money under false pretenses, the court held that a false promise — that is, a promise not intended to be kept — was a criminal pretense. In that case it appeared that accused had defrauded a young woman out of something more than a hundred dollars by falsely pretending that he intended to marry her. He was convicted and sentenced to imprisonment for three months, although the prosecuting attorney had stoutly contended for a year. In an English or American court a false promise is not a criminal false pretense.

In another case an old woman who was a tenant was convicted of taking out her household goods, in excess of what was actually necessary for family use, without the consent of the landlord, thus depriving the latter of his lien for rent. The family consisted of the old woman and her son. She had an upholstered chair and four common wooden chairs, and it was held that in taking away the upholstered chair and two of the common chairs she had violated the law, but she was fined only three marks (72 cents), and was allowed time to pay her fine.

In another case an old woman was fined three

marks for being tipsy on the streets, and the law having thus been vindicated, the judge and the two citizens sitting with him paid the fine out of their own pockets.

The defense of moral irresponsibility is not unknown in Germany. A man being charged with a violent assault, it was claimed that, being a victim of epilepsy, he committed the assault while he was laboring under an epileptic attack, and was not responsible for his conduct. A medical expert was called, and his testimony supported the theory. The case was dismissed and the accused discharged without calling any other witnesses.

### Legal Laughs.

"I don't know what I would have done if it hadn't been for you!" exclaimed the discharged prisoner.

"Well, you probably would have done time," said the proud lawyer. — *Yonkers Statesman*.

In arguing a point before a judge of the Supreme Court, Col. Folk, of the mountain circuit in North Carolina, laid down a very doubtful proposition of law. The judge looked at him for a moment and queried:

"Col. Folk, do you think this is law?"

The colonel gracefully bowed and replied:

"Candor compels me to say that I do not, but I did not know how it would strike your honor."

The judge deliberated a few moments and gravely said:

"That may not be contempt of court, but it is a close shave."

Lawyer — "You think, then, that your assailant attacked you with malice prepense?"

Client — I dunno, sah; he might'er had one o' dem kind o' mallets; but de principle thing he used wuz a razzor, sah."

"My wife will bear witness," said the prisoner at the bar, "that at the very time I am accused of burglarizing Mr. Smith's premises I was engaged in walking the floor with my infant child in my arms, endeavoring to soothe it to sleep by singing 'Rock-a-By, Baby.'" "The prisoner is discharged," remarked his honor; "he can prove a lullaby."

Young Lawyer — "I claim the release of my client on the grounds of idiocy. He is a stupid fool, and is not responsible for any act he may have committed."

Judge — "He doesn't appear stupid to me."

Prisoner (interrupting) — "Your honor, look at the lawyer I've hired."

"Yes," said the lawyer, mopping his brow, "I got him off, but it was a narrow escape."

"A narrow escape? How?" inquired a brother attorney.

"Ah, the tightest squeeze you ever saw. You know I examined the witnesses and made the ar-

gument myself, the plea being self-defense. The jury was out two whole days. Finally the judge called them before him and asked what the trouble was.

"Only one thing, your honor," replied the foreman. "Was the prisoner's attorney retained by him or appointed by the court."

"The prisoner is a man of means," said the judge, "and hired his own attorney."

"I could not see what bearing the question had on the case," continued the perspiring lawyer, "but ten minutes later in filed the jury and acquitted my client on the grounds of insanity."

From a stenographer not yet familiar with law terms, a proposition dictated in reference to a defense of unavoidable accident, "or act of God," came back with the neatly typewritten statement that "it was occasioned by the active God, which no human agency could have foreseen or prevented." Another stenographer, notwithstanding a great deal of experience in courts and elsewhere, once tried to make the digester say that certain conduct would "constipate an act of bankruptcy." But unfortunately for the business world nothing has ever been found that could do that.

"There's no more fun in the practice of law," observed the judge as he softly brushed away the film of soft ashes from the live end of his cigar. "Thirty years ago, when we used to impeach all the witnesses on the other side and have two or three fights every noon recess, it was worth while to be in the profession."

"I read in my old home paper yesterday that Bill Traynor was dead. There was a character. Did I ever tell you the story about him?"

"Bill once sat on a jury in one of my first cases. It was an assault and battery case. The trouble came up over the attempt to build a fence across a highway. There were two defendants and four prosecuting witnesses. The trial was held at the home of the justice of the peace, a clapboard little house right out in a cornfield. We couldn't find twelve men in the township, so we agreed to a jury of six. The justice's wife stood in the doorway during the trial and dictated all the rulings."

"They didn't make any case against us — my partner and I appeared for the defense — but we knew the jurymen wanted their fees, and they wouldn't get any if the defendants won. So we were not very hopeful."

"The six jurymen went out into the cornfield to deliberate. They were gone about two hours, and then brought in a verdict of guilty, and fined each of the defendants \$2 and costs. The jury was about to be discharged, when my partner jumped up and said to one of the jurymen: 'Say, who are you? I don't remember seeing you before.' Then the foreman spoke up and said: 'That's all right. Bill Traynor couldn't wait. He went off home, and we got Joe here to take his place.'

"That's a fact. Bill had put in a substitute on

the jury after they got out in the cornfield. The justice said it was all right anyway, so long as there was a majority of the jury present, but I got up and threatened to sue him on his bond, so he got scared and set aside the verdict and discharged our clients."

"After I came on the bench Bill Traynor was up before me for stealing a steer, and I made the instructions to the jury rather favorable to him, and he was acquitted. You see, I had a friendly feeling for him because he had helped me to win one of my first cases."

### Legal Notes of Pertinence.

A Kansas City justice of the peace announces that he will furnish opera tickets with every certificate of marriage as long as he is on the bench.

In Cripple Creek, Col., there have been 247 recorded violent deaths since January, 1894. Of these 125 were caused by explosions and suicide, and the remainder were cases of homicide.

A merely parol dedication of a street is held, in *San Francisco v. Grote* ([Cal.], 36 L. R. A. 502), to be insufficient to support an action of ejectment by the city against the owner of the fee.

A mortgage upon personal property removed to another county before the mortgage is recorded is required in the case of *Fassett v. Wise* ([Cal.], 36 L. R. A. 505) to be recorded in the latter county only.

The Fall River (Mass.) News is authority for the statement that at a recent bar examination the highest mark was attained by a blind young man, Wm. B. Perry, of New Bedford, a graduate of the Harvard Law School.

James C. Carter, the eminent New York lawyer, has contributed \$5,000 to the Randolph Tucker memorial hall which is to be erected at Washington and Lee University, at the cost of \$50,000, for the accommodation of the law school.

Former President Cleveland authorizes a contradiction of the report that he is desirous of an appointment on the bench or of going to the United States senate. He has resumed the writing of his memoirs.

Power to impose a license tax upon non-residents who carry on business within city limits is upheld, in *Petersburg v. Cocke* ([Va.], 36 L. R. A. 432), where the rule was applied to an attorney at law having an office in the city, but residing outside.

Ralph L. Goodrich, formerly of Oswego, N. Y., for twenty years clerk of the United States Court for the Eastern District of Arkansas, dropped dead of heart disease in Little Rock on October 6. He married a month ago a daughter of ex-Governor Churchill.

For the loss of the fingers of a little child, who puts her hand up the spout of a coffee-grinder in a store or shop, while there with her father to make a purchase, it is held, in *Holbrook v. Aldrich* ([Mass.], 36 L. R. A. 493), that the shop-keeper is not liable.

Over 100 indictments of the year 1893, it is reported, have been stolen from the office of District Attorney Olcott, of New York. It is estimated that the suspect was formerly a clerk in the district attorney's office. Three of the indictments alleged to have been stolen were for murder.

The fire losses in the United States and Canada during the month of September aggregated \$9,392,000, exceeding the fire loss of September, 1896, by more than \$1,000,000. The fire losses for the nine months of the year amount to over \$80,000,000, being about \$10,000,000 less than for the same period last year.

The fact that a train was running at high speed, in violation of law and in breach of the promise of the engineer made to a boy who intended to jump off, is held, in *Howell v. Illinois Cent. R. Co.* ([Miss.], 36 L. R. A. 545), insufficient to render the railroad company liable for injury to the boy, when he attempted to get off, knowing the danger.

Pension Attorneys Samuel B. McLean, of Pittsburgh, Pa.; M. M. Chase, of Los Angeles, Cal., and D. P. Bethumin, of Mount Vernon, Ky., have been disbarred from practice before the interior department. The two first named are charged with demanding and receiving illegal pension fees, and Bethumin with filing forged declarations in pension cases.

In the case of the *Equitable Life Assurance Society v. Goode*, the Supreme Court of Iowa held that the exemption of the books of a lawyer from execution exists in favor of a lawyer who gives some time to the work of his profession, which contributes to his support, even if he does not appear in court, advertise as a lawyer or earn his living by services as a lawyer.

A bicycle association which agrees to clean a member's bicycle twice each year, repair tires when punctured by accident, and the bicycle if damaged by accident, also to replace it if stolen unless recovered in eight months, and provide another bicycle during that time, in consideration of which the member pays \$6 membership fee per year, is held, in *Com., Hensel, v. Provident Bicycle Asso.* ([Pa.], 36 L. R. A. 589), not to constitute an insurance company for which a charter is necessary under the Pennsylvania statutes.

Negligence in pointing a gun at another and pulling the trigger is held, in *Bahel v. Manning* ([Mich.], 36 L. R. A. 523) to be unaffected by the fact that the person doing it had used the ordinary means of unloading the gun and satisfied himself that it was unloaded. But the fact that the person

injured failed to protest or get out of the way when he saw that the gun was about to be snapped, and had time to do so, was held to constitute such contributory negligence as would preclude his recovery of damages from the other.

An illiterate maker induced by fraud to sign a note and mortgage, supposing he is signing other instruments, is held, in *Green v. Wilkie* ([Iowa], 36 L. R. A. 434), not to be liable even when the note is in the hands of an innocent purchaser, unless he was guilty of negligence in making the note. This is on the ground that he was never a party to the contract contained in the instrument. With this case the authorities are collected showing the general rule, and the exceptions thereto, as to the effect of fraud in obtaining the execution of a note as against a *bona fide* holder.

Having spent fifty out of the last sixty-five years in prison, Josef Hell, of Jicin, Bohemia, saw no reason why in this age of jubilees he, too, should not have his, and so, a few weeks ago, he indicated his intention to celebrate it. He is now eighty-five years old, has seven more to serve, and therefore expects to begin life again at ninety-two. He has been in nearly all the prisons of Bohemia and Austria, and knows more about them than any other person. He speaks approvingly of modern prison reform, and remembers with indignation the dark subterranean dungeons that received him after his first offense.

Judge John Jay Jackson, of the United States District Court for the Western District of West Virginia, who recently enjoined the striking miners from marching on the public highway, is in years of service the oldest judge in this country. He was appointed to the bench by President Lincoln, on August 3, 1861. Justice Field, of the Supreme Court, holds the next oldest commission, having been appointed by Mr. Lincoln in 1863. Judge Jackson, we believe, is not only the oldest American judge now living, but no other Federal judge before him was ever so long a time on the bench. Judge Marshall was on the bench 34 years, and Judge Jackson has served for 36 years, and he is now 76 years of age. He has made many most important decisions of constitutional questions, and it is said that the Supreme Court has never reversed one of them. One of his most famous decisions was that declaring the test oath unconstitutional.

### English Notes.

Announcement having been made that Sir Richard Webster is nominated to be the captain of a parliamentary cricket team, which is to be absent from England some nine months, the *Law Times* inquires: "Will the office of attorney-general be put in commission, or will Sir Robert Finlay perform dual duties?"

Sir Francis Jenne is laid up with an attack of rheumatism at Arlington Manor.

The fifty-first report of the commissioners in lunacy has just been issued as a parliamentary paper. The commissioners regret to report the very large increase of 2,019 in the number of lunatics in England and Wales on the 1st of January, 1897, over the corresponding number on the 1st of January, 1896. The returns show that the total number on the first of those dates was 99,365, as against 96,446 at the beginning of 1896. It is pointed out with regard to assigned causes of insanity that very great reliance cannot be placed on returns; but so far as they go it would appear that hereditary influence continues to be the most fruitful cause, previous attacks coming next, and intemperance in drink third.

Lord Ludlow (Lord Justice Lopes), who has returned from his holiday abroad, received a warm welcome on reaching his home, near Westbury, Wiltshire. The streets of the town were decorated with arches, flags and evergreens, and his lordship was heartily cheered as he drove through. In the market-place the G Company of the First Wiltshire Rifle Volunteers gave a salute, the band playing "Home, Sweet Home." Outside the town hall an address was presented, congratulating the distinguished judge upon the honor her majesty had conferred upon him in raising him to the peerage. Lord Ludlow having expressed his deep gratitude for the reception accorded him, proceeded to his residence at Heywood, escorted by volunteers. The members of the reception committee and the volunteers were afterwards entertained by his lordship.

The Daily News understands that the life-sized marble statue of the late Judge Thomas Hughes, which is to be erected at Rugby by old Rugbeians and others, has been entrusted for execution to Mr. Brock, R. A., who will carry out the work forthwith. Towards this object over £1,200 has been subscribed.

One of the most sensational criminal trials of modern times is called to mind (says the Pall Mall Gazette) by the release from penal servitude of Louis Staunton, one of the four prisoners convicted at the September sessions of the Central Criminal Court in 1877, and sentenced to death for the murder of Harriet, the wife of the man just released, but whose sentences were subsequently commuted to penal servitude for life. Mr. Justice Hawkins, who had only been elevated to the bench the previous year, was the presiding judge, and "The Penge Mystery," as the case was called at the time, was probably the first of the long series of murder cases which, either at the Central Criminal Court or at Assizes in the provinces, it has been the lot of him who has thereby established for himself the reputation of being the ablest criminal judge we have, to try. The trial commenced

on Wednesday, September 19, 1877, and lasted seven days. The attorney-general, the late Sir John Holker (afterwards Lord Justice Holker), the solicitor-general (the present lord chancellor), and Mr. Poland (now Sir Harry Poland, Q. C.) conducted the prosecution on behalf of the treasury; Mr. Montagu Williams and Mr. Charles Mathews defended Louis Staunton; Mr. (now Sir Edward) Clarke, Q. C., defended Patrick Staunton; Mr. (now Sir Douglas) Straight defended Elizabeth Staunton, Patrick's wife; and Mr. Percy Gye (now a County Court judge) defended Alice Rhodes, the sister of Elizabeth Staunton, and who soon after the trial was pardoned and released from prison.

The doctrine enunciated by the Court of Appeal in *Anderson v. Gorrie* is a startling one to the lay mind, says the Law Journal. That a judge should be able to commit to false imprisonment, from malicious motives, and yet enjoy immunity, seems the worst kind of legal heresy; for injustice in the judge — the very dispenser of justice — is as bad as hypocrisy in the priest. But in criticising this doctrine of judicial immunity we must remember that policy requires that judges should preserve a semi-sacred character. It is for this reason that they are invested with every attribute of outward dignity. All the pomp and circumstance which attend a judge's entry into an assize town is but a symbol of the majesty of justice incarnate; and for the same reason a judge's integrity and incorruptibility must be treated as above suspicion. It would never do to search his conscience for motives of malice or bias — so long, that is, as it is possible to avoid doing so. But when a judicial scandal becomes open and notorious, "rank, and smells to heaven," it would be fatal to ignore it. The mischief in such a case is not in the individual cases of hardship, but that public confidence in the administration of justice is shaken; and confidence, once shaken, is not easily restored. Want of confidence in the administration of justice means insecurity of property, insecurity of life; and people will not live in a country where their property or their lives are insecure.

### Notes of Recent American Decisions.

Injury to Person on Railroad Track — Duty to Look — Engine Running Backward. — Where one suddenly steps on a railroad track without looking whether a train or engine is coming, and is run down, he can not recover when it appears that he, by first looking, would have seen an approaching engine, and that although the engine was coming with tender forward, with no light thereon, where those in charge of the engine were not aware that the deceased would suddenly step on the track in this manner. (*C. H. & D. R. R. Co. v. Mary R. Lally*, Executrix, Hamilton, O., Circuit Court, Jan. Term, 1897, xiv Ohio L. J. 333.)

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, OCTOBER 23, 1897.

### Current Topics.

**S**PECULATION over the expected retirement of Justice Stephen J. Field from the bench of the United States Supreme Court has at last been set at rest by the authoritative announcement from Washington that the venerable jurist has made formal application to be retired on December 1st next. The substance of the interesting correspondence between the retiring official and the president of the United States is given in other columns of this issue of the JOURNAL, and will be read with deep interest by the profession throughout the country. It is exceedingly felicitous, and not without a tinge of sadness, for no great tribunal can lose forever the services of one of its members without a sense of the great loss sustained. Particularly is this true when the withdrawal closes the longest, and one of the most remarkable terms of service in the history of the highest legal tribunal in the United States. On the day of his official retirement, December 1, 1897, Justice Field's continuous service on the Supreme bench will have covered the period of thirty-four years, seven months and twenty days, exceeding that of Chief Justice Marshall, whose service in the same great tribunal extended over the period of thirty-four years, five months and six days. It was long the ambition of Justice Field to exceed the term of Chief Justice Marshall, and now that that ambition has been fulfilled, he bows to the inevitable, and, recognizing the fact that

Time's unerring finger has left traces on brain and body, impairing to some extent his usefulness for the best and highest service on the bench of the Supreme Court, he makes room for a younger and more vigorous intellect. The retiring Nestor of the bench is a distinguished member of a most distinguished and remarkable family of seven sons, all of whom made name and fame for themselves in the higher walks of life. Of these seven sons Justice Field is the sole survivor — the last leaf upon the tree. The names of David Dudley, the great lawyer and codifier; Cyrus West, the indefatigable advocate and promoter of the transatlantic cable; Matthew W., an engineer of eminence; Henry Martyn, a distinguished clergyman and writer; Jonathan, who was president of the Massachusetts senate, and Timothy, an officer in the United States army, will occur to every one. While Stephen J. Field has always been a Democrat in politics, it is a noteworthy fact that he was appointed to a seat on the Supreme bench by the first Republican president, Abraham Lincoln, March 10, 1863, when the court was increased to nine members. During the period of more than a quarter of a century since intervening, the influence of his active and powerful intellect is seen in all the proceedings of the great tribunal with which he was so long identified. He has written many notable opinions, and is justly famed for the keenness of his intellectual insight and the force with which he expresses his views. His long term of service covered the most critical and exciting period of the nation's history — that of the Civil War and the subsequent reconstruction of the government — and he took a prominent part in the settlement of the momentous questions arising out of that awful struggle. On his retirement Justice Field will receive the full salary of an associate justice of the Supreme Court, \$10,000 a year, for the remainder of his life, a proper and just recognition of long and distinguished public service. The approaching retirement of Justice Field, in itself a momentous event, has given rise to much interesting speculation concerning the possible changes to occur not only in the

VOL. 56 — No. 17.



august tribunal from which he withdraws, but in the cabinet of the president of the United States. It seems to be conceded on all sides that Attorney-General Joseph McKenna will be appointed Justice Field's successor. Coming, as he does, from the same State as the retiring justice — California — and possessed as he is of almost ideal qualifications for the exalted position, the appointment is certain to meet with general approval. Among the interesting rumors rife is the intimation that Judge W. R. Day, now first assistant secretary of state, will be made attorney-general. The vacancy caused by the expected retirement of Secretary of State John Sherman, who, by reason of the increasing infirmities of age, is expected to surrender the post, is, rumor says, to be filled by transferring Secretary John D. Long, from the navy, where he will be succeeded by Theodore Roosevelt, now his first assistant.

With the convening of the Supreme Court of Illinois in its new rooms at the State capitol, Springfield, on the 5th inst, it may be said that a new era began in the judicial history of that populous and progressive commonwealth. For the first time in half a century, the Supreme Court met in a place that it could call its permanent home. Prior to that time, for well-nigh half a century, to quote biblical writ (I Sam. vii, 6), "it went from year to year in circuit to Bethel (Mt. Vernon), and Gilgal (Ottawa), and Mizpeh (Springfield), and judged Israel (Illinoisans) in all those places." Now it rests, reverses or affirms at Mizpah. Under the antiquated migratory system which so long prevailed suitors suffered wrongs that the court had no power to remedy, and sometimes the law's delays incident thereto were tantamount to a denial of justice. In addition to this, as the court records were, of necessity, removed from place to place between the sessions, it has subjected them to the possibility of loss, and has proven a source of great inconvenience not only to lawyers, but to clients as well. By the Constitution of 1848 the Supreme Court was made to consist of three judges. The State was divided

into three grand divisions, the people in each division electing one of the judges, though after the first election the assembly might provide for their election in a different manner. Three grand divisions were established, but provision was made that they might be afterward changed to equalize their population. Nine circuits were established, with a judge in each to relieve the supreme justices of this work. The number of judges was increased to its present number by the Constitution of 1870, and there are now seven, whose jurisdiction is as provided under the Constitution of 1848. The chief justice is selected by the court; four justices constitute a quorum, and the concurrence of four judges is necessary to a decision. The three grand divisions established by the Constitution of 1848 were retained, and it was these that were recently consolidated. The State, for the election of Supreme judges, is divided by the Constitution into seven districts, one judge being elected from each district. The election occurs on the first Monday in June in each year in such districts as the terms of the judges may expire. The term of office is nine years. The present membership of the Illinois Supreme Court is: David J. Baker, Cairo; Jesse J. Phillips, Springfield; Jacob W. Wilkin, Danville; Joseph N. Carter, Quincy; Alfred M. Craig, Galesburg; J. H. Cartwright, Rockford, and Benjamin D. Magruder, Chicago. Under the circumstances referred to, the convening of the court for the first time in its permanent home was made an occasion of general rejoicing on the part of the bench and bar. The interesting ceremonies were properly under the auspices of the State Bar Association, which had worked long and earnestly for the consolidation of the court. Speeches were made by Gen. Orendorff, president of the Bar Association; Adolph Moses, of the Chicago bar; ex-Senator John M. Palmer, and Chief Justice Phillips. Ex-Senator Palmer, who is perhaps the oldest attorney in active practice in the State, spoke in a reminiscent mood. Under the Constitution of 1847, he said, the salary of the judges was \$1,000 per annum, and he remembered that the general assembly, at one time, passed a resolution

requesting the judges to remit \$200 of that amount each. Gen. James Shields prepared the reply to the resolution, in which it was declared that the judges had too much respect for the Constitution to give up any portion of their salary. The happy culmination of the long struggle for consolidation, so pleasantly marked by the proceedings referred to, is properly hailed with thanksgiving by bench and bar alike.

The Madras (India) Law Journal for July, which has just come to our table, quotes approvingly and with full credit the editorial article which appeared in the ALBANY LAW JOURNAL several months since on the subject of the overcrowding of the legal profession. It seems that the congested condition to which we referred in that article is world-wide, for the Madras paper adds: "The same may be observed of the state of the profession in this country, too. Manual labor is considered degrading, and the higher the caste the more it is felt to be so. As soon as a youth takes the degree of bachelor of arts he is in a fix as to what course he is to adopt. The utmost that he can get, if he has some wealthy or influential relatives to back him up, is a pittance of Rs 15 a month. He naturally wishes to postpone the day of decision. There is the law course, which takes three years, to be gone through, and he finds that that will remove his anxiety for some time; and regardless of anything that qualifies one for the profession, aptitude, wealth and strength to persevere even at the risk of starvation, he joins the law class and finds himself in the plight in which his American brethren are described to find themselves in."

The remarkable apathy and indifference of American electors to anything in the nature of a referendum, on the propriety and necessity of adopting which we have heard a great deal in some quarters during the past few years, is again shown by the results of the voting in Connecticut, on the proposition to amend the Constitution by requiring an increased educational qualification for suffrage. The statute law of the State had already pro-

vided that an elector must be able to read the English language before he could vote, but the amendment to the Constitution, which has been adopted by an estimated majority of fully 20 to 1, requires voters to be able to read in the English language any article of the Constitution or any section of the State statutes. In three other States of the Union, viz., California, Massachusetts and Mississippi, there is an educational test for voting, but in none is the qualification so restrictive as in Connecticut, under the newly-adopted amendment. Full figures are not at hand, but taking the city of Hartford, the vote stood 1,151 for to 51 against. Compare this with the 36,063 votes cast at the presidential election last fall, and we see how difficult it is to get the American people aroused to action unless a great national or State campaign is on. The reason for this condition of affairs is not easy to discover, unless it be the national trait of intense absorption in business affairs, the wild, unwearying chase after the nimble and elusive dollar, from which nothing can turn aside the average Yankee but a grave crisis or an impending calamity.

The New York Court of Appeals recently handed down a decision in the case of Bartlett v. Goodrich, in which it was held that life insurance was not firm property. The case involved \$100,000 of insurance on the life of the late E. B. Bartlett, a resident of Brooklyn. The question at issue was whether the insurance money belonged to Bartlett's personal estate or to the firm of E. B. Bartlett & Co. When the insurance was effected the policies were assigned by Bartlett to his partners, Woodruff and Nitchie, and the title remained in them for several years. Subsequently the policies were re-assigned to E. B. Bartlett, and later assignments were drawn up by Bartlett's counsel to transfer them back to his partners. The firm of E. B. Bartlett & Co. paid all the premiums, amounting to nearly \$30,000, and after Bartlett's death letters written by him were found declaring that this insurance belonged to his partners. The firm of E. B. Bartlett & Co.

made an assignment shortly after Bartlett's death to Justice W. W. Goodrich, and the executrix of Bartlett, who had collected the \$100,000 of insurance, paid it over to the assignee of the firm. Thereupon the creditors of E. B. Bartlett demanded that this money should be repaid to his executrix, and they were permitted to bring suit in her name against the assignee. The court at Special Term held that the executrix was entitled to this money, less the premiums, and this decision has been affirmed by the Court of Appeals.

As a part of a movement in Tennessee to reduce the expenses of State government, the plan is suggested of having a smaller legislature. Ex-Governor Peter Turney has written a letter to the Nashville American, in which, as a starting point in the effort to economize public expense, he suggests a reduction in the representation of both houses of the general assembly. His plan is to reduce to ten senators and twenty representatives, which he thinks the legislature has power to do under the Constitution. If the representation in the legislature is thus arranged, he thinks the State can have its best men legislate for it, as the extent and population of a district would require that the man who hoped to succeed as a candidate must be known to the people to be qualified before he could be elected, and that he would, in addition, be freed from local and personal prejudices and favors, which, under the present system, are potent factors in the selection of legislative material. With thirty instead of 132 members of the legislature each member would, he thinks, feel a responsibility for legislation, and know that responsibility could be traced to him, and would, therefore, be more active and zealous in the discharge of his duty. There would, he thinks, be more deliberation and sounder judgment in the enactment of laws, and the interests of the people better subserved; there would be less room for bribery and corruption, and more room to punish them, if occurring. Under the plan which Ex-Governor Turney proposes, the present cumbersome and unwieldy organization

would not only be done away with, but there would be a saving of \$500 a day or about \$40,000 per legislative session to the State. These views are not particularly new, but they are, nevertheless, worthy of careful consideration. The same plan, substantially, has been proposed in other States, and similar arguments advanced in favor of it. It may well be questioned, however, whether Governor Turney has not gone too far in advocating a reduction to thirty members. A legislative body so small would hardly be numerically strong enough to do committee work satisfactorily, and there are obviously other arguments which might be advanced against so small a body of law makers. A reduction to sixty would probably, on the whole, be much wiser. It can hardly be denied that one of the greatest governmental needs to-day is an improvement in the quality of law-making bodies, as a natural consequence of which will come an improvement in the quality of their product, and heaven knows this is needed badly enough. The selection of better and more competent men to make the laws rests entirely with the people under our form of government. If they are badly governed, or governed too much, they have the remedy in their own hands.

Is mustard a food? This question Judge Craig, of Stroudsburg, Pa., was called upon to decide recently, and upon the decision depended the result of, not one, but many lawsuits. The facts of the case appear to be that R. M. Simmer, inspector for the State Pure Food Commission, brought suit against Seig Brothers, general merchants, of Tobyhanna, for selling impure mustard. The case was the first one tried in Pennsylvania involving the charge of selling impure mustard. The result of the action depended upon the construction of the Pure Food act. Judge Craig, after carefully studying the question, held that mustard is not a food, and the jury accordingly acquitted the defendants. But there ought to be justice for the adulterators of mustard as well as for the dispensers of wooden nutmegs.

**Notes of Cases.**

The New York Supreme Court, Special Term, Part VI, decided, in *Fitzpatrick v. Fitzpatrick*, that the "cruel and inhuman treatment for which, under the statute law of New York, a judgment of separation may be granted between husband and wife, may be evinced by verbal outrage as well as by bodily abuse. The court (Judge Pryor) said:

"A judgment of separation does not affect the integrity of the marriage relation, but merely discharges the complaining spouse from the duty of cohabitation.

"It is not the law of New York, that to such judgment in favor of a wife, actual or apprehended physical injury is an indispensable condition. By the terms of the statute 'cruel and inhuman treatment' justifies a sentence of separation; and that inhumanity may be evinced and cruelty inflicted by verbal outrage as well as by bodily abuse is a fact of human experience and of judicial recognition. (*Lutz v. Lutz*, 31 St. Rep. 718; *Strauss v. Strauss*, 67 Hun, 491, 492; *Atherton v. Atherton*, 82 Hun, 179.) Whatever the rule elsewhere and at other times, in this jurisdiction at the present day meek submission and patient resignation are not a wife's sole resource under a brutality that shrinks only from physical violence; but against such misconduct of a husband the courts will afford her commensurate redress.

"Upon proof, therefore, of such angry, contumelious and degrading reproaches by a husband, applied maliciously and without provocation, as makes his presence an intolerable grievance, destructive of the happiness that is the end of the matrimonial association, a wife is entitled, without sacrifice of her right to support, to be relieved of the humiliating and tormenting companionship.

"Upon this principle judgment is awarded to the plaintiff.

"By a preponderance of credible testimony it is established that repeatedly and in wrath the defendant addressed profane and opprobrious language to the plaintiff — denouncing her as a 'cur,' a 'worm,' and a 'devil' whom he consigned to 'hell,' and that, under circumstances of peculiar atrocity, he maliciously and unjustifiably impugned her conjugal fidelity. On the trial, indeed, he denied that he ever accused her chastity, and professed confidence in her virtue; but with cynical insincerity, in face of an answer plainly imputing to her habitual wantonness and systematic immorality. (*Holmes v. Jones*, 121 N. Y. 461, 466; *Cornwall v. Cornwall*, 30 Hun, 573, 574.)

"Where the instances of misbehavior casual and exceptional they might claim some indulgence on the score of infirmity of temper; but being persistent and characteristic, they stamp the conduct of the defendant toward the plaintiff with a uniform tenor of deliberate cruelty and inhumanity, and appear, as by implication he confesses, to

have been directed to the end of driving her to a separation.

"Indeed, his vindictiveness did not cease with her departure; but after her escape he subjected her to the infamy of a public advertisement as a recreant to marital duty, to whom no tradesman might safely supply the necessities of life.

"All these indignities the defendant inflicted upon a woman whom he knew to be of delicate health — upon a wife who requited his cruelties with angelic gentleness, and to whose spotless purity he is constrained to bear reluctant testimony.

"Where bodily harm, as the effect of defendant's maltreatment, requisite to the plaintiff's case, it is abundantly apparent in the evidence.

"The defense of condonation, were it pleaded, is manifestly not substantiated by proof. (*Reynolds v. Reynolds*, 4 Abb. Ct. App. 35.)

"Nor, since the abandonment of which the defendant complains was caused by his own misconduct, is it a valid ground of counterclaim. (*Waltermire v. Waltermire*, 110 N. Y. 183, 187.)"

Judgment for plaintiff.

The Supreme Court of Iowa on the 5th inst. affirmed the decision of the lower court in the State embezzlement case against Suel J. Spaulding, and rendered a decision which will have an important bearing in the case which was recently begun against Spaulding and his bondsmen. Spaulding, while secretary and treasurer of the State Pharmacy Commission, embezzled \$13,000 of public money which he lost in grain speculations in Chicago. The Supreme Court holds that he was not a public officer, that he took no oath of office, and that the office was a pure creation of the Pharmacy Commission, without authority of law. The State may now try to hold the commissioners, whose private agent Spaulding was at the time he took the State's money.

After his wife, Mary, had begun proceedings against him for divorce, George L. Davidson, on the 9th of November, 1894, executed a contract with her, by which he agreed to pay her \$2,000 a year in semi-annual installments of \$1,000 each, in consideration of a release of her dower and an undertaking on her part to save him harmless from any debts of her contracting. The wife, three weeks afterward, got her divorce decree. After marrying again, which she did in a short time, she brought an action, as Mary B. Train, in the Supreme Court in Westchester county, to recover \$2,000 which she claimed to be due under the agreement. Judgment given in her favor has now been reversed by the second appellate division, in an opinion by Justice Willard Bartlett. One of the defenses on the trial was that, the plaintiff being desirous of marrying another man, the

defendant was to facilitate her in obtaining a divorce by furnishing the necessary evidence. The reversal was based upon the ground that evidence tending to establish such an agreement was erroneously excluded, as it was claimed to constitute, with the agreement in suit, an entire contract, and such an agreement was against public policy and void.

Edward H. Murphy, in an action against Henry L. Davis, as guardian, impleaded with Edward M. Davis, set forth an agreement in writing by which Edward M. Davis, after majority, had duly assigned to plaintiff, as attorney, a percentage of a claim which he had against his former guardian, in consideration of the prosecution by the attorney of the claim against the guardian, and also against such other persons as it might be advantageous to prosecute. The complaint also contained allegations, sustained by some proof made upon the trial of the action, of the existence of the claim and of some of the services having been rendered, accompanied by a statement that the defendant and the guardian had made a collusive settlement in order to defeat the claim of the attorney "as provided in said agreement," and that, inasmuch as the guardian had filed no account, the attorney was unable to state the amount to which he was entitled, and finally demanded that the guardian account. The second appellate division has reversed judgment, dismissing the complaint, holding, in an opinion by Justice Bradley, that the complaint stated, as between the attorney and his client, an enforceable equitable cause of action.

#### HE MADE THE COURT SMILE.

A YOUTHFUL ATTORNEY WHO ASSUMED ALTOGETHER TOO MUCH.

THE dignity of the Appellate Court was greatly endangered the other day by the arguments of a young lawyer who appeared for the appellant in an action brought by the authorities of a southern tier county against one of its citizens, who was alleged to have practiced veterinary medicine and surgery without a diploma from the proper authorities, says the Rochester Democrat and Chronicle.

The specific charge against the doctor was the dishorning of a number of cattle, on several different occasions. The attorney for the respondent county claimed in his brief that dishorning cattle was practically an operation which came under the head of veterinary surgery. His very positive young opponent declared, with many gestures and in sonorous tones, that veterinary surgery consisted in the curing or healing of injuries, diseases, malformations, etc., and that the dishorning of perfectly sound cattle was not a curative or a healing operation. He finally stated that upon the

first trial of the case the prosecution had called an expert witness, a veterinary, who declared that the driving of a nail into a horse's hoof for the purpose of holding a shoe was veterinary surgery. This the young lawyer declared to be ridiculous, and for the sake of comparison said:

"Perhaps some of you, your honors, are farmers, or rather are, or rather were at one time the sons of farmers, and saw your fathers placing a ring in a hog's nose." The intimation that any of the five learned justices, clothed in their dignity and broadcloth, were farmers, not only caused a smile on the faces of the large number of waiting attorneys present, but it became contagious with the justices themselves, and five duplicate briefs were soon hiding as many smiling countenances that loomed up over the bench.

The attorney was oblivious, however, of the fact that he was making a comedy out of a serious duty, and after imparting some more information about "ringing hogs," he proceeded to explain and analyze for the benefit of the justices the meaning of many statutes of which they knew much more than it is presumed he will ever be able to learn, should he live for another half century.

When he had most emphatically declared that the driving of a horseshoe nail was not veterinary surgery, Justice Follett, who rarely lets pass an opportunity for a joke, stated that should the nail penetrate the flesh of the foot, it would undoubtedly be a surgical operation, or, at least, something that would demand the services of a veterinary surgeon. The youthful emulator of Choate even then did not "tumble," but continued in his glorious arraignment of the expert witness.

He laid the greatest stress upon the fact that in the original complaint, which, unfortunately for him, and by his own oversight, was the only one served, the respondent county had charged the illegal practice of veterinary medicine and surgery, without stating any specific operations, although it subsequently developed that the defendant had been dishorning cattle.

"We did not know what to defend ourselves against," said he. "Whether it was for sawing the leg off of a saw horse, or administering castor oil to a sick cat." He was interrupted at this point by Presiding Justice Hardin, who inquired if he had asked that the complaint be made more specific, and when Justice Follett, a little later, asked why he had not asked for a bill of particulars, the lawyer endeavored, without much success, to advance a plausible reason. The waiting attorneys smiled when they heard this, and, as one of them remarked to a brother lawyer, "It's all off with him now."

Pennsylvania judges refuse to incorporate societies whose names are in a foreign tongue, and one judge has declared that aliens have no right to a charter from the State for any purpose.

## JUSTICE FIELD'S RESIGNATION ACCEPTED.

THE VENERABLE JURIST TO SEVER HIS CONNECTION WITH THE SUPREME COURT DEC. 1—  
AN UNPRECEDENTED RECORD.

WASHINGTON dispatches under date of October 14 state that the announcement was made at the United States Supreme Court, on that day, that Justice Stephen J. Field, of California, had notified President McKinley of his intention to retire as a member of the court, and had informed his colleagues of this fact. After the adjournment of the court on that day the members called in a body on the retiring justice to pay their respects. It is expected that his successor will be nominated by the president immediately after the assembling of congress in December, and that Attorney-General McKenna, also of California, will be named for the office.

Although the resignation does not take effect until the 1st of December, it is understood that Justice Field will not resume his seat on the bench during the interim.

Justice Field's letter announcing his retirement was in words following:

"SUPREME COURT OF THE UNITED STATES,  
WASHINGTON, D. C., Oct. 12, 1897.

"Dear Mr. Chief Justice and Brethren: Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the president, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:

"EXECUTIVE MANSION,  
WASHINGTON, D. C., Oct. 9.

"The Hon. Stephen J. Field, Associate Justice of the Supreme Court of the United States, Washington, D. C.:

"MY DEAR SIR.—In April last Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as associate justice of the Supreme Court of the United States, to take effect December 1, 1897.

"In hereby accepting your resignation, I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

"Entering upon your great office in May, 1863, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months, a term longer than that of any member of the court since its creation, and throughout a period of special importance in the history of the country, occupied with as grave

public questions as have ever confronted that tribunal for decision.

"I congratulate you, therefore, most heartily upon a service of such exceptional duration, fidelity and distinction. Nor can I overlook that you received your commission from Abraham Lincoln, and, graciously spared by a kind Providence, have survived all the members of the court of his appointment.

"Upon your retirement both the bench and the country will sustain a great loss, but the high



JUSTICE STEPHEN J. FIELD.

character and great ability of your work will live and long be remembered, not only by your colleagues, but by your grateful fellow-countrymen.

"With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir, Very truly yours,

"WILLIAM McKINLEY."

"My judicial career covers many years of service. Having been elected a member of the Supreme Court of California, I assumed that office on October 13, 1857, holding it for five years, seven months and five days, the latter part of the time being chief justice. On the 10th of March, 1863, I was commissioned by President Lincoln a

justice of the Supreme Court of the United States, taking the oath of office on the 20th day of the following May. When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years. I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare in every case coming before me for decision the conclusions which my deliberate convictions compelled me to arrive at by the conscientious exercise of such abilities and requirements as I possessed.

"It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor. Up to that time there had been no representative here of the Pacific coast. A new empire had risen in the west, whose laws were those of another country. The land titles were from Spanish and Mexican grants, both of which were often overlaid by the claims of the first settlers. To bring order out of this confusion, congress passed an act providing for another seat on this bench, with the intention that it should be filled by some one familiar with these conflicting titles and with the mining laws of the coast, and as it so happened that I had framed the principal of these laws and was, moreover, chief justice of California, it was the wish of the senators and representatives of that State, as well as those from Oregon, that I should succeed to the new position.

"At their request Mr. Lincoln sent my name to the senate and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office for the reason that, as chief justice of California, I had heard arguments in many cases in the disposition of which, and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench: and I fixed the 20th of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

"At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the associate justices was Mr. Justice Waite, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity nearly an entire century of the life of this court. During my incumbency three chief justices and sixteen associate justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

"When I came here the country was in the midst of war. Washington was one great camp,

and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say '*inter arma silent leges.*' This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation here as elsewhere. But the war ended in a couple of years and then came the great period of reconstruction and the last amendments to the Federal Constitution. In the effort to re-establish the nation, to adjust all things to the changed political, social and economic conditions, questions of far-reaching import were developed—questions of personal liberty, of constitutional right, which, after oft times heated discussions before the people and in the halls of Congress, came to us for decision. I do not exaggerate when I say that no more difficult and momentous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity, as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

"As we all know, the period of war was followed by one continuing event to the present time of marvelous material development. Wealth accumulated—such as was never before dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessings of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these are added fifty-seven opinions in the Circuit Court, and 365 prepared while I was in the Supreme Court of California, it will be seen that I have voiced the decision in 1,042 cases.

"It may be said that all of our decisions have not met with the universal approval of the Amer-

ican people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions and demonstrates that the people of the United States are capable of self-government.

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States and representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people and for the people.' It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

"With this I give place to my successor, but I can never cease to linger on the memories of the past. Among the compensations for all the hard work that a seat on this bench imposes have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not affect our mutual regard and respect. These many years have indeed been years of labor and of toil, but they have brought their own rewards, and we can all join in thanksgiving to the author of our being that we have been permitted to spend so much of our lives in the service of our country. With profound respect and regard, I am, my dear brethren, very sincerely and always yours,

STEPHEN J. FIELD."

#### WORDS OF PARTING REGRET.

Following is the court's reply:

"SUPREME COURT OF THE UNITED STATES,

"WASHINGTON, D. C., October 13.

DEAR BROTHER FIELD.—We are profoundly moved by the letter in which you announce to us your retirement from the bench. The termination of a judicial career of such length and distinction cannot fail to inspire among all your countrymen, and, indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of work so constant, so exacting, and of such vital importance as ours inevitably draws us together by ties of the closest character, which cannot be dissolved without emotions of deep sad-

ness and regret. We feel that our parting involves not simply the deprivation of the assistance afforded by your learning, your vast experience, and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

"This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up and may safely be committed to the judgment of posterity. But we cannot part with you as an active member of the court without the fervent expression of the hopes that you may be spared for many years to enjoy the repose you have so thoroughly earned and the commendation bestowed on good and faithful service. We are, dear Brother Field, your affectionate brethren.

"MELVILLE W. FULLER,

"JOHN M. HARLAN,

"HORACE GRAY,

"DAVID J. BREWER,

"HENRY B. BROWN,

"GEORGE SHIRAS, JR.,

"E. D. WHITE,

"R. W. PECKHAM."

Justice Field has been eligible for retirement since November 4, 1886, when he became 70 years old. Since that time there have been frequent rumors that he was about to leave the bench. He was appointed to the Supreme Court by President Lincoln in 1863. His life has been twice attempted—once with an infernal machine sent through the mails, and once by Judge David S. Terry, who was counsel for Sarah Althea Hill in her sensational suit for the Sharon estate and who was shot by Deputy United States Marshal Nagle as he was about to assault the justice in a California railroad station.

Justice Field is a remarkable man and one of a remarkable family. His father was David Dudley Field, a Congregational minister of New England. His mother was Sumit Dickinson Field. His grandfather on his father's side was Timothy Field, a captain in the Revolution, and his grandfather on his mother's side was Noah Dickinson, who served with Israel Putnam in the French and Indian war, and also served through the Revolution.

Justice Field is the sole survivor of a brilliant family—the last leaf upon a noble family tree.

#### A FELICITOUS NOTE OF CONGRATULATION.

The following felicitous note of congratulation, which was recently addressed to the retiring jurist by one of the leaders of the New York bar, will be read with pleasure and interest by the profession at large:

"NEW YORK, Oct. 16, 1897.

"My Dear Mr. Justice Field: An event so important in your life, to the profession and the



country, as your retirement from the bench of the Supreme Court, I cannot allow to pass without an expression of the deep sensibility with which I heard of its announcement. We knew that in the course of nature it must occur at no very distant period, but it is one of those events for which we are never fully prepared, to which we are never quite reconciled, and which we cannot but profoundly regret. To a service of unequalled duration, through a period of unequalled importance in our civil and constitutional history, it is distinction enough to satisfy the highest ambition that your labors have shed additional splendor upon a tribunal, the most august in the world, which has been made illustrious by Marshall, Story, Taney, Curtis, Miller, and many eminent associates. This distinction, by universal consent, is justly yours.

"I shall not in this friendly note enter upon a review of your judicial career. It sufficeth to say that so long as our Constitution shall endure, so long as individual liberty and government by law shall be prized, so long as jurisprudence shall be regarded as the highest interest of men and nations, your name and services will be gratefully remembered. Speaking in the language of our profession, the future holds your fame in sure reversion, in perpetuity.

"Upon the retirement of Lord Mansfield after thirty-two years' service as chief justice of King's Bench, Lord Erskine, on behalf of counsel practicing in his court, presented him with an address, wherein, after expressing their regret at the loss of so great a magistrate, he added some reflections which seem to me to be equally applicable to your retirement after even a longer service. He said:

"'But while we lament our loss, we remember with peculiar satisfaction that your lordship is not cut off from us by a sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which have so long distinguished you among men; but that it has pleased God to allow to the evening of a useful and illustrious life the purest enjoyments which Nature has ever allotted to it—the unclouded reflections of a superior and unfading mind over its varied events; and the happy consciousness that it has been faithfully and eminently devoted to the highest duties of human society in the most distinguished nation upon earth. May the season of this high satisfaction bear its proportion to the lengthening days of your activity and strength.'

"What more needs be said? and who can say it with more felicity of speech?

"I am, my dear justice, as ever,

"Most sincerely yours,

"JOHN F. DILLON.

"*Mr. Justice Field, Washington, D. C.*"

#### PUBLIC POLICY AND THE LAW.

ALTHOUGH it cannot be claimed that there has ever been a time since the foundation of modern jurisprudence when the public weal did not enter more or less into the spirit of all laws, it has so developed and grown under the fostering care and protection of democratic institutions and ideas that it has now become an established principle. The progress of civilization has forced upon us conditions of society unknown to earlier ages. The voice of a liberty-loving people long ago proclaimed to the world through the Declaration of Independence that all men are born equal. It was at the priceless expense of human blood that was established the sentiment of a government of the people, by the people and for the people. It has been through more blood-shedding that labor's rights have gained a power of vantage, although this great economical question is still debatable ground.

The needs of the people are fashioning legislation. Courts have left off strict construction of time-worn legal principles where they conflict with the needs of a changed social condition, and are giving to the laws an application demanded by an advanced condition of society. Even the Federal Constitution, the supreme law of our country, is not entirely proof against change. In the opinion of eminent men, learned in the history of the law, it is to be treated, as it was intended, in its application to the people, as a bill of rights. Its provisions are to be construed in the light of social vantage and progress; to protect and advance the interests of the people.

"A reasonable construction is what such an instrument demands and should receive; and the real question is, what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." So says Judge Cooley in his work on Constitutional Limitations.

Chief Justice Parker, in *Henshaw v. Foster* (9 Pick. 316), has said: "We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of the rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an approved state of society may produce."

The scriptural construction of such a compact would be in language very much like the following: "The letter killeth, but the spirit maketh

alive." And in the "spirit of the laws" we find this: "We must acknowledge the relation of justice antecedent to the positive law by which they are established." And: "Before laws were made there were relations of possible justice. To say there is nothing just or unjust but what is commanded or forbidden by positive laws is the same as saying that before the describing of a circle all the radii were not equal." — Montesquieu.

It would be entirely impracticable in an article of this kind to go into the history and growth of this subject of public policy. It is not intended so to do. The absorbing interest of the public in questions presented by corporate exactions, and the development of trusts and monopolies, and the consequent warfare between these interests and labor, is placing all other phases of this subject in the background. Outside, then, of a brief reference to the action of the Supreme Court in the Income Tax case, this discussion will be confined to a treatment of the subject as it relates to corporate combinations and trusts and the courts.

There was never a more strictly technical adherence to the biblical proposition above quoted, "The letter that killeth," etc., than in the majority decision against the Income Tax. The law is dead and buried, but its spirit, like John Brown's body, goes marching on. The decision in these Income Tax cases, it may be admitted, is in harmony with a strict construction of the provisions of the Federal Constitution. But it is to be regretted, nevertheless, that where the principle involved was of such vital importance, and the line of construction of the constitutional provisions brought the court so near to the line of demarcation between the fortunate and unfortunate conditions of the people, that something of the spirit of Abraham Lincoln's noble conception of the people's rights and needs could not have brought the court to a harmonious conclusion to form a policy of construction nearer to the mass of the people. Call it socialism, if you please, but if this nation is to approach the grand conception of "a government for the people," in which the mass of the people are to enjoy comparative happiness, then the judiciary must depart from technical construction of constitutional compacts and statutory enactments. The Jeffersonian maxim of "the best government being the one which governs least" is with us to-day with the added force of three-quarters of a century of experience.

If we are to develop a socialistic school in this country it must be adapted to our national genius. The anarchical socialism of France and Germany will not do for us. The business instinct is too strongly interwoven into our system. We have no time now to speak of inclination, for plots and upheavals. And the principle of liberty of the people, so well recognized in all our laws and institutions, is the safeguard against anarchy.

Justice Jackson, in his able dissenting opinion

in the Income Tax cases, gives expression to the following:

"The decision disregards the well-established rule or canon of construction to which I have referred, that an act passed by a co-ordinate branch of the government has every presumption in its favor, and should never be declared invalid by the courts unless its repugnancy to the Constitution is clear beyond all reasonable doubt. It is not a matter of conjecture; it is the established principle that it must be clear beyond a reasonable doubt. I cannot see, in view of the past, how this case can be said to be free of doubts. Again, this decision not only takes from congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens residing in different sections of their common country."

The effect, by implication, of the decision of the majority of the court, is to give to certain kinds of property, viz., rents or income of real estate and income from certain bond investments, a position of favoritism which is inconsistent with the fundamental principles of our social organization, and, at the same time, invests them with a power and influence that is apt to become a menace to the mass of the people on whom rests the burden of taxation. If it is charged against the act that congress exceeded its power in enacting class legislation, what may be said of the action of the majority of the Supreme Court in thus exempting from its proper burden of taxation these incomes? Were it not for having the support of four of the judges we might hesitate to ask this question. But the effect of the decision of the court is as apparently discriminating as the act itself.

It may, perhaps, be justly said of the Income Tax Act that it sought the application of the taxing power in a particularly discriminating manner, and, therefore, the decision of the court may be said to be just and right. But beyond this there is the question if the emergency of the times did not demand a different and more popular result. It was largely on account of limitations on the taxing power that the old confederation of colonial times practically went to pieces. Remembering this the fathers gave to the new government the most ample authority in this particular, or at least they intended so to do.

By the decision of the Supreme Court the reserve taxing force of the government has been weakened beyond any question.

It has been charged by those who were antagonistic to the Income Tax law that it tended to communism and socialism. If to require those best able to bear the burden of the public expenses, or at least to bear the burden proportionately to property owned, is socialistic or communistic, then perhaps the charge is true. But it was undoubtedly one of the fundamental principles upon which

the new federation of States was erected, and the new compact of the Constitution adopted that taxes should be equal.

Upon this phase of the decision Congressman George S. Boutwell says, in the *North American Review* for May, 1896: "The exemption from taxation of the rent and income from real estate works, practically, a very serious impairment of the ability of the government to raise revenue. It may well be assumed, as was suggested in the opinion of the court, that an income tax and direct taxes through the States should be resorted to only in an exigency, but it is of supreme importance that the government should be able, in an exigency, to raise revenue from rents and incomes from real estate by some practicable method."

The framers of the Federal Constitution well knew this because of their experience under the old articles of Confederation. That they fully intended to vest in congress this power is evidenced in the wording of the article of the Constitution providing for the levy and collection of taxes, duties, etc. And nothing should be excepted from the powers of congress beyond what is expressly declared to be so excepted.

The stability of every government depends upon the adequacy of its taxing power, and any limitation upon this power tends so much to impair its power to protect its subjects.

Wealth makes a greater demonstration in our country than in any other. Of the present perils which threaten the stability of our democratic institutions that of corporate greed seems the most imminent. Corporations are a necessity in any great civilization. In transportation by land and water, manufacturing, mining, banking and insurance they have practically a monopoly. But while acting within their proper channels they are a blessing to most of the people.

On the other hand, through the medium of municipal corruption, their grasp upon legislation becomes so strong that they become dominant in the control of legislation, and combination into so-called trusts easily follows. These trusts have no warrant or authority for their existence and are inimical to the policy of the State.

The main purpose for their existence is to stifle competition, to limit production to a point of forcing up prices, and to monopolize the sale of the necessities of life. This, says Mr. Justice Brown in a late address to the Yale Law School, may be carried to the point of revolution.

"The truth is that the entire corporate legislation of the country is sadly in need of overhauling."

We have now become so accustomed to looseness in statutory enactments, charter rights, the betrayal of trust and wrecking of corporate interests by its officers; to the corruption of legislators and councils of towns by those seeking franchises

thereof; to the issue of preferred stocks to "friends," and to the extension of monopolies in all directions for the purpose of extorting profit from the mass of the people to enrich and build up a few favored ones, that we are gradually coming to regard this as a sort of good thing, in the way of business sharpness, of which we Americans are so proud.

What a nice little study is found in the following police court incident, said to have quite recently occurred in Chicago, a not unlikely place for it to occur:

"The evidence, your honor," began the police officer.

"Hang the evidence" interrupted the police justice. "Has he any influential friends?"

"No, your honor."

"Then I will convict him."

It seems now to be no longer a mooted question as to whether courts can restrain the operations of trusts and corporate monopolies. The whole policy of a democracy is opposed to such interests. Public weal demands the protecting influence of the courts and a decisive response is not wanting. But the trusts have survived an unbroken series of adverse judicial decisions, and neither the principles of the common law nor special statutes have proved effectual as yet. Public opinion is strongly antagonistic to the usurpation of the people's rights by these corporate interests and it is not unlikely that a generation hence they will not be alive to "fret the State."

The whisky trust, which so recently got its quietus in a tussle with the Illinois court, is not the only octopus which has its slimy arms about the people of that commonwealth. There is not a corporate trust doing business by authority of their charter under the laws of that State which is not subject to the same condemnation. A combination to control prices by depriving the public of the advantage of free competition is one to which no representative body should give the stamp of its approval. And yet how many legislators are in the grasp of this giant. The chief States of this country have been and are dominated by this power. If it is not the whisky trust, it is the standard oil trust, or the sugar trust, or the Anthracite coal combine. They are all under the ban of public disapproval, because they are inimical to our inherited constitutional rights and are not consonant with the ideas of a liberty-loving people. It is to be expected that such decisions as the Supreme Court of Illinois has given in the above case will not entirely deter men from committing the evil. Since the promulgation of the Ten Commandments and the interpretation of them by Moses, men have gone on trying how not to observe them.

The Chicago Times-Herald, commenting upon

the decision of the Supreme Court of that State in the whisky case, had this to say:

"But the fact that a thing is illegal has its repressive influence, and if all men may not be deterred from shady and illegal transactions, many men may. The stamp of illegality and illegitimacy has been placed upon monopolies and trusts. Some may profit by them and grow rich, but to their wealth is attached the odium of indirection and oppression and uncleanness. And this in the end must have effect on the public morals and establish new standards of behavior. Time was when gambling was reputable and lotteries a common means of raising the public revenue. Slavery and slave trading laid the foundations of many fortunes, and there have been other avocations as ill-savored that were once pursued without shame or reproach."

The great difficulty in handling these corporate monopolies lies in the fact that their existence is subject to the action of the different States, or the courts of the different States. There is no Federal power which can reach their organization within the separate States. Under the Federal doctrine as suggested Illinois may have the power to put a quietus on the doings of a foreign corporation within its limits, but it cannot prevent its migration into other States. This the Supreme Court has practically held in a number of cases before the court. So the real danger is apparently in not having a central power with the necessary force to execute its mandates in relation to these corporate menaces to the public weal.

In defense of the Federal judiciary, against which has been preferred the charge of favoritism, Judge William H. Taft, of the United States Circuit Court of Appeals, in an address before the American Bar Association last August, calls attention to the more cogent reasons why these corporate interests have become so insolent. The corrupt condition of politics, the susceptibility of the people's representatives to the corrupting influences of money used without fear by the corporate power in getting its grants of liberal franchises from the people, are the most potent factors in this great public wrong.

"The Federal courts can do nothing to prevent such abuses \* \* \* except where such trusts are for the purpose of directly controlling interstate commerce, and not where, in the course of their operation, interstate commerce may occur as an incident." Such is the settled policy of the court according to the authority above quoted. If we are not to have the strong hand of Federal authority in aid of the people's rights, as it has been extended in aid of corporation rights and protection of corporate property, then it may well serve to encourage the audacity which such combinations are showing. There has been, we are told, a reorganization and a recapitalization of the Whisky Trust in the State of Illinois since the

decision above, and now thirty-five millions of dollars are represented in this gigantic undertaking to override judicial mandate, or at least to avoid its effect, and to set its foot on the neck of the people.

Can this state of things be attributed to the fact that the people have become less watchful of their rights to such a degree as to have forfeited somewhat of their liberty? If this be so, or if too much confidence has been felt in the power of the Federal judiciary to protect the people's rights under the Constitution, we do not know. But that there is need of a "quickenened public conscience" there is no room for doubt.

The New York law is so stringent against "monopolistic trusts" that in their organization they avoid that State. But notwithstanding this stringent prohibition of home organizations the corporate organizations of other States are doing business without hindrance, in spite of such laws. The Sugar Trust combination is grinding the people of that State as well as the people of other States. And in the face of their legislative enactments and the opinions of such judges as Folger, in *Atchison v. Mallon*; Andrews, in the Court of Appeals of that State, in the case of the *People v. Sheldon*, and the decision of Judge Haight in vacating the charter of the Milk Exchange of New York, the corporate organizations having an existence outside of New York are compelling the people of that State still to pay tribute—Cæsarism.

Judge Folger held that "agreements which in their operation tend to restrain natural rivalry and competition, and thus result in disadvantage to the public, are against the principles of sound policy, and void."

Judge Andrews held: "Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used. If agreement and combination to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence may be very convincing."

Thus it may be seen there is not wanting the wholesome support of the judiciary where it is invoked. Indeed, the warfare in so far as New York is concerned goes merrily on, the latest thing in this direction being the action of the attorney-general of New York in citing the American Tobacco Company, a New Jersey corporation doing business in that State under the general law of State comity, to appear and show cause why its authority should not be revoked. The charge against this corporation, generally speaking, is that by reason of consolidation, combination and conspiracy said company has been able to control

the market price of the various kinds of tobacco manufactured. The one aim of this giant concern, with its millions of capital, has been to kill competition, and thus to restrain legitimate trade. It is undoubtedly because of having had its clutches upon the throat of legitimate competition that this corporation has been able, according to the Journal of Commerce of New York, to pay a twelve per cent. dividend on its inflated stock, and to lay aside some six or seven millions of accumulated gains for the purpose of extending its business methods.

Tobacco is not a necessity, but upon its fate, perhaps, may hang the fate of the Sugar Trust and others of the same character whose dealings are in the necessities of life.

And now if public policy, as it is being recognized more and more by the courts, shall crystallize into a first principle in the administration of all our laws; if the Federal Supreme Court in its close relation to the Constitution, the State judiciary and the people's representatives in congressional or legislative halls, shall listen to the dictate of conscience in the construction and application of laws to meet the needs of the great mass of the people, then will this government be of the people and revered by them, and the State be safe from this organized oppression.

PERCY L. EDWARDS.

Owosso, Mich., Oct., 1897.

### LINCOLN'S HUMOR IN LAW.

ONLY EQUALED BY HIS CONSCIENTIOUSNESS IN  
TAKING CASES.

**E**VEN as early as 1852 Lincoln had acquired a reputation for story-telling. When not busy during the session of the court he was "habitually whispering stories to his neighbors, frequently to the annoyance of Judge Davis, who presided over the Eighth Circuit." If Lincoln persisted too long the judge would rap on the chair and exclaim: "Come, come, Mr. Lincoln; I can't stand this! There is no use trying to carry on two courts. I must adjourn mine or yours, and I think you will have to be the one." As soon as the group had scattered the judge would call one of the men to him and ask: "What was that Lincoln was telling?"

In his law practice Lincoln seems to have been singularly conscientious, his first effort being to try to arrange matters so as to avoid litigation. Nor would he assume a case that he felt was not founded upon right and justice.

"We will not take your case," he said to a man who had shown that by a legal technicality he could win property valued at \$600. "You must remember that some things legally right are not morally right. We will not take your case, but will give you a little advice, for which we will

charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making \$600 in some other way."

One of the most interesting anecdotes is the one quoted from Joe Jefferson's autobiography. Jefferson and his father were playing at Springfield during the session of the legislature, and, as there was no theater in the town, had gone to the expense of building one. Hardly had this been done when a religious revival broke out. The church people condemned the theater and prevailed upon the authorities to impose a license which was practically prohibition.

"In the midst of our trouble," says Jefferson, "a young lawyer called on the managers. He had heard of the injustice and offered, if they would place the matter in his hands, to have the license taken off, declaring that he only desired to see fair play, and he would accept no fee whether he failed or succeeded. The young lawyer began his harangue. He handled the subject with tact, skill and humor, tracing the history of the drama from the time when Thespis acted in a cart to the stage of to-day. He illustrated his speech with a number of anecdotes and kept the council in a roar of laughter. His good humor prevailed, and the exorbitant tax was taken off. The young lawyer was Lincoln."

Another one of these anecdotes is related in connection with a case involving a bodily attack. Mr. Lincoln defended, and told the jury that his client was in the fix of a man who, in going along the highway with a pitchfork over his shoulder, was attacked by a fierce dog that ran out at him from a farmer's dooryard. In parrying off the brute with the fork, its prongs stuck into him and killed him.

"What made you kill my dog?" said the farmer.

"What made him bite me?"

"But why did you not go after him with the other end of the pitchfork?"

"Why did he not come at me with his other end?" At this Mr. Lincoln whirled about in his long arms an imaginary dog and pushed his tail-end toward the jury. This was the defensive plea of "Son assault demesne" — loosely, that "The other fellow brought on the fight" — quickly told and in a way the dullest mind would grasp and retain. — *Pittsburg Commercial Gazette*.

### A COURT ORDER EXTRAORDINARY.

**J**UDGE Dunne, of the Cook County Circuit Court, entered an order in a divorce proceeding this week the like of which has been hitherto unknown in this bailiwick, and should never attain here or elsewhere the dignity of precedent, says the Chicago Law Journal.

At the request of the attorneys, who, it appears, represented both parties in the case of Loker v. Loker, his honor dismissed the suit, quashed a writ of *ne exeat* which figured in the case, and

ordered the files sealed so that in the future they will be closed to public inspection, the last being an anomalous proceeding in jurisprudence.

It appears that since the wife filed her bill for divorce two weeks ago, charging her husband with infidelity, the pair have become reconciled and decided to cease contention.

The defendant occupies a prominent business position and enjoys a very comfortable income. Where the court found warrant for its unusual course is not disclosed. That the proceeding was an arbitrary exercise of power goes without saying. The files of any case are not the personal property of the court, but belong to the common public, and such action as the court took in the instant case might be employed to work the grossest injustice or conceal the most flagrant wrong. There should be neither mystery nor suppression attendant upon any procedure once begun in a court.

### Legal Laughs.

A young man, anxious to become a lawyer, made application for a position in the office of a barrister, whereupon the following unconventional dialogue ensued, according to the Youth's Companion:

"Well, young man, and so you'd like to be a lawyer?"

"Yes, sir; I think I would like to be one."

"Where's your gun, my boy? I want to see your gun, my young gentleman. Fond of sporting, eh?"

"I have no gun, sir; don't know whether I'd like gunning."

"No gun? Well, you keep a boat then? Like boating?"

"I do not own a boat, sir; do not know how to use one."

"You wear a watch, or keep a dog?"

"I am too poor to wear a watch, and I have no dog."

"You'll do, my lad, if you persevere in the course you have begun. The law is a jealous mistress, and cannot be won except by undivided attention. Remember this, my lad, and I will insure your success. You may rely on any assistance I can render you."

The young man entered the office and in time became a famous lawyer.

During the legal absence of Mr. (afterwards Lord) Campbell on his matrimonial trip with the ci-devant Miss Scarlett, Mr. Justice Abbott observed, when a cause was called on in the Court of King's Bench, "I thought, Mr. Brougham, that Mr. Campbell was in the case." "Yes, my Lord," replied Mr. Brougham, with that sarcastic look peculiarly his own; "he was, my Lord; but

I understand he is ill." "I am very sorry to hear that," said the judge. "My Lord," replied Mr. Brougham, "it is whispered that the cause of my learned friend's absence is the 'scarlet fever.'" — Law Times (London).

### Legal Notes of Pertinence.

The official ballot for the greater New York election will have eleven columns and will be two feet and three inches wide and a foot and a half long.

The Swiss national council, by a vote of 101 to 9, has adopted a bill making insurance against sickness compulsory in the case of all persons not having independent means.

Justice Lemon, of Brooklyn, has decided "that an engagement ring is not a gift, and that in case the engagement is broken the ring does not belong to the woman, but to the man."

John Wedderburn & Company have been disbarred from practice before the Interior Department as patent attorneys or agents. The action of Commissioner Butterworth is based on section 487 of the Revised Statutes. The firm is held to have been guilty of "gross fraud and unprofessional conduct."

George M. Judd of No. 173 Fifth avenue, New York, attorney for the Title Guarantee and Trust Company, who retained \$300 given him by Josephine Mallebre, of No. 1386 Clinton avenue, was sentenced by Judge Cowing to two and one-half years in State prison. Mr. Judd is described as a man of education and refinement. His employers believe that his total shortage will reach \$13,500.

Papers have been filed in a breach of promise case in New York City, involving two women and a man whose combined ages are 197 years. The plaintiff, one of the women, is fifty-seven years of age; the fickle defendant is seventy-eight years of age, and the person accused of having, by coy and cunning feminine artifices, won the antique's ardent love away from the plaintiff, is three score and two.

On the opening day of the United States Supreme Court, October 11, 1897, no business was transacted beyond the admission of attorneys to the bar. Those admitted were: W. F. Fitzgerald, of San Francisco (attorney-general of California); W. H. Anderson, of San Francisco, Cal.; James E. Boyd, of Greensboro, N. C.; John G. Thompson, of Danville, Ill.; John D. Johnson, of St. Louis, Mo.; Edward F. Bunn, of New York city; Wm. H. Blymer, of New York city; J. C. Byers, of Mena, Ark.; Benjamin Morris Strouse, of Lebanon, Pa.; George H. Pierce, of Camden, N. J.; Henry M. Earle, of Washington, D. C.; Thomas H. Clark, of Montgomery, Ala.; L. W. Campbell,

of Waco, Texas; E. G. C. Bleakly, of Camden, N. J., and William L. Grubb, of Birmingham, Ill. The attorney-general presented to the court John K. Richards as solicitor-general, and it was ordered that his commission be recorded.

### English Notes.

Dick's Coffee House, in Fleet street, London, which has long been the haunt of the bar of the metropolis, is soon to disappear.

The Rt. Hon. Judge Warren, for many years president of the Dublin Probate Court and member of the Privy Council, died recently at his residence in Dublin.

The East Denbighshire election does not indicate any decline in the popularity of lawyers as legislators. Sir George Osborne Morgan, whose death created the vacancy, was a member of the bar, and both the gentlemen who sought to fill his place belong to the same profession.

At the Vestry Hall, Islington, Mr. W. F. Webster, as revising barrister, sat last week to revise the voting lists. In one case the claimant's wife was in a lunatic asylum, and the point was whether this was medical relief. The revising barrister decided that it was, even when the husband contributed towards the maintenance of his wife.

The Term Reports, when they use the very language of Lord Kenyon, often contain a series of broken metaphors, says the *Law Times*. For example: "If an individual can 'break down' any of those safeguards which the constitution has so wisely and so cautiously erected, by 'poisoning' the minds of the jury at a time when they are called upon to decide, he will 'stab' the administration of justice in its most vital parts."

The long legal and political career of the late Sir John Simon, Sergeant-at-law, formerly M. P. for Dewsbury, is to be treated in a memoir now being prepared by his son, Mr. Oswald John Simon. This will comprise much interesting correspondence with eminent lawyers and statesmen, extending over a period of half a century, while the active and influential part taken by the late sergeant in relation to Jewish affairs all over the world will form an important section of the work.

### Notes of Recent American Decisions.

Master and Servant — Liability to Third Person — Scope of Employment. — In *Barabasz v. Karat*, decided by the Court of Appeals of Maryland, in June, 1897 (37 Atl. R. 720), it was held that a pastor rightfully instructing a doorkeeper of a church to admit only such as have tickets, is liable for injuries resulting from the use of unnecessary force by the doorkeeper in preventing

from entering one who had no ticket. It was further held that a servant instructed to admit in a church only such persons as have tickets cannot, by directing police officers to arrest one who seeks to enter without a ticket, make his master liable for false arrest made pursuant thereto, as he would not be acting within the apparent scope of his employment.

Purchase-Money Lien. — The vendee of a tract of land having executed his note to the vendor for the unpaid part of the purchase-money, reserving a lien upon the land to secure the note, and the vendor having assigned the note to the father of the vendee, the vendee was entitled upon the death of his father to have the note credited by an amount equal to one-eighth of it, he being one of eight children and entitled to one-eighth interest in the father's estate, but the lien upon the land continued to exist until the obligation was satisfied, and the other children were entitled to have their part of the note paid in full out of the proceeds of a sale of the land, and the chancellor erred in adjudging any part of the proceeds of sale to the payment of a subordinate lien created by the original vendee, who had sold the land to another, the land at judicial sale bringing less than the balance due on the original note. *Strode v. Mt. Sterling Nat'l Bank* ([Ky. Sup. Ct.], Ky. L. Rep., Sept. 1, 1897.)

Water Course — Drains — Liability of Municipality for Insufficient Sewer. — Where surface water has been carried away from a road by a natural gully, if a municipality in adopting a system of sewage places a sewer which proves inadequate, and as a consequence, water that would have been carried off by the gully is backed up upon private property, there can be no recovery by the person injured thereby. Where sewers are not sufficient to carry off surface drainage, the city is not liable for damage resulting therefrom, unless they have been defectively constructed or left out of repair. (*Sullivan v. Pittsburg, Pa.*, Superior Ct., 41 Weekly Notes of Cases, 542.)

### Communications.

THE YOUNGEST COURT OF APPEALS JUDGE.

To the Editor of the Albany Law Journal:

In your recent article on Judge Parker you state that in case he is elected chief judge of the Court of Appeals, he will be the youngest man that ever sat on that bench. This is a mistake. A. S. Johnson was much younger when elected a member of the court. He took his seat on the bench January 1, 1852. *Lanman's Dictionary* says he was born in 1822. *Appleton's Annual Cyclopaedia* for 1878 puts the date of his birth at 1817, so that he was either

30 or 35. See Blatchford, Circuit Ct. Reports, Vol. xiv, p. 558.

Justice Charles C. Dwight, of Auburn, went on the bench of the Court of Appeals March 16, 1868. He was probably born in 1830, and his exact age would have to be determined before it could be said which was the younger, he or Justice Parker. They were probably of the same age. I infer Justice Dwight's age from the Legislative Manual (1897), page 579, which shows that his term will expire in 1900, by virtue of the 70 years' limitation. Their respective affidavits on file with the secretary of state will show the dates of their birth.

Respectfully,

C. M. FOSTER.

TOPEKA, Kan., Oct. 12, 1897.

[Our correspondent may be right with reference to Judge Johnson, but he is certainly laboring under a serious error with reference to Justice Dwight. Justice Charles C. Dwight, of Auburn, is a justice of the Supreme Court for the Seventh Judicial District, and never sat upon the Court of Appeals bench. We have searched the records in the office of the secretary of state, and find that there are no affidavits on file as to Judge Johnson's age. The law which now requires that important formality did not go into effect until many years after Judge Johnson took his seat.]

### New Books and New Editions.

The Colonial Laws of New York, from the year 1664 to the Revolution. Albany: James B. Lyon, State Printer, 1894.

The legislature, by chapter 125 of the Laws of 1891, directed the Commissioners of Statutory Revision to republish the Laws of the Colony of New York. The five volumes now before us are the result. By the terms of the law referred to the commission was directed to republish the laws verbatim, preserving the original spelling and punctuation. It is an interesting fact that there has never before been a complete publication of the laws of the colony. In an explanatory note the commissioners state that, in the year 1694, William Bradford, who was then public printer of the colony, published the laws enacted by the colonial legislature since its first session in 1691. There are but seven copies of this edition known to be in existence, three of which are in Albany—one in the State Library, one in the office of the Secretary of State, and the other owned by Mr. John Boyd Thacher. Another publication of the colonial laws, known as Baskett's edition, was made in London in 1718. Other editions were subsequently printed, including that known as the Van Schaack, in 1772, which has been taken as the basis of the present publication, so far as the arrangement and chapter numbering are concerned. Vol.

I covers the period from 1664 to 1719; Vol. II, from 1720 to 1737; Vol. III, from 1739 to 1755; Vol. IV, from 1755 to 1769, and Vol. V, from 1769 to 1775. In a note by the commissioners they state that when the present commissioners assumed their duties early in the year 1895, they found that the work of copying the colonial laws was completed, and some of the earlier portions were already printed. Great care was taken to obtain an accurate copy of the laws, as required by the statute, all of the work having been compared twice with the original before being printed, and afterwards thoroughly compared and verified. Robert C. Cumming, Esq., of Albany, N. Y., chief clerk of the commission, was given special charge of the work. Vol. I contains a historical note by Mr. Cumming embodying a sketch of the history and development of representative government in the colony. In the explanatory note above referred to it is stated that the acts of the colonial legislature, except as affected by amendment or subsequent repeal, continued in force until 1828, when it was enacted by chapter 21 of the Laws of that year, that "no statutes passed by the government of the late colony of New York shall be considered as a law of this State." As affecting titles to real estate or as constituting irrevocable contracts, some of the laws may, however, still be in force; but for the most part this publication is of a greater value from a historical than from a legal standpoint. The books contain invaluable historical records of the earliest period in our history, and, as the commissioners say, "present an interesting field for the study of the political and judicial development of the colony, and also the social conditions incident to pioneer life." Chapter 400, of the Laws of 1897, provides for the distribution of the volumes to various libraries, educational institutions, members of the legislature and to State, department and other officers, and further distribution has been provided for, including historical and colonial societies, and public libraries outside the State, where the people generally may have access to the work. Through the medium of the State Library a still further distribution will be made to each State in the Union and to several foreign countries.

A Treatise on Fraudulent Conveyances and Creditors' Bills. By Frederick S. Wait of the New York bar. New York: Baker, Voorhis & Co., 1897.

This is the third edition of a well-known work on a difficult and important subject. Much fresh matter has been embodied in the original text, a number of new sections have been written, and the citations of authorities increased several thousand cases over the number contained in the former edition. More than 180 pages of entirely new matter has been written for this edition and special



effort made to utilize the latest important authorities bearing upon the topics discussed. In his preface to the third edition the author remarks:

"The writer is confirmed in his early conviction that the policy resulting in a relaxation of remedies against the person which an enlightened civilization seemed to demand, has created a numerous and very obnoxious class of what may be called professional debtors. The spendthrift trust cases, now so numerous, reflect no credit upon the body of our law. The policy of enlarging statutory exemptions; of depriving creditors of the right to resort to powers as assets; of shifting liens upon personal property; of shielding debtors with an undeserved mantle of presumptions, and of exacting explicit proof of notice sufficient to charge alienees with bad faith—is certainly working injustice to the creditor class."

This work, which is now thoroughly up to date, is more than ever invaluable for every lawyer in actual practice. It is in one large octavo volume of 900 pages, and in the best law-book style.

A Treatise on the Competency and Rights of Witnesses and Parties in Interest, in all actions or proceedings before courts or magistrates. By Russel Headley of the Newburgh bar. Albany, N. Y.: Matthew Bender, 1897.

In this work, which is sufficiently described by its title, the author has sought to define clearly and concisely, in the light of the most recent decisions, both American and English, the competency and rights of witnesses. Such examination as we have been able to give to it indicates that the author has produced a very satisfactory treatise, and one that will materially aid the student and practitioner. Among the chapter headings which may be mentioned are: Disparaging and Criminating Questions; Defendant and Accomplices; Procedure under sections 829 and 830, Code Civil Procedure; Privileged Communications; Husband and Wife; Confessions. The author has, within the limits of a handy volume of 280 pages, condensed information of much value and has presented it in a clear, concise and orderly manner.

Commentary on Mechanics' Lien Law for the State of New York. By Edward L. Heydecker, A. M., LL. B., of the New York bar. Albany, N. Y.: Matthew Bender, 1897.

The aim of the author, as stated by him in the preface to the work, has been to treat the subject as a separate branch of the law, not merely to annotate the act in question. With this view he has examined the act and all decisions construing its predecessors, with a view, first, to ascertain the principles of law applicable, and, second, to note the practice to be followed. He has sought to present the whole subject in a logical division

which will readily submit itself to the immediate need of the practitioner and enable him, without difficulty, to find all the passages of the act and their judicial interpretations gathered on any point which comes before him. The subject is one of great importance, and since the recent enactment of the codification by the commissioners of statutory revision it has become necessary for the practitioner to fully understand the new act before using any of the old forms or precedents. Mr. Hydecker's work will certainly be of great assistance in enabling him to do so.

General Digest, American and English, Annotated, Vol. III, new series. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co., 1897.

This volume covers all the reported decisions of all the courts in the United States, of the higher courts of England and the Supreme Court of Canada, with many important cases from other Canadian courts. It includes all officially reported cases and all cases not to be officially reported which were first published between January 1, 1897, and July 1, 1897. The plan and arrangement are similar to those of previous volumes of the General Digest, with the exception of the annotation which is of two kinds—one furnished by the courts themselves, consisting of the citation, from the opinion in the case digested, of the authorities from other jurisdictions which the court relied upon or the cases which it criticised, distinguished, limited or overruled; the other, a careful editorial compilation of the authorities on important points raised by the decisions. Thus, as the editors say, one who finds the latest case on a question in the current digest will often find with it the whole line of pertinent authorities.

#### BOOKS RECEIVED.

"A Handbook on the Annexation of Hawaii." By Lorrin A. Thurston.

"Proceedings of the Ninth Annual Meeting of the Virginia State Bar Association," held at Hot Springs, Va., August 3d, 4th and 5th, 1897.

"Report of the Third Annual Meeting of the Pennsylvania Bar Association," held at Cresson, Pa., June 30 and July 1, 1897.

#### The Magazines.

The October number of the American Monthly Review of Reviews is fully up to the high standard which the management has set. There are a number of timely articles, and the illustrations are unusually copious in number and interesting in variety.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, OCTOBER 30, 1897.

### Current Topics.

THE Luetgert murder trial, in many respects the most remarkable in the criminal annals of this country, has ended in the disagreement and final discharge of the jury, after long-continued but fruitless efforts to reach a verdict. The trial itself lasted nine weeks, and naturally excited intense interest, not only in Chicago, where it occurred, but throughout the civilized world. So remarkable was the case, in many of its features, that a brief review of it will be of interest. The prosecution, which was conducted with great skill and vigor, was compelled to rely wholly upon circumstantial evidence. There was, indeed, no actual proof that a murder had been committed. A woman had been missing since May 1st, last, and the prosecuting officers had a theory as to her disappearance which they sought to prove by a very strong chain of circumstances. If, with this proof, a conviction could have been obtained, it would have been a remarkable result, and a great victory for the prosecuting officials. It was claimed by the State that on the night of May 1st, the wife of the prisoner, his alleged victim, went with him to the sausage factory of the defendant where he strangled or otherwise killed her, disintegrated her body in a boiling solution of crude potash, with which one of the vats had been filled, and burned what bones remained in the factory furnace. Other alleged facts and circumstances relied upon by the prosecuting officials were these:

Luetgert, who was at one time an extensive manufacturer of sausages, had become embarrassed in business. It was a notorious fact that the couple did not live happily together, and that he had made numerous vague threats against her life. The motive of the alleged crime was said to be the defendant's desire to be rid of his wife because he was infatuated with a servant girl in the employ of the family. The chain of evidence upon which the authorities relied for conviction was somewhat as follows: The factory had not been run for sausage-making purposes since the February previous to the woman's disappearance. On March 11 Luetgert bought 328 pounds of crude potash and had the stuff taken to the factory basement and dissolved in a huge vat of water. This material, it was testified, burned the hands of those who touched it, and had never been used in the establishment before. On the night of May 1st, the defendant and his wife were seen walking toward the factory. Previously the defendant had turned steam into the potash vat, after which he sent the watchman out twice to a neighboring drug store on trivial errands. He was shown to have remained in the basement of the factory until three o'clock the next morning, and on leaving ordered the place to be thoroughly cleaned out. In searching the vat which had been used on that night, the authorities found two gold rings, both of which, it was alleged, bore the initials of the missing woman, and an artificial tooth such as it was claimed Mrs. Luetgert wore, and in the catch-basin under the vat some small pieces of bone and a small tangle of blonde hair were also found. Luetgert, himself, was shown to have raked the furnace fires, and to have ordered ashes dumped into the street. It was proved that he had shown complete and unnatural apathy over the disappearance of his wife, and to have made no effort whatever to ascertain her whereabouts when her absence began to excite public attention and comment. To test their theory that the dead body of Mrs. Luetgert had been dissolved in some powerful chemical solution, experiments were made at the Rush Medical College, in Chicago, which,

it was claimed, proved conclusively that such a result could be obtained. It was alleged that these experiments proved that a dead body could be dissolved in less than three hours. But there was much conflicting testimony as is usual in such cases. Professors and chemical experts tried to show that a human body could not be dissolved in the time given, and that this was especially true of the frontal bone of the skull, and of the teeth. Several experts for the prosecution testified that the pieces of bone taken from the vat were human, while, for the defense, expert osteologists declared, with equal positiveness that the bones could not be identified. The temporal bone, which had been positively identified by Prof. Dorsey, of the Field Columbian Museum, as human, was declared, by the defense's experts, to be merely a collection of small bones, fused together. It was agreed, by the experts on both sides that the bones showed the action of potash or some other destroying agent. It can hardly be denied that the result of the trial will be to still further discredit the testimony of what are called expert witnesses. One of the most remarkable features of the defense was the testimony offered going to prove that Mrs. Luetgert had been seen in Wisconsin and in other places since the alleged murder, and Luetgert, himself, stoutly asserted that he would not be surprised to see his missing wife walk into the courtroom at any time. It was claimed that her mind had become unbalanced because of her husband's losses, and that she had wandered away. The defendant's presence in the factory on the night of May 1st, was admitted, but it was explained that he was engaged in experimenting in soap-making, with a view to going into that branch of manufacture, as sausage-making did not pay any longer, and chemists tried to show that an analysis of the solution contained in the vat bore out this theory. Luetgert appeared for preliminary hearing May 22, before Justice Kersten, and witnesses for the State were heard from May 22 to 29, inclusive; he was indicted June 5. Habeas corpus proceedings were begun before Judge Gibbons June 17, and ran to June 22; Judge Gibbons refused

to release Luetgert under bonds. The trial before Judge R. S. Tuthill began August 23, and occupied sixty days. The jury was secured in five days. The State passed seventeen peremptory challenges and the defense fifteen. The number of veniremen summoned was 175, and the court excused 114 for cause. On October 21, the jury, after being out sixty-six hours, were unable to agree and were discharged by the court. It was admitted by members of the jury, after their discharge, when they stood nine to three for conviction, that the disagreement was brought about by the wide differences of opinion regarding the rings found in the vat, and the testimony of witnesses who positively swore that they saw Mrs. Luetgert alive on May 3, 4 and 5. By the prosecution it is claimed that some of the testimony was clearly perjured, and prosecutions are hinted at. It should be said that the production of Mrs. Luetgert alive would have cleared away all of the mystery, and it is scarcely conceivable that if alive she could be kept in ignorance of the fact that her husband — an innocent man — was on trial for his life. Nor can it be supposed that, however bitter their quarrels may have been in the past, she, knowing the facts of the trial, and the terrible accusation brought against her husband, would suffer him to be convicted and punished for a crime which he had never committed. As a fitting finale to the trial, full of sensations as it was, came the signed statement of the defendant to the public, made under oath, with the consent of his leading counsel, former Judge Vincent, in which Luetgert expresses disappointment and surprise that the jury did not bring in a verdict of acquittal. "I did not kill my wife," he solemnly declares, "and I do not know where she is, but I am sure that it is only a question of time until she comes home. I did not go upon the witness stand because my lawyer, Judge Vincent, was bitterly opposed to my doing so, and because he advised me it was not necessary. I am grateful for the tremendous change in public sentiment in my favor, and time will demonstrate that I am not only an innocent man, but a very grievously wronged man." The

disagreement of a jury is to be regretted under any circumstances, but particularly so in a case which has involved the expenditure of so much time, energy and money as this great trial has involved. Attorney Deneen declares that a second trial will be had, and meanwhile the defendant may be admitted to bail. Public sentiment seems to be divided as to his guilt, with probably a large majority firmly convinced that he really committed the horrible crime with which he still stands charged, and of which nine out of the twelve members of the jury, after hearing all of the evidence, solemnly declare, under their oaths, they believe he is guilty. A second trial ought certainly to be had, and a verdict either of conviction or acquittal rendered. Any other result would be a gross miscarriage of justice.

The New York Court of Appeals decided, in *People ex rel. The Woodhaven Gas Light Co., appellant, v. James F. Deehan, as Street Com'r, etc., respondent*, a very important question, viz.: That where the right to use the public streets of a town has once been granted, in general terms, by the local authorities, to a gas light company, such grant will be deemed to include new streets and extensions of old ones, as they are subsequently opened. Judge O'Brien wrote the opinion, in which all concurred, except Gray, absent, and Vann, J., dissenting. The ruling of the Appellate Division, that the consent of the town authorities applied only to streets and highways then existing, and not to streets and highways thereafter opened or used, the Court of Appeals considers altogether too narrow. The rule that public grants are to be construed strictly against the grantees, the court says, means that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant; but the obvious intent of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. The court continues:

"It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not

only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made."

\* \* \* \* \*

"Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose and duration. There is no good reason for restricting its operation to existing highways unless that purpose appears from the language employed. It is not claimed that any such limitation was expressed, and none can be implied from the nature of the case. The language of the consent confers the right to place the conductors in the streets, upon compliance with reasonable regulations, not only as the streets then existed, but as subsequently enlarged or changed. That is what the grant contemplated when made, and such is the fair meaning of the language used."

Perhaps the first instance of the admission of an X-ray photograph as evidence in the trial of a criminal case in this State occurred on the 21st inst., at Watertown, in the Haynes murder trial. The claim of the prosecution was that a 32-calibre bullet struck Allen, the victim, in the jaw, and that it split, one piece being deflected into the jaw and the other piece into the back of Allen's head. The defense claimed that the substance at the base of Allen's skull was not a fragment of a 32-calibre bullet, but a complete 32-calibre bullet. To prove this claim, the defense produced an X-ray photograph of Allen's neck, showing the substance which resembles a bullet near the second vertebra at the base of the skull. Dr. Gilbert Cannon, of

Watertown, made the photograph, and from his experiments, says that the bullet is not a 32-calibre bullet. Both sides argued for several hours over the admission in evidence of the photograph. Justice Wright, following, we believe, precedents in other States, allowed the photograph to be put in evidence, and the jury carefully examined it. Science has already recognized in the X-ray a valuable agent, and the law, being an equally progressive science, does not propose to be behind in making use of every proper means of ascertaining the facts in any given case.

Our interesting namesake, the Canada Law Journal, seems to agree with us that the alleged "unpublished" letter of Chancellor Kent, which the "Green Bag" gave to its readers, some time since, as a genuine production of the great jurist and commentator, is anything but what it purports to be. Under the heading, "An Orthographical Issue," the Canada Law Journal makes these witty, erudite and facetious remarks:

"The 'Green Bag' has published what it alleges to be a recently discovered letter of Chancellor Kent to one of his friends, which has as rare an orthographical flavor about it as the masterpieces of Artemus Ward, Orpheus C. Kerr and Josh Billings — shining lights as they are in the American literary firmament. The ALBANY LAW JOURNAL scornfully rejects the claim of this treasure-trove to be placed among the *ana* of the famous chancellor. It deems it beyond conception that he could have been guilty of such shameful illiteracy as to write 'Salust' for Sallust, 'Quinctillion' for Quintilian, 'Bynkersheek' for Bynkershoek, and 'Machiavell' for Machiavelli. But if he really did so miscall them, fancy his charlatantry in claiming *any* sort of acquaintance with these extremely defunct but yet immortal gentlemen! However, a new field is opened up for Mr. Ignatius Donnelly and his commendable bureau for the detection of literary frauds. We must now expect it to be proved to a demonstration that Kent did not write the Commentaries that bear his name, but that they were written by — well, say

Washington Irving. On the whole, we are glad that the unlettered chancellor hailed from New York instead of from Boston. Boston has, of late, so far fallen from her high intellectual estate as to use a Latin infinitive to express a purpose — and this, too, in an inscription on one of her monuments. She has also, according to the newspapers, been publicly referring to the Bacchantes as if the pronunciation of the name of those bibulous ladies were compassed in two syllables! All of which is quite dreadful, and if the *locale* of this new literary discovery had been Boston, then, indeed, would the American Athens have been in the hands of the Boeotians."

We only publish this extract to show how the matter strikes others who are quite as free from prejudice in the matter as ourselves. Meanwhile, it is noticeable that the "Green Bag" has in no way publicly attempted to fortify the genuineness of the "unpublished" letter. Why?

A correspondent of the Chicago Record writes thus to the editor of that paper: "It is a theory of law that a man cannot be placed on trial for his life more than once. Will you please tell me what would happen if there should be such a case as this? Suppose a man to be acquitted of a charge of murder. Then, after a lapse of a few weeks or so, if absolute and certain evidence should come to light, proving beyond any possible question that he was guilty, could he be placed in jeopardy again?"

The editor remarks that, "It is an interesting question, but we have made it a rule not to go into technical legal discussions in this column."

The answer to the question of the correspondent, above given, seems easy. The fifth amendment to the Constitution provides: \* \* \* "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Under the provisions of this plain and positive guarantee, it would appear that a person who had been once acquitted of a crime, could not be again placed on trial for the same offense, no matter what, or how absolute or certain might

be the character of evidence subsequently discovered, tending to show that he committed the crime in question.

The question whether a bicycle is properly classed as luggage was recently decided in the West London Police Court. In the case referred to, the cabman summoned the lady in order to recover from her the sum of two pence for carrying her bicycle on his cab. He had apparently raised no objection to carrying the machine when it was offered to him, but when he had taken the lady to her destination he demanded six pence extra for it. This the lady refused to pay, and the summons for two pence was dismissed. The Solicitor's Journal points out that by section 17 of the Hackney Carriages (Metropolis) act, 1853, every driver of a cab "who shall refuse to carry by his carriage a reasonable quantity of luggage for any person hiring or intending to hire such carriage" is liable to a penalty. Again, by the regulations made under the powers given to a secretary of state by the Metropolitan Public Carriage act, 1869, the driver is entitled to charge as an extra payment if any luggage is carried outside the sum of two pence for every package so carried. It seems fairly clear that luggage does not include every sort of goods whatever that a person may desire to put on a cab, but means such articles as are usually carried as their baggage by persons who hire cabs, and that the learned magistrate was right when he decided that a bicycle (which is itself a carriage) does not come under the description of luggage. There are two important consequences of this decision. On the one hand, a cabman is not bound to carry a bicycle on his cab at all, and therefore, if he chooses to do so, he may make such agreement as he can with his fare for payment. But, on the other hand, if he carries the machine without making any such agreement, he cannot demand the two pence which he is entitled to under the last-mentioned statute for carrying a package of luggage, nor can he recover any sum whatever in the police courts. He is clearly entitled to be paid for his services, and can recover in an action of *quantum meruit*, but to do this he

must go to the County Court, which is a cumbersome method of recovering a few pence. Cabmen, therefore, who wish to be quite safe, and who cannot trust to the fairness of their hirers, had better agree on the sum they are to receive for carrying bicycles before they allow the machines to be placed on their cabs."

This is the view already taken by the railways, viz., that a bicycle is not luggage. The London Law Journal is fearful lest the measure be extended to baby-wagons, to the confusion of families returning from the seashore.

### Notes of Cases.

In the case of *Campbell v. Galloway et al.*, recently decided by the Supreme Court of Indiana, it appeared that a real estate agent executed a written proposition to sell an oil lease for \$250, and procured its acceptance by a person who gave him in return a check for that amount, payable to the agent, which was never transferred nor delivered to the owner of the oil well, the agent having no authority except what was conveyed in a letter written by a clerk employed by the owner of a fourth interest in the well, who, in answer to a letter asking the employer to "notify me if the lease is for sale, and what the price and terms are, and what there is in it for me," replied by letter, stating that he would "not sell for less than \$250 net to me; all over that you can have," to which he signed his employer's name, although he had no authority to do so. The court held that such written authority of sale could not be enforced, the authority to bind a purchaser at a certain price does not include authority to make a contract of sale at that price, and that letters written by a clerk concerning matters in which he has no authority and signed by his employer's name, with the addition of the clerk's initial, do not bind the employer.

The Supreme Court of Michigan, in the case of *Hudson v. Wilbur*, held recently that garnishment proceedings will not lie against an executor or administrator. The court said: "It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law does not permit one court to assume control over the representative of another court or the property confided to his charge. By this it is not meant that personal remedies against the individual may not be sought, but any proceeding in the nature of an action in rem, whereby it is sought to reach the property which another court has taken pos-

session of, is forbidden. Thus replevin from an officer holding order of the Court of Chancery is punishable as a contempt. Even suits against a receiver in his representative capacity are forbidden, though the court appointing the receiver may, on cause shown, permit them. The Probate Court has not even this power respecting its officers, who can only be sued in the manner pointed out by statute, and a garnishee proceeding is not included among statutory proceedings against executors and administrators in Michigan, though it is in some States. That administrators and executors are exempt from this process is the general rule."

In *Taylor v. Wabash R. Co.* a somewhat novel question in the law of negligence was raised. The plaintiff sued for damages incurred by reason of a severe illness, due to the cars of defendant, on which he was a passenger, being insufficiently warmed, on the theory that it is the duty of a railroad company to provide its passengers, not with bare transportation only, but with a vehicle in which they will not be exposed to a temperature so severe as to injure their health. After the evidence was in the court instructed the jury to return a verdict for the defendant. On appeal the Supreme Court, speaking through Mr. Justice Barclay, said:

"By accepting plaintiff as a passenger upon the train, defendant became obliged to discharge some other duties towards him beyond that of mere safe carriage to the plaintiff's destination. The principles of the common law, as applied to the circumstances of travel at this day and in this country, require of the carrier of passengers by railroad a certain measure of attention which we believe the defendant in this action did not fully meet. To quote a recent writer on this topic: 'The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of his passenger. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with proper berths, if a sleeping car; with warmth in cold weather; with light at night,' etc. In the case at hand defendant was notified of the plaintiff's suffering from want of proper or insufficient heat in the car. Notwithstanding such notice, repeatedly given, defendant omitted to comply with the demands of its duty, although it appears from the evidence that the train made many stops at stations along the route. Defendant, it may fairly be inferred, had ample opportunity to supply the needed heat, had it seen fit. Such, at least, is the showing of fact which plaintiff makes; and the truth of it he is entitled to have submitted to the proper triers of the facts. The plaintiff's case is not founded on any claim for mere discomfort on his journey. It is founded on

the theory that he ultimately suffered a severe illness and impairment of his ability to work, as a direct consequence of the cold he contracted on the ride with defendant of which he complains. His testimony tends to sustain that theory; and he was, we think, entitled to go to the jury upon it. (*Hutch. Carr* [Mechem's 2d ed. 1891], sec. 515d; citing *Turrentine v. Railroad Co.* [1885], 92 N. C. 638; *Hastings v. Railroad Co.* [1892], 53 Fed. 224; *Railway Co. v. Hyatt* [1896, Tex. Civ. App.], 43 S. W. 677.)"

The Appellate Division of the Supreme Court at New York has recently given an interesting decision upon mooted questions as to the powers of the board of health in proceedings to destroy buildings which are unfit for human habitation. The suit was one brought by the health department against Frederick Dassori for the condemnation and destruction of the four tenement houses owned by him, in the rear of Nos. 308 to 314 Mott street, New York, as being unfit for occupancy. The court holds, in an opinion by Justice Rumsey, that while the board might order that the buildings be vacated, it had no right to order the buildings to be demolished. After judgment was given in favor of the board, commissioners appraised the value of the materials of the buildings, and then they were ordered to be destroyed. The owner claimed there was no sufficient evidence given that his buildings were unfit for human habitation, or that they were incapable of being made fit, but he offered no evidence on the subject. Justice Rumsey says the referee was justified in his finding that these houses were unfit for human occupancy, but the testimony, he holds, was far from establishing that they were not capable of being made fit for habitation, or that the nuisance upon them could not be abated in any other way than by their destruction. The unsanitary condition was caused to a very considerable extent, if not entirely, he says, by the filthy habits of the persons who inhabited them, and grew out of the fact that they were used for human habitation. It did not appear that after the buildings had been vacated they might not easily have been put into a sanitary condition by proper repairs and the removal of the offensive appurtenances. "Even if it be said from this testimony," Justice Rumsey continued, "that the referee would have been justified in finding that the buildings could not have been made fit for human habitation, still the necessity for their destruction was not made to appear. A thing is a nuisance when, because of its inherent qualities, or the use to which it is put, it works an injury to people who live in its neighborhood. The right to abate it arises from the necessity of the case, exists only because of that necessity, and is to be exercised only so far as the necessity requires. A

thing which is a nuisance because of the use to which it is put cannot be destroyed. Although the buildings may not have been capable of being made fit for habitation, still, if they were so put in repair that the evil smells should be removed and the sources of contagion taken away—as it is claimed from the evidence might be done—the buildings would cease to be a nuisance; and the fact that they might not thereby be made fit for human habitation would not authorize their destruction. If they ceased to be in such a condition as to breed pestilence and spread disease, and were rendered innoxious, the owner of them had a right to have them remain upon the premises, even though he might not be permitted to use them as a tenement house. There are many other uses to which he might lawfully put them; and the undoubted power of the public to refuse him permission to rent them to be used for human habitation did not necessarily involve the right to destroy them if they were not fit for that purpose.

“One of the allegations in the petition was that the buildings prevented proper measures from being carried into effect for remedying nuisances dangerous to health and other sanitary evils in respect of other buildings to which they were adjacent. As has been said, it was made to appear that these buildings were erected within a very short distance of other buildings, which were also used as tenement houses, and it is quite likely that the proximity of the two buildings deprived each of them of the ventilation necessary to make them fit for the uses to which the owners intended to put them. But if these particular buildings were themselves, in a proper condition, or were put in a proper condition, the fact that, located as they were, they stopped ventilation of other buildings, so that those other buildings were not fit to be used as tenement houses, was not warrant for the destruction of these buildings. It might furnish a good reason why the other buildings—not being supplied with sufficient air, so that they could be occupied by a greater number of people—might be vacated; but was not a reason for the destruction of these buildings, so that the other buildings might become more fitted for use as tenement houses, and thereby more valuable. In this country the right of one owner of property to have light and air for his buildings, at the expense of land, of another owner, is not recognized, except it comes to exist by express contract. All that the owner of any building can be called upon to do with regard to that building, even if he desires to use it as a tenement house, is to keep it in such a condition as the statute required. If he does that he has complied with the law, and his building is not a nuisance. He cannot be compelled to submit to the destruction of his building, if on his own land, because some other building adjacent to it is thereby deprived of proper ventilation.”

#### LAWYERS AND POLITICS.

SHOULD lawyers engage in politics? Before this question can be intelligently answered it is necessary that it be more clearly defined. I presume it goes without saying that lawyers should discharge in politics the obligations resting upon all good citizens. Under our form of government every qualified citizen owes certain duties to the government, and he is recreant to his trust if he seeks to evade this responsibility. It is his duty to endeavor to make the laws under which he lives as perfect as possible; to suggest changes and make alterations in them. It is his duty to ferret out crime, and to see that the violators of law suffer the penalties imposed upon them. It is his duty to see that the laws are framed so as to shield the innocent and punish the guilty. It is his duty to endeavor to fill the offices with the most competent officials. It is his duty to take an interest in public affairs, to discuss important issues, and to exert his influence in behalf of purity in politics and a wise, just and economical administration of law. To this extent lawyers, in common with all other good citizens, have their political duties to perform. And I think it is safe to go even farther, and assert that the lawyer, by reason of his very profession, should take a more active part in politics than the average citizen. His very vocation opens out before him peculiar opportunities for doing his country political service. In the study and practice of the law he has an opportunity for detecting its defects and suggesting improvements in its form and administration. In his business dealings with all classes and conditions of people he learns who among those who are candidates for the suffrages of the people are the most worthy. In representing clients, both in the courts and out of them, he gains their confidence, and thus is enabled to shape their conduct not only in business matters, but in politics also. The duty which a lawyer owes, then, as a citizen, demands of him that he take an interest and part in politics up to a certain point. Nor has he a right to shirk this responsibility. For him to do so because he will be subjected to criticism, lose some clients, make enemies, alienate friends, curtail his profits and injure his popularity, is to act an unworthy and cowardly part. By abstaining from politics entirely he will have more time for his profession, more time to devote to study, more time to consult his clients and discharge his other professional duties. But he has no right to look at it from this selfish standpoint. He owes to society certain duties, and should endeavor to perform them even at a personal sacrifice of time, leisure and money. Nor should a lawyer refuse to render professional service in the line of political duty. Criminals must be prosecuted no matter how high they may stand in politics. It is a great tempta-



tion, at times, to avoid duties of this kind. It is often extremely disagreeable to prosecute those who occupy a prominent place in the political walks of life. In discharging duties of this nature lawyers often incur the lasting enmity of clients who can pay good fees. By going forward and manfully performing his duty, a lawyer may find himself a target for criticism, an object of abuse and a subject of calumny on the part of every mean and base slanderer. But it matters not how severe the trial; it matters not how disagreeable the task, in matters of this kind every true lawyer will bravely face the danger and fearlessly discharge the duty incumbent upon him.

And now I have brushed away some preliminaries, and I have removed from this discussion certain aspects of my subject about which the great majority of the legal profession, and the public generally, I believe, are agreed.

Should lawyers engage in politics? If they wish to rise to professional eminence, if they wish to make a name for themselves, if they wish to make money, if they wish to be successful in their day and generation—is it wise for them, to use a common, but forcible, expression, to dabble much in politics? Is it wise for them to run for office, to spend much of their time among the people endeavoring to win popularity and public applause—in other words, to devote more time and attention than their duties as citizens impose upon them, to getting into the good graces of the people? Or, to put the question more sharply still, if a lawyer wishes to rise to eminence at the bar, should he devote himself exclusively to his profession, not meddling at all in politics? I dare say the consensus of opinion of the most able and successful lawyers would favor answering this question in the negative. Prof. John B. Minor, who was a professor of law in Virginia's far-famed university, and who as a teacher and expounder of the law was perhaps unsurpassed on this continent, in lecturing to his classes, strenuously advocated a divorce between the law and politics, and urged upon young men the importance of devoting themselves assiduously and exclusively to their profession. That the law is a jealous mistress is an expression which has so often been repeated as to have become axiomatic. "The profession of the law," says Mr. Ritso, "is that, of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it; and, indeed, there is no other path of life in which the unassumed superiority of individual merit is more conspicuously distinguished according to the respective abilities of the parties. The laurels that grow within these precincts are to be gathered with no vulgar hands; they resist the unhallowed grasp, like the golden branch with which the hero of the *Æneid* threw open the adamant gates that led to Elysium."

It stands to reason that the lawyer who gives all of his time to his profession must, in the long run, outstrip his competitor who divides his time between law and politics. While the latter is out among the people hunting up votes, the former is poring over the pages of the law. If a lawyer devotes himself, as he should do, to his profession, he has no time for anything else. Every mail brings letters to be answered, every day brings clients whose cases must be looked after, and every court brings cases to be argued. He must be familiar with the fundamental principles of the common and statute law. He must have mastered Blackstone, Kent, Story, Smith's Mercantile Law and Adams' Equity. He must be familiar with the changes made in the statute law of his own State, and he must know by heart its Constitution. He must keep up with the reports of his own State, and must be pretty familiar with a number of those of other States, and especially with those of the Supreme Court of the United States. And then there are a thousand office duties to be performed. Certainly a lawyer has no time to spare for matters outside of his profession.

The experience of the most successful lawyers proves the same thing. As a general rule, lawyers who have given their energies to their profession have succeeded, while many of those who have attempted to unite law and politics have failed in both. Many a bright young lawyer becoming disgusted with the commonplace routine work of his profession, and fretting because he does not at once receive that recognition which he feels that his talents merit, launches out upon the tempestuous sea of politics, only to be stranded upon its rocks. There are two reasons which demand of lawyers now more than ever before this intense devotion to their professional work. In the first place, competition is sharper now than it has ever been. I do not mean simply that the bar is crowded, for that has almost invariably been the case. What I refer to more particularly is this: Formerly lawyers were accustomed to gather around them a line of clients who were attached to them not only professionally, but personally, and who could be depended upon through thick and thin. To a considerable extent this has been changed. Clients do not generally now remain as steadfast and loyal as was once the case. A man may be one attorney's client to-day, and to-morrow another's. In the rapid press of business and the spirited competition of the times clients will not wait. If they call at the law office and find that the attorney whom they want is out, they will often at once go elsewhere and form a new relationship. If their business interests demand it, they have no compunctions at all in changing from one attorney to another. In the second place, the law in many respects has taken on a business character. In the law offices we find the telephone, a stenog-

rapher and typewriter, an office boy, and many other conveniences. Letters must receive immediate attention. Correspondents cannot afford to wait for answers to their letters, and will not do so. Executions and sentences of the court must sometimes be stayed by telegram. One day a lawyer must attend the State court, and on the next he must appear before the United States, District or Circuit Court. At one hour he may be in his own office, advising his clients; at the next he may be in the court-room arguing some intricate case, and the third hour may find him in the consultation-room of some attorney in another city many miles distant.

This new attitude which the profession is fast assuming demands of an attorney the rigid application of business rules and regulations, and it is getting to be more and more prohibitive of outside work, it matters not whether it may be "the charms of a light literature" or the fascinations of a political life.

But it may be answered, he may form a partnership and in this way relieve himself from the demands of office work, and, to some extent, of duties in the court-room. While, in a measure, this may alleviate matters, yet it by no means accomplishes all that may be desired. Oftentimes clients call to see if they can obtain the services of a particular member, and, finding that one out, they go elsewhere. Besides it is often the case that one member of a partnership is better qualified for doing a special kind of work than another, and it would be surprising if this were not so.

Of course there are exceptions to all rules. In some individual cases it may be well to mix a little politics with your professional work. I do not think it will hurt a lawyer in the rural districts, especially if he has a partner, to be a member of the legislature. He will not lose a great deal of time from his office. He will widen his acquaintance with the people; he will become acquainted with the prominent men of his State; he will keep up with the changes in the laws, and where the legislatures elect judges he will stand a better chance for promotion to the bench. And then there are positions in public life, such as solicitor and attorney-general, which are in the line of his profession, and which, in place of retarding, will often help him in his professional work, if he can secure them.

And now let us look at this question as we see it exemplified before us. Practically we see lawyers in office on every hand. We find a great many of them in the State legislatures. We find them in the various county offices, in the executive offices of many of the States, and, in fact, we find them filling almost every variety of office in the gift of the people. In the house of representatives and in the senate of the United States we

find a long roll of attorneys. Nor is it generally a matter of surprise when we learn that the successful candidate for the presidency is a member of the legal profession. Were you to ask them why they had gone into politics, the answers would be as varied as they would be interesting. Some of them would tell you that politics was more congenial to their tastes than the friction of the court-room and the dry pages of the law. Some would tell you that they were ambitious and liked to hear their praises sung by the multitude. Others, again, would tell you that they got tired waiting for clients to come, and sought public office rather than starve. And others still would tell you that they had engaged in politics against both their inclination and their judgment, because they thought that they were bound to obey the voice of the people. I venture to assert that the great majority of them would say that they regretted ever entering politics; and yet the probability would be that, if it were possible to be done over, they would do the very same thing again. Lawyers have to consult their own peculiar qualifications and tastes. They have to take into consideration their peculiar circumstances and environments. I have no idea that entering politics was a mistake on the part of Clay, Calhoun or Webster. Calhoun was only at the bar for a few years, and no doubt acted wisely in selecting a wider field. Clay was a successful lawyer, politician and statesman, even though he failed to reach the goal of his ambition—the presidency. Webster was a great lawyer and a great statesman. For a man with the diversified talents which he possessed to tie himself down to one profession would be a grievous mistake. Abraham Lincoln, Stephen A. Douglas and Daniel W. Voorhees were all successful lawyers as well as politicians. In the cultivated and distinguished Carolinian, Hugh S. Legare, we find the qualities of a lawyer, politician and statesman happily combined. I have no doubt that Judah P. Benjamin, who was a distinguished member of the Confederate cabinet and an ornament first of the American and afterwards of the English bar, would have egregiously erred had he in his own case divorced politics from the law. Nor have I any doubt that the eloquent statesmen and great Georgia lawyers, Hill, Toombs and Stephens, were inspired to a happy choice when they united politics and the law.

Nor do I believe that either of our ex-presidents, Harrison or Cleveland, made a mistake in entering politics. After a lawyer has attained eminence at the bar, and has secured a comfortable estate, I think it is both wise and commendable in him to branch out into the wider field of politics and statesmanship.

WALTER L. MILLER.

ABBEVILLE, S. C., Oct. 12, 1897.

# **TAXES ASSESSED UPON PERSONAL PROPERTY OF CORPORATION.**

ATTACHMENT AND EXECUTION BEFORE ACQUISITION OF SPECIFIC LIEN FOR COLLECTION OF TAXES BY WARRANT OR OTHER PROCESS.

NEW YORK COURT OF APPEALS.

October 5, 1897.

DAVID L. WISE ET AL., Plaintiffs, v. L. & C. WISE COMPANY, Defendant; SIMON GOLDBERG, Respondent; RECEIVER OF TAXES, Appellant.

Taxes which have been assessed upon the personal property of a corporation, but for the collection of which no specific lien has been acquired by warrant or other process until after the levy of an attachment and execution thereon at the suit of creditors, are not a prior lien upon the assets of the company in the hands of a receiver for distribution.

Appeal from an order of the Appellate Division, First Department, reversing an order of the Special Term.

Robert G. Monroe for appellant; Otto Horowitz for respondent.

O'BRIEN, J.—The question in this case is whether taxes assessed upon the personal property of a corporation, and which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors are a prior lien upon the assets in the hands of a receiver for distribution, under the direction of the court, and which arose from a sale of the property subject to the levy.

The defendant was a New Jersey corporation doing business in New York, and being insolvent, one McMasters was appointed receiver of its property in this State December 7, 1893.

Prior to the time of his appointment, attachments had been levied upon the personal property, issued in actions at law, in which judgments were subsequently recovered and executions issued and levies made. The lien under these executions was acquired September 23, 1893, the date of the levy upon the attachments.

On the 23d of December, 1893, the sheriff, under an order of the court, delivered all the property held by him under the attachments and executions to the receiver, who received it subject to all liens thereon and reserving to all creditors their rights against the proceeds in the hands of the receiver, and their respective priorities of lien. The proceeds of the property in the hands of the receiver were not sufficient to pay the judgments upon which the sheriff had taken possession of the property.

The receiver of taxes for the city of New York

presented a claim to the receiver for \$556.92, personal taxes for the year 1893, which he claimed was a lien on the fund prior to the judgment.

The court, at Special Term, sustained the claim, and ordered the receiver to pay the taxes in preference to the judgments. The Appellate Division, however, reversed the order, and directed that the entire fund be paid over to the judgment creditor, and from this decision the receiver of taxes has appealed to this court.

The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the State, to priority of payment over all other claims, though they may have been secured by specific liens. That the people of this State have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition.

In support of his contention he has called our attention to various authorities in England and in this country. (*Giles v. Grover*, 9 Bing. 130-285; 2 Bac. Abr., p. 363; *Toller on Ex.*, chap. 2, p. 259; *In re Columbian Ins. Co.*, 3 Abb. Ct. App. Dec., 239; *Central Trust Co. v. N. Y. C. & H. R. R. Co.*, 110 N. Y. 250; *U. S. Trust Co. v. R. R. Co.*, 117 U. S. 434; *U. S. v. State Bank North Carolina*, 6 Peters, 29-34.)

The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that when a fund is in the hands of the court or the trustee of an insolvent person or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. The prerogatives of the crown with respect to the imposition and collection of taxes was the subject of a long and obstinate dispute in England between the people and the executive. Without attempting to ascertain whether the limits of this prerogative have ever been judicially defined with anything like precision, it is entirely safe to say that many of the utterances of the English courts on the subject to be found in the books cannot be considered law here, or even in that country. The great contest with respect to the right of the sovereign to levy and collect what was called ship money illustrates the extent to which the claim of prerogative was pushed, the

nature of the dispute, and the conflicting views of the judges. (3 Howell's State Trials, 826-1254.)

In this country the right of the government to be preferred in the distribution of such a fund exists under the authorities, in two cases: (1) Where the preference is expressly given by statute, as was the case in *U. S. v. Bank of North Carolina* (*supra*). (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection, as was the case in the *Columbian Ins. Co. Receivership* (3 Abb. Ct. App., Dec., 239).

But where there is no statute giving the preference, and no warrant or process has been issued for the collection of a tax on personal property, there is no controlling authority for preferring such a claim over specific prior liens in favor of creditors obtained by levy under attachments or executions. (*Roraback v. Stebbins*, 4 Abb. Ct. App., Dec., 100.)

The case of *Central Trust Co. v. N. Y. C. & H. R. R. Co.* (110 N. Y. 250) decides nothing contrary to this rule. In that case the receiver of a railroad failed to pay the franchise tax under chapter 361, Laws of 1881, for several years. He had in his hands moneys derived from the operations of the road and the exercise of the franchise. The attorney-general petitioned the court to order the receiver to pay the tax. The motion was opposed on two grounds: (1) That the tax was against the corporation and not the receiver; (2) that the mortgages upon the property, to foreclose which the action had been commenced, resulting in the appointment of a receiver, were a prior lien upon the fund. The court ordered the receiver to pay the taxes, and held that as the fund was derived from the exercise of a franchise granted by the State and subject to the tax, the claim of the State was in equity superior to the mortgages.

The case presented no question with respect to the prior lien of a tax upon personal property over that of a levy by attachment or execution at the suit of a creditor upon the same property, and through which a specific lien had been obtained before any warrant was issued for the collection of the tax. Railroad mortgages are generally in terms and always under general principles of law or equity, subject to liens for taxes levied from time to time upon the property, or accruing by operation of law.

The substantial feature of the controversy in that case was whether the court would permit its own officer to operate a railroad and receive the earnings without payment of the franchise tax that accrued under the statute from year to year when no one else claimed or had any specific lien upon

the fund in his hands, and there was no superior equity in favor of the mortgagee. The court, in the exercise of its discretion, very properly directed the receiver to pay the franchise tax to the State upon the petition of the attorney-general.

The question now before us is quite different. It is simply whether a specific lien upon personal property, acquired by attachment in an action at law, can be displaced in favor of a subsequent claim for taxes on the same property, where no specific lien has been acquired by warrant or any legal process whatever. The learned Appellate Division held that it could not, and that the claim of the vigilant creditor who had thus acquired the lien could not be postponed for the payment of public taxes.

We think that the decision was right, and that the order appealed from should be affirmed, with costs.

All concur, except GRAY, J., absent.

Order affirmed.

#### CIRCUMSTANTIAL EVIDENCE.

**B**Y a curious coincidence in the two most remarkable murder trials of the year—the Luetgert case in Chicago and the Guldensuppe case in New York—the same unusual theory of defense has been set up, namely, that there has been no murder.

Counsel for the accused man Thorn, by whom the New York authorities believe the missing man Guldensuppe was lured to a cottage at Woodside, Long Island, there killed and dismembered, and his remains disposed of in fragments, has obtained from the court a postponement of the trial until November 8, on the ground that, if further time is given, he believes he will be able to prove, by witnesses brought from Germany, that Guldensuppe has visited friends in that country since the date when the alleged remains of his body were identified at the morgue in New York. More than this, the counselor says he expects to prove, by witnesses brought from Virginia, that the body pieced together and identified as Guldensuppe's is, in fact, the body of a man named William S. Edwards, of that State.

Improbable as these theories of the disappearance, for unknown reasons, of Mrs. Luetgert in the one case and Guldensuppe in the other, seem upon their face to be, it is of interest to note that more improbable things have happened, and are matters of court record. There have been cases, though they are not numerous, in which circumstances conspired to indicate murder so strongly that accused men were convicted, in some cases executed, and later on it was proved that no murder had been committed. Without offering any opinion upon the two famous cases in Chicago and New York, we may recall one or two historic instances.

At Benton, Ill., in 1866, a skeleton was found in some woods and identified as that of Henry Mahorn, who had been long missing, under circumstances that seemed to point to one Daniel Williams as his probable murderer. Williams was indicted and put on trial. The evidence against him was strong, and his conviction seemed likely, but just as the prosecution had finished its case Henry Mahorn walked into the court-room and explained his long absence.

A most tragic case of this kind occurred at Gibraltar in 1841. James Baxwell, a respectable merchant there, was charged with the murder of his daughter Elezia. The girl was missing, and in a cave near her father's house some of her hair and clothing were found stained with blood. Witnesses testified to hearing the father say angrily that he would rather see her dead than see her married to a certain man who had asked for her hand. Wild shrieks, as of a woman in mortal agony, were heard on a certain day by other witnesses issuing from the cave where the clothing was found. And, to clinch the case, nobody had ever seen the girl alive since that day. Baxwell was convicted and sent to the scaffold. Just as he was about to be launched into eternity, the girl's lover, William Katt, cried out to stop the execution, as the girl was still alive. He had married her and kept her in hiding ever since, and had fabricated the evidence in the cave, including the cries of mortal pain, for the vindictive purpose of hanging her father. The black cap was removed from Baxwell's face, but he was dead. The excitement of the ordeal had killed him.

Most extraordinary of all such cases, however, was that of two brothers, Stephen and Jesse Boorn, of Vermont, convicted of the murder of one Russell Colvin in 1812. They had undoubtedly quarreled with Colvin and assaulted him. They had some fear that they had killed him, for when brought to trial they both confessed to the murder. They did so, apparently, hoping to escape the death penalty. One brother was reprieved; the other was left for execution. Then it was that, feeling doubtful whether Colvin had been really killed at all, the doomed brother caused an advertisement to be put in a local paper, describing Colvin, and calling on any one who knew where he was to bring him forward and "save the life of an innocent man."

Newspapers all over the country were asked to "please copy." Many of them did so, and among others the New York Evening Post. In that paper it was seen and read aloud in a New York hotel parlor. A gentleman present named Whelpley said he had known Colvin, and described his peculiarities more particularly. As he did so another gentleman in the company was impressed with the idea that he had lately seen Colvin at work on a farm in Dover, N. J. Mr.

Whelpley went to the farm in question, and there found the long missing Colvin. He had much trouble in getting the man to go back to Vermont in time to save the condemned Boorn's life, but he did so.

These well-authenticated cases show sometimes "truth is stranger than fiction," and fully justify the rule of law which demands, in all murder trials, that the actual commission of a murder shall first of all be clearly established. — *Baltimore Sun*.

#### GOOD ADVICE TO LAW GRADUATES.

THE following very excellent advice was given by the Hon. Isaac Newton Phillips, in an address to the law graduates of the Illinois Wesleyan University, at Bloomington: "Don't take life too seriously. Don't go about wearing a countenance of a dyspeptic owl. Cultivate a sense and appreciation of humor, but don't, oh! don't set up as a professional humorist. It is one of the chief compensations of a practice at the bar that the nervous strain and drudgery are frequently relieved by bursts of humorous light between the shadows. Ludicrous situations arise in the progress of litigation, and if you have not the sense of humor to enjoy them you will miss that which has in it more solace than large retainers. What a 'balm of hurt minds' is a little innocent fun! Our great president, Abraham Lincoln, preserved his mental health in the terrible ordeal of the war by indulging his exquisite sense of the ridiculous. I would not have you descend into undignified frivolity, by any means; but there is a false dignity as well as a true one, and you may set it down that one who always wears a grave, solemn and forbidding countenance is carrying around a very large supply of stupidity under the guise of what he supposes to be dignity. A saving sense of humor is a monitor to good taste and propriety, and keeps us out of many errors and follies. When you are done with the work of the day lock your office door and go home a free man. Don't carry your lawsuits about with you for the entertainment of your friends. Never 'talk shop,' even in your own home. Nothing is more intolerable than the lawyer who can talk in society of nothing but 'his quilllets, his cases, his tenures, and his tricks,' unless it is the doctor who persists in telling you whose head is just now ringing with his latest dose of quinine.

\* \* \* \* \*

"It is a laudable ambition in each of you to desire to become a successful lawyer. That you may abundantly succeed is my sincere prayer; but I would not have you forget that there are far greater and better things than to be even the most successful lawyer — greater and better things than any riches or worldly honors which may follow professional success. To be true to your con-

victions, and live always in the good company of your own self-respect, is more than the winning of lawsuits or the taking of cities. Riches and worldly honors cannot alone make you happy. Though you voyage with Sinbad to the Valley of Diamonds, and though you chafe the lantern of magic with Aladdin until the genii of thrift come and build you palaces in a night, there must still remain a great want in your soul if this be all you have to carry with you down the other side of the hill of life, for when your hair is silvered, and your step uncertain—when your voice can no longer instruct courts or enthral juries—you will recur fondly to those greener spots on memory's waste which signalize the helpful hand and the loving deed, and then the memory of one tear of gratitude on the cheek of the widow or the orphan whose patrimony you have saved without reward will be to you far more than forensic victories or palaces of gold."

#### WHAT THE LAW DECIDES.

The liability of a husband for slanderous words spoken by his wife is denied, in *Lane v. Bryant* ([Ky.] 36 L. R. A. 709), under statutes which give the wife control and use of her property independent of the husband or his control.

The manner of delivering messages to railroad employes is held, in *Card v. Eddy* ([Mo.] 36 L. R. A. 806), not to constitute a part of the master's duty so as to make him liable for injuries to an employe by negligence of another who delivered the message intrusted to him by attaching it to a weight and throwing it from a moving train.

An ordinance requiring proper and suitable fenders on the front of electric cars to prevent accident, and making it unlawful to operate them in the streets without such fenders, is held, in *State ex rel. Cape May, D. B. & S. P. R. Co. v. Cape May* ([N. J.] 36 L. R. A. 653), to be a valid exercise of the power to regulate the use of the streets.

Moneys collected by the trustees of an insolvent as the proceeds of sales made by him as commission merchant, and which are capable of identification, are held, in *Drovers' & M. Nat. Bank v. Roller* ([Md.] 36 L. R. A. 767), to belong to the consignor, but general assets in the hands of the trustee are not chargeable with a lien in his favor.

The right of the owner of the soil to cut and remove ice from a non-navigable stream is sustained in *Gehlen v. Knorr* ([Iowa] 36 L. R. A. 697), even to any extent, for his own use, whether for storage or sale, if it does not thereby appreciably diminish the amount of water that can be used by the lower proprietor, and the construction of a dam to collect and retain the water for this purpose to a reasonable extent is upheld.

Voluntary submission to treatment for the purpose of an abortion is held, in *Goldnamer v. O'Brien* ([Ky.] 36 L. R. A. 715), to preclude any right of action against other persons for inducing and aiding the attempt. This is based on the general rule that the suit of a wrongdoer will be rejected when seeking redress for another's participation in the wrong.

An ordinance absolutely prohibiting a railroad company from inclosing its track in the platted portions of the city, and providing that such inclosure shall be a nuisance, was held, in *Grossman v. Oakland* ([Or.] 36 L. R. A. 593), to be void, although the city charter confers power to prevent and restrain nuisances, and declares what shall constitute a nuisance.

For baggage left on a depot platform by a passenger who arrived at the place after 11 o'clock at night, when there were no conveyances running by which he could take it away, the carrier was held, in *Kansas City, Ft. S. & M. R. Co. v. McGahey* ([Ark.] 36 L. R. A. 781), to be liable only as a warehouseman, and not as a common carrier, if the baggage was burned during the night.

A deposit of public moneys by a State treasurer in a legally constituted depository for public funds in compliance with the law is held, in *Bartley v. Meserve* ([Neb.] 36 L. R. A. 746), to be in substance and legal effect a loan of the moneys so deposited, and he can deliver the funds to his successor without withdrawing the money and giving physical possession thereof.

Concurrent jurisdiction in the courts of different States for the garnishment of a foreign corporation which is doing business in each State by agents is held, in *Lancashire Ins. Co. v. Corbetts* ([Ill.] 36 L. R. A. 640), to exist, and it is held that the jurisdiction is not determined by the situs of the debt, but by the liability of the garnishee to be sued at the place.

The right of a tenant in common, who is also a lessee of his cotenant, to compensation for improvements made by him, enhancing the value of the property, and made with the knowledge, but without the consent, of the cotenant, is denied in *Cosgriff v. Foss* ([N. Y.] 36 L. R. A. 753), when their effect was not to protect or preserve the property, but to aid the business of the tenant, and the increased income was not shared with the cotenant.

A judgment annulling foreclosure proceedings in an action commenced after a loss of insured property by fire is held, in *Tierney v. Phoenix Ins. Co.* ([N. D.] 36 L. R. A. 760), to be inadmissible against an insurance company which was not a party to the action annulling the judgment, and which had no notice thereof for the purpose of

defeating the effect of the foreclosure as a defense to a claim for insurance by the mortgagor, although the insurer had proved the foreclosure to defeat the insurance.

A fictitious credit given by a bank to a nominal depositor by entering a credit in his favor and immediately canceling it by another entry, showing that a check was drawn for the full amount of the credit, but when the pass-book of the depositor showed the credit only, is held, in *James v. Crosthwait* ([Ga.] 36 L. R. A. 631), to make the banker liable to a person who sustained a loss by relying on the apparent credit, where he inquired of the banker as to it, and was induced to believe that the entry in the pass-book represented a real credit.

The right of a telephone company to require a telegraph company to place a telephone instrument in its office for use in receiving and transmitting messages, on the ground that it has allowed another telephone company to have an instrument there for that purpose, is denied, in *People ex rel. Cairo Teleph. Co. v. Western Union Teleg. Co.* ([Ill.] 36 L. R. A. 637), on the ground that the telegraph company cannot be compelled to receive oral messages, and that by waiving its rights in that respect in favor of one company it is not compelled to do so in favor of another.

#### WHEN LAWYERS WERE SCARCE.

IN the year 1820, under the authority of the State of New York, an enumeration of the lawyers entitled to practice at the State or local courts was made. The regulations for admission to the bar at that time were simple and easy to comply with. Nevertheless there were found to be only three lawyers on Staten Island, 13 in Westchester, 60 in Albany and 45 in Onondaga. Monroe county had not then attained the distinction which it has had since the growth of Rochester into a city, and it had within its borders only 17 lawyers, while Columbia county, which has since given to the bar of the State many learned jurists, had 32, and Dutchess county 52. The people of Long Island were even less inclined to litigation than they are now, for in the whole of Suffolk county there were six lawyers only, in Queens county there were but two, and in Kings county (it is very different now) there were only three.

In Broome county there were five lawyers, in Greene county 21, in Putnam 3, in Steuben 12, and in Tioga 14; but perhaps the lawyer of that period, who enjoyed what might in these days be called an easy snap, was the one member of the New York bar, who resided in Orleans county. After 1820 there was a large increase of lawyers in New York State, and in 1834 they numbered 2,084. — *New York Sun.*

#### "CHEAP LAW MAY BE DEAR."

AN eminent commercial judge now on the bench once described how he was induced while at the bar to act as arbitrator between two business men who had a difference, says the *London Law Journal*. They were each to put their case before him, and produce their books and documents without the intervention of a solicitor. He never, he said, had such a *mauvais quart d'heure* in his life. The confusion, the irrelevance, the wrangling, were beyond belief. From that day he knew the value of a solicitor in the presentation of a case. People complain of the expensiveness of law. But this is often incidental to the orderly method of transacting business and preserving records of it. Clients do not know the legacy of muddle which, but for the expenditure of time, they would otherwise bequeath to their families—uncertainty of rights, unsettlement of accounts, incomplete transactions, unintelligible memoranda, with all their attendant train of family quarrels and heart-burnings—a veritable *damnosa hereditas*. A few guineas, as has been well said, spent on competent advice may save the ravages of a posthumous Chancery suit.

#### Legal Laughs.

Here is a story of the present lord chief justice of England: When he was still known as Sir Charles Russell he went to Scotland to help the liberals in a certain campaign. He purposely began his speech with some very badly pronounced Scotch.

After the confusion caused by his apparent blunder had subsided, Sir Charles said:

"Gentlemen, I do not speak Scotch, but I vote Scotch."

Tremendous applause followed, whereupon Sir Charles proceeded: "And I often drink Scotch." After this he was the hero of the hour.

"Now," said the attorney for the defense, "here is a skull. Can you tell us to what species it belongs?"

"It's the skull of a lawyer," replied the expert witness.

"How can you tell?"

"By the cheek bones, here. They are much more prominent and of a harder substance than those of the ordinary skull."

At an Assize Court the late Justice Maule was engaged in passing sentence on a prisoner, when one of the officers of the court annoyed him by crossing the gangway beneath him with papers for members of the bar. "Don't you know," cried the judge, severely addressing the official culprit, "that you ought never to pass between two gentlemen when one of them is addressing the other?" Having thus relieved his mind, the judge proceeded to pass sentence of seven years' penal servitude on the other gentleman.

**Legal Notes of Pertinence.**

The Supreme Court of the United States has advanced the argument of the Durrant murder case, brought from San Francisco, and set it for hearing November 15.

Mrs. Lucia O. Case, of the Topeka bar, the only Kansas woman in the active practice of law, has announced her candidacy for associate justice of the Supreme Court on the Democratic-Populist ticket.

La Porte, Ind., claims the distinction of having the youngest woman lawyer in the United States, Miss Mollie L. Loring. The lady is but twenty years of age, is a member of the La Porte bar, and is legally qualified to practice in the courts of Indiana. She is a graduate of the law college at Denver, Col.

A London magistrate has decreed that a householder cannot interfere with an organ-grinder unless he is disturbed in his business, has sickness in his house, or is affected in his health by the sounds of the organ.

Associate Judge Crouse, of Snyder county, Pa., recently secured a verdict of \$4,000 against the Pennsylvania Railroad Company for injuries he alleged he received by falling into a ditch on a dark night in 1892 while crossing defendant's tracks.

The United States Supreme Court has rendered an opinion against the railroad company in the case of the Southern Pacific Railroad Company v. the United States, brought here from the Ninth Circuit. The case involved about 700,000 acres of land in Southern California.

The New Jersey State Board of Canvassers, on canvassing the returns of the recent constitutional election, found that the anti-gambling amendment had been carried by 802; the *ad interim* amendment by 7,426, and that the woman's suffrage amendment was defeated by 10,059.

Another gift has been announced for the Yale Law School. The donor is John W. Hendrie, of South Beach, one of the most generous patrons of the school. He has now given \$50,000 to the institution. It is expected that the new building will be completed in a few months.

A Bible contest between the members of the Sussex county (Del.) bar and the teachers of the Methodist Episcopal Sunday school of Georgetown, took place in the church recently, Rev. V. S. Collins asking the questions like a spelling bee. The Sunday school folks won, answering 41 questions to 24 correct replies for the lawyers.

A check for \$10,000 of the \$13,278.65 granted by the New York Court of Appeals to Cayuga county has just been received by the treasurer of that county. It is to reimburse Cayuga county

for moneys expended in trying and convicting men who had committed crimes while serving sentences in Auburn prison. The case has been in the courts for ten years, and the dates of the crimes committed extend over a period of twenty-four years.

The official figures of the registration at the Yale Law School are: Graduate course, 26; seniors, 26; middle class, 83; juniors, 82. The total is 217, against 213 last year. The reason given for the small membership in the present senior class is that two years ago the course was lengthened from two to three years, and that the present senior class was recruited from those who have entered between years or have been dropped from other classes.

The Vermont Bar Association held its annual meeting at Montpelier on the 13th inst., with a large attendance of attorneys. The annual address was read by Judge E. L. Waterman, of Brattleboro, the association's president, and this was followed by a biographical sketch of members who had died the past year. In the evening a banquet was held, at which Judge Waterman presided. The speakers were Hon. A. S. Batchellor, of Littleton, N. H.; ex-Governor D. N. Dale, of Brighton; Senator Hazleton, of Burlington; Alexander Dunnett, of St. Johnsbury; J. H. Senter, of Montpelier; George A. Ballard, of Fairfax; James L. Martin, of Brattleboro, and Robert Roberts, of Burlington.

At the recent annual meeting of the Vermont Bar Association, held at Montpelier, the following named officers were chosen: President, Charles P. Hogan, St. Albans; vice-presidents, Harry Blodgett, St. Johnsbury; H. M. Meldon, Rutland; H. E. Rusted, Richford; secretary, George W. Wing, Montpelier; treasurer, H. Carlton, Montpelier; board of managers, President Hogan (*ex-officio*), Fred A. Howland, Montpelier; Robert Roberts, Burlington; James L. Martin, Brattleboro, and W. B. Sheldon, Bennington. Resolutions deploring the death of six members of the State bar during the past year were adopted. Resolutions favoring the selection of more intelligent jurors were passed, and the association voted to recommend that only two sessions of the Supreme Court be held yearly.

William Willis, one of the oldest murderers confined in any State prison under life sentence, has just died in Dannemora after an imprisonment of 34 years. He was 75 years of age and a veteran of the late war. He went home on a furlough in the early part of 1863 to visit his folks and sweetheart at his old home in Ulster county. Preparations for his marriage had been made, and it was planned that as soon as the wedding was over he would return to the seat of war. To his surprise and anger, he found his sweetheart had been married a number of months before his arrival. He



sought the young woman and killed her. His trial created a great excitement at the time, almost the entire county taking sides in it. After a protracted legal battle he was convicted of murder in the first degree. In consideration of his services on the battlefield strenuous efforts were made with Governor Fenton to pardon him. The latter was finally prevailed upon to commute his sentence to life imprisonment.

In the case of *Dobbs v. Dobbs*, in the Circuit Court, the complainant verified her bill for separate maintenance before her solicitor as notary public. A motion for temporary alimony and solicitors' fees was on hearing before Judge Burke, when John F. Geeting, solicitor for defendant, objected to the reading of the bill as an affidavit, contending, in support of his objection, that an affidavit is a written statement made on oath under such circumstances as would, if false, subject the affiant to a prosecution for perjury, which action in this instance could not be maintained for the reason that the notary public would not be eligible as a witness, otherwise the accused would be obliged to either lose the benefits of cross-examination or, by the cross-examination of the notary public, disclose matters of privilege between attorney and client interwoven with the circumstances surrounding the verification of the bill. The court sustained the objection and the motion was for the time discontinued. — *Chicago Law Bulletin*.

Bernard D. O'Connell, a well-known Lowell (Mass.) lawyer, was recently disbarred. The decision in the case was recently filed in the Middlesex County Court, at East Cambridge, by Judge Richardson, before whom the case was heard. The hearing occupied four days, and much interest was manifested over the outcome, not only by the members of the legal profession, but by the people of Lowell. The charges against O'Connell were brought by Lawyer Charles Cowley, of Lowell. A little over two years ago Cowley was suspended from practice for a period of two years, the charges being brought by Bernard D. O'Connell. Cowley was reinstated the past summer, and he at once preferred charges against O'Connell. Ex-Mayor B. B. Johnson, of Waltham, was appointed by the court as special prosecuting officer, and O'Connell defended himself. Lawyer O'Connell is only about 31 years of age. He was admitted to the Middlesex bar in 1889. He was once employed in the office of Lawyer Charles Cowley, and he has had an eventful career. He figured in the famous Lowell bribery case, which is now before the Supreme Court. There were eight charges made against O'Connell. The principal charges were that the defendant made a corrupt proposal in writing to Francis Jewett, of Lowell, intending to influence one of the bar examiners on the question of his admission to the

bar; that the respondent was willing to sacrifice his client's interests for his own preferences, and that he used a legal process in an abusive and oppressive manner, and also for his connection with the Lowell bribery case.

### English Notes.

Ten judges of the English Supreme Court continue on the bench, although they have passed the period at which they are by law entitled to retire on a pension.

London has 14,000 policemen, Paris 6,000 and New York 3,800. The average number of arrests in New York in a year is 85,000, in Paris 100,000, and in London 150,000.

Lord Coleridge, Q. C., has been entertaining the inhabitants of Ottery St. Mary with a lecture on the history of the town, which has long been the home of the Coleridge family, the poet, Samuel Taylor Coleridge, having been born there in 1772.

The Incorporated Law Society, at their provincial meeting, have passed unanimously a resolution in favor of reducing the long vacation by some weeks — that it should extend from the first Monday in August to the last Saturday in September.

Sir Charles Mordaunt, bart, whose death is announced, in his 62d year, will be remembered on account of the famous divorce proceedings which he brought against the first Lady Mordaunt, involving several of the best-known men in England. It was in this case that the Prince of Wales was said to have testified under oath like a gentleman.

Mr. George Garcia, Q. C., who has just resigned the attorney-generalship of Trinidad, was one of the very few men of color who held a position of legal authority under the crown. Trinidad's solicitor-general has also this distinction. Mr. Garcia, whose resignation is due to ill-health, is a man of considerable academic distinction, and has a fine forensic style.

Sir Edward Clarke told his constituents the other day that rumors about his appointment to judicial office are all groundless. "He apparently does not mean to leave political life for some years to come," adds the *London Law Times*. "Thus it must be now that there is but one great judicial prize — the lord chief justiceship; front-rank men will remain in the front rank until the chancellorship or retirement offers them a congenial change."

The old notion that a corporation, "having no soul," was incapable of malicious intentions, was disregarded as "quaint" and unsubstantial; and it was held that in case of a wilful and intentional wrong, an action of tort is maintainable against a corporation, where the act complained of is within the purpose of the incorporation, and it has been

done in such a manner as that it would constitute an actionable wrong if done by a private individual. (*Green v. London General Omnibus Company*, 1 L. T. Rep. 95.)

There has of late years been a curious shrinkage in litigation in all the Australian colonies. From the *Australasian Review of Reviews* it appears that some striking figures have been published in Victoria, showing how steadily the volume of litigation has shrunk during five recent years. Here is the record of Supreme Court writs and County Court complaints issued during these years: In 1889, 7,099 writs and 10,243 complaints were issued; 1892, 5,747 writs and 9,594 complaints; 1894, 3,011 writs and 5,746 complaints; 1895, 2,115 writs and 3,932 complaints; 1896, 1,432 writs and 3,270 complaints.

Within the next few days the metropolitan police courts, which have hitherto been under the control of her majesty's commissioner of works and buildings, will be formally handed over to the receiver for the metropolitan police. In future he will be responsible for their maintenance, and for the salaries of all the officials connected with the courts, with the exception of the magistrates. On the other hand, he will receive the fines and penalties which have up to now been paid into the exchequer for the support of the police. In other words, the expense of maintaining the London police courts will be borne by the metropolitan ratepayers instead of by the country at large. This change has been made by the secretary of state under an act which gives him the necessary powers.

There are well-seasoned stories of judges who have had applications for injunctions made to them in strangely unjudicial situations, says the *Law Journal*—in the hunting field or the bathing machine—but it was a novel experiment to make an application for an order by telegram, as was done recently to Mr. Justice Ridley. That learned judge at once expressed his disapproval of such a proceeding, and its impropriety is obvious; for what means are there of identifying the sender of the message? He may be counsel. He may be one of those impertinent and officious persons who send letters to judges to instruct them about cases they are trying. Or he may be a common crank. Bankers generally refuse to act on telegrams from customers; and though this rule may inconvenience the customer fixed up at a foreign hotel with an unpaid bill, it would be impossible for bankers consistently with their own safety to depart from it at present. What the resources of science may accomplish in the future in enabling the recipient of a telegram to identify the sender no one of course can say. The court sometimes has to transmit an injunction by telegram. When it does so the course is to send to a local agent and let him serve the order on the offender. This is, *semble*, the proper course.

## Notes of Recent American Decisions.

**Contempt — Judgment.** — A judgment or order of court that a defendant stand committed to the county jail until the further order of the court, for a contempt in refusing to obey a previous order requiring him to surrender certain promissory notes adjudged to be the property of another, is illegal, and void for uncertainty as to the duration of the punishment, and will not justify the imprisonment. (*Taylor v. Newblock* [Okla.], 49 Pac. Rep. 1114.)

**Contracts — Validity — Restraint of Trade.** — Where the seller of stock in an ice company doing an ice business at P. agreed with the purchaser not to engage in the ice business at P., nor adjacent thereto, at any time, the agreement was not an unreasonable restraint of trade, and void as against public policy. (*Up River Ice Co. v. Denler* [Mich.], 72 N. W. Rep. 157.)

**Federal and State Courts — Conflicting Jurisdiction.** — When the State court has acquired jurisdiction in a case, entered judgment, and is proceeding to its enforcement, the appointment of a receiver by the United States court to the defendant corporation cannot divest the jurisdiction of the State court, and stay the execution issued to enforce the judgment. (*Lake Bisteneau Lumber Co. v. Mimms* [La.], 22 South. Rep. 730.)

**Habeas Corpus — Grounds of Remedy — Jury — Discharge on Sunday — Consent of Defendant — Jeopardy — When Attaching.** — 1. Where it is conceded, in a *habeas corpus* proceeding, that the commitment emanated from a court of competent authority, having jurisdiction of the subject-matter and person, the only question is whether the process is void for illegality. 2. Hill's Ann. Laws, § 208, provides that "while the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury till a verdict is rendered or the jury discharged." Section 928, adopted with section 208, provides that "no court can be opened, nor can any judicial business be transacted on a Sunday," except to give instructions to a jury then deliberating on their verdict; to receive the verdict of a jury, or for the exercise of the powers of a magistrate in a criminal action. *Held*, that section 928 limits the power conferred by section 208, and hence a court cannot discharge a jury on a Sunday in consequence of their failure to agree on a verdict. 3. Within Const., Art. 1, § 12, providing that "no person shall be put in jeopardy twice for the same offense," jeopardy attaches when the jury are impaneled and sworn. 4. In a criminal case the authority to discharge the jury on a Sunday because of their failure to

agree on a verdict cannot be conferred by the consent of defendant, the act being in contravention of Hill's Ann. Laws, § 928. (*Tice v. Frazer* [Sup. Court of Oregon], 43 Chicago L. J. 544.)

**Life Insurance — Cancellation of Policy.** — Where the beneficiary under a life insurance policy, which had lapsed, except for its paid-up value, procured its reinstatement through false and fraudulent representations, equity may compel the surrender and decree the cancellation thereof, and enjoin an action at law thereon, though the alleged fraud might defeat such action at law. (*John Hancock Mut. Life Ins. Co. v. Dick* [Mich.], 72 N. W. Rep. 179.)

**Negligence.** — In an action by a fireman to recover for injuries by a collision, where the evidence showed that plaintiff was asked by the engineer if he could see a switch which they were approaching, and he reported that he could not, and that it was impossible to see it because of the very heavy snowstorm raging at the time, it cannot be said, as a matter of law, that the fireman was negligent in not seeing the signal for the switch. (*Fairman v. Boston & A. R. Co.* [Mass.], 47 N. E. Rep. 613.)

One street railroad company cannot maintain condemnation proceedings against another to acquire the use of a portion of its road in the street until it has first obtained the consent of the property owners and local authorities to use the street. Consent given by the local authorities and property owners to one company to operate its road in the street is not sufficient to authorize another company to come into the street, notwithstanding the new company is to use the same tracks and appliances as the old one in operating its cars. (*Colonial City Traction Co., appl't, v. Kingston City R. Co.*, respondent, N. Y. Court of Appeals. Opinion filed Oct., 1897.)

**Preference for Wages — Employees of Corporation for Which Receiver Has Been Appointed.** — One who is employed by a corporation to make sales of its machines, to pack and unpack them and set them up for purchasers, is an "employee" of the company, within the meaning of the act, chapter 376 of the Laws of 1885, giving to employees, operatives and laborers of a corporation for which a receiver has been appointed a preference for wages due them. The mere fact that the employment is such as might be designated an agency is not alone sufficient to take the case out of the protection of the act. Bookkeepers and persons employed to make sales of merchandise, or of property manufactured by the corporation, are "employees" within the meaning of the act, and their compensation earned is "wages," whether such persons are employed by the day or month or year, and whether their compensation is denominated salary or wages in the contract of

employment. (*Palmer, resp't, v. Van Santvoord et al.*, appellants [N. Y. Court of Appeals], N. Y. L. J., Oct. 20, 1897.)

### **New Books and New Editions.**

**A Treatise on the Law of Carriers of Passengers.** In Two Volumes. By Norman Fetter, Author of a Handbook on "Equity Jurisprudence." St. Paul, Minn.: West Publishing Co. 1897.

In this work Mr. Fetter has set forth the law pertaining to carriers of passengers in a manner on the whole admirable. The increasing importance of the subject, due to the marvelous growth of the carrying business during the last 25 or 30 years, is well known, and the difficulty of the author's task made all the greater by reason of the fact that the courts have been compelled to "blaze the way through unexplored regions of jurisprudence," with few principles of the old common law to guide them, and with but little assistance from the legislative department. As the author well says: "By free reasoning upon the actual facts of life, and guided by broad and comprehensive considerations of justice and public policy, the courts have practically created a new common law, instinct with all the vitality of youth." The author finds it "impossible to refrain from paying a tribute of respect to the rugged sense of justice which has pervaded the great body of the judges in announcing the law on this subject," and adds: "It is but the statement of a truism to say that the law which they have created in grappling with concrete questions, day by day, and year by year, judge-made though it be, is more serviceable and more essentially just than any Code promulgated by the legislative department on the advent of railways could possibly have been." This deserved tribute to the ability, discrimination, integrity and sense of justice of the courts of the land, in dealing with these great problems, will be generally conceded to be just and thoroughly merited. An examination of Mr. Fetter's work shows that he has spared no effort to make it comprehensive in plan, careful in statement, and clear in meaning. The author's style is admirably straightforward, and his powers of statement notable. To weld the great mass of material obtained from the reports into a clear and coherent narrative was one of great difficulty, and we are free to say that Mr. Fetter has been remarkably successful. Every important phase of the subject is treated with the same care, showing rare familiarity with the leading principles as well as their application. As an illustration of the fulness and scope of the work, it may be stated that the chapter on "Contributory Negligence" embraces nearly 200 pages. It is a pleasure to commend such a work to the profession, for it is certain to prove a valuable guide and counselor.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, NOVEMBER 6, 1897.

### Current Topics.

THE voters of the Empire State have rendered their verdict, and the Hon. Alton Brooks Parker, of Kingston, N. Y., will succeed Judge Charles Andrews, on the first of January, 1898, as the honored chief of the highest court in this State. The campaign was short, and, happily, conducted on a high plane, free from personalities and mud-slinging. The candidates of both the great parties were concededly in every respect fitted for the arduous and responsible duties which the incumbent must assume. In the event of Judge Wallace's success at the polls, he would have given up his life tenure as a circuit judge of the United States Court. With two such candidates no mistake was possible, and congratulations are in order—the United States Court is to be congratulated upon the fact that it is not to be deprived of the eminently satisfactory services of Judge Wallace; the Court of Appeals is to be felicitated upon the choice of such an ideally fitted jurist as Judge Parker, and the people of the State upon the fact that the inexorable provision of the Constitution which compelled the retirement of Chief Judge Andrews will in no wise result in the impairment of the ability of the court or the lessening of the universal respect in which it is held by lawyers and litigants alike.

The successful candidate, though only 46 years of age, has had nearly twenty years' judicial experience. His career is an incentive to every lawyer who has an honorable

ambition to rise in his profession. His splendid success has been wholly due to his own efforts. Possessing no special advantages in early life, except those of health, strength, untiring industry and honorable ambition, he made his own way, paid for his own education by teaching school, and after adopting the law as a profession, did not shrink from the toil which he knew to be absolutely necessary in order to reach eminence in it. Twenty years ago, when he was but 26 years of age, he showed his great popularity by being elected surrogate of Ulster county when every other candidate on his ticket was defeated by large majorities. Last Tuesday's results indicate that that popularity is just as great throughout the State as it was then in his own county, and Ulster's magnificent tribute to her favorite son on an occasion which was known to be in all probability, in the event of his success, the last upon which he would ask their suffrages, was fully as significant as was that of 1877. Indeed, the vote in his home county shows that the idea of non-partisanship, so especially desirable in the selection of the judiciary, has taken a strong hold upon the masses of the people; and the result in the Greater New York, as well as throughout the entire State, gives additional proof, if any were needed. In Judge Parker was recognized an ideally fitted candidate and partisanship was thrown to the winds. Nor was there, in this magnificent tribute to the worth and fitness of Judge Parker for the high office to which he had been nominated by the Democratic party, any feeling of the unfitness of the Republican candidate. Rather was it the thought that Judge Wallace, while perhaps equally well fitted, could best serve the people in the position of circuit judge, in which he had so long served, and to which he held a life tenure. It may be added that the elective system of choosing judges can never be a failure while it gives to the bench such an ideally fitted member of the Court of Appeals as Alton B. Parker. It has been well and truly said that no office is so desirable, so in the line of legal advancement, so fitting a crown to the lawyer and the judge, as that to which Judge Parker has been elected. The

successful candidate, besides possessing ability, honesty, courtesy, fairness and courage, is known to be of that rare judicial temperament which, free from fads, prejudices, mental bias and favoritism, holds the scales of justice with an even, steady hand. Added to all this is the fact that Judge Parker will enter upon the discharge of his arduous duties in the very meridian of life, and not only prepared, but firmly and highly resolved to give the best years of that life to the service of the great State which has so many times and now so signally honored him.

The proposition to abolish the grand jury system is not a new one. It has been frequently advanced, and some of the States of the Union, west of the Mississippi, have already taken such action, substituting therefor the process of filing information by the State's attorney. Serious objections to the grand jury system as at present constituted are easily discovered. One of these is the growth of a class of professional grand jurymen. In a paper recently read before the State Attorney's Association of Illinois, Mr. C. E. Chipperfield thus aptly described him:

In this connection I wish to call your attention to the professional grand juror, the man who has a pull, and appears at each and every term as the fittest man for the place. He hasn't a great deal to do at home, and can just as well serve his country as not, provided he gets well paid for his time. He hasn't any mind of his own in cases which are being investigated from the other townships, and in those cases he sides in with the majority; but when the grand jury reaches a case from his locality he wakes up; he has a duty to perform by his constituents, who meekly permit him to serve term after term, and he devotes all of his energies to the task of preventing the heavy hand of the law falling upon any of his guilty neighbors. Why does he do this? Simply because that is what they expect him to do; and should he adopt any other course he would have trouble in coming back next term. The best class of men who compose the membership of the grand jury are those business men who have mingled with the world sufficiently to understand human nature, and when you have several of this class upon the jury you almost invariably find them to be in such a hurry, on account of the value of their time, that, in their anxiety to get away, they refuse to give individual cases proper consideration, and, as a result, public interests suffer.

Another objection urged by Mr. Chipperfield to the grand jury system, as it now exists, is the facility with which it is possible to ascertain the nature of its proceedings. In the writer's opinion, the size of the grand jury is another potent objection, regardless of the fact that anciently it was one of the best features of the institution, as it enabled the body to discover, through its individual members, nearly all the crimes committed in the district from which it was drawn; but in this day of civilization, with the press and telegraph, every crime is heralded far and near, and the people are no longer dependent upon the individual knowledge of each grand juror for such information. But perhaps the strongest of all the objections urged against the system by Mr. Chipperfield is that based upon the absolute personal irresponsibility of the individual juror. The writer says:

He is a law unto himself; no power can regulate him and no power can control him. He can be called before no earthly tribunal, except his own conscience, to account for his actions. He can pursue an enemy for personal motives of revenge; he can favor a friend or political associate; he can advance and maintain before the jury, by argument, ideas that he would never father in any other place; he can shirk responsibility by voting to turn the guilty loose, pleading for mercy for the confessed criminal, and the next moment cast his vote to indict the innocent, but friendless, accused; ignoring, in order to do so, his oath and every distinction between hearsay and competent evidence. The State's attorney is powerless to protest against or prevent these insane antics upon the juror's part, and the court is equally unable to prevent the denial of justice. The unscrupulous and corrupt juror has the power to overrule the instruction of the court, to act contrary to the advice of the State's attorney and to utterly disregard all laws, in order that his own selfish ends may be accomplished. Despite the charge of the court, the evidence of unimpeached witnesses and the appeals of the prosecuting officer, he has the power to say, "Thus far shalt thou go, and no farther;" that no indictment shall be found and no further prosecution permitted.

The large expense required to empanel and keep in attendance a grand jury is another point to be considered in weighing the value of the system. Mr. Chipperfield, without claiming infallibility or the possession of superior knowledge, thus outlines three or

four proposed substitutes for the grand jury as it now exists:

"1. To abolish the grand jury altogether, authorizing the State's attorney to file information in all cases.

"2. Abolish the grand jury in all cases, except when public necessity requires that a grand jury should be impaneled, and then have one drawn upon the order of the circuit judge. At all other times the State's attorney to proceed in all cases by information.

"3. Abolish the grand jury in all cases, permitting the State's attorney to file informations in all cases of misdemeanors, and in all felony cases, after an examination before a magistrate, where the defendant is held, authorize the State's attorney to proceed by information.

"4. Abolish the grand jury so far as all cases of misdemeanor are concerned, authorizing the State's attorney to proceed by information; retaining the grand jury for the investigation of cases of felony after changing the manner of its selection so as to conform to the mode of drawing petit juries; also giving the State's attorney, in felony cases, coordinate power to proceed by information."

The subject is one of great importance, and the ALBANY LAW JOURNAL invites public discussion of it, in its columns, by those who have ideas on either side of the question.

The question of the authority of a judge of the Police Court to remit the fine and costs imposed for violation of the State medical practice laws was raised, according to the Ohio Legal News, in Columbus, recently. This question, which grew out of the action of Police Judge Swartz in remitting the minimum fine of \$20 and costs, imposed upon Mrs. Dr. Corwin, for having practiced without a license, was submitted to Director of Law Selwyn N. Owen, who holds that, in case of conviction there is no alternative for a judge of a court of record to omit to impose a fine less than the minimum penalty prescribed by law, or to omit the imposition of a fine altogether. While the amount of the fine imposed may be increased or modified before the sentence has gone into operation, there is no authority vested in judges of

courts of record, under the laws of Ohio, to go beyond this. Judge Owen, in his opinion, says: "The question you submit to me concerning the legal effect of an entry by the judge of your court of an order of remission of fine and cost in case of verdict of conviction and sentence under 'An act to regulate the practice of medicine in the State of Ohio' (92 O. L. 45, 48), is not free from doubt. Ordinarily courts of record (which includes your court) have such control over their records as authorizes them, at the same term, 'before the original sentence has gone into operation or any action has been had upon it, in the exercise of judicial discretion, to revise and increase or diminish such sentence within the limits authorized by law.' (Lee v. The State, 32 O. S. 113.) In the case upon which you ask my opinion, the court by its sentence, imposed the minimum fine provided by law. The fine prescribed by the act controlling the question is not less than twenty dollars (\$20) nor more than five hundred dollars (\$500). The minimum fine — \$20 — was imposed by the court. The court had no 'judicial discretion' to impose a fine less than the minimum. It had no discretion to omit a fine altogether. The court, in the case above cited, declares the power of the court to increase or diminish the sentence 'within the limits prescribed by law.' The lowest limit of fine prescribed by the law, as we have said, is \$20. No discretion was vested in the court to go below this sum. If the fine originally imposed had been forty dollars (\$40), an entry diminishing the fine to twenty dollars (\$20) would, under the circumstances, have been authorized. After the trial, verdict and sentence, the imposition of the penalty of at least twenty dollars (\$20) was in the nature of a mere ministerial act. In my opinion, therefore, the attempted remission of the penalty of fine and cost after its formal imposition was unauthorized."

The United States Supreme Court will soon be called upon to decide whether a State legislature possesses the power to pass a law fixing the duration of the working day for adults, and making it a punishable offense for an employer to hire a man to lab

more than the prescribed number of hours. The case has been appealed from the Supreme Court of Utah, which sustained the constitutionality of the Utah Eight-hour law for miners engaged in work in underground mines, as being a proper exercise of the police power of the State in the protection of life, health and morals. The facts of the case referred to are as follows: An operator named Holden was convicted for employing a miner for ten hours a day, contrary to the new eight-hour law, and sentenced to pay a fine and to serve fifty-seven days in jail. Holden, admitting the facts alleged, had pleaded not guilty — first, because the miner had voluntarily entered into the contract for the services in question; second, because the statute was repugnant to the Constitution of the United States in that it deprived employer and employe of the right to contract in a lawful way for a lawful purpose; third, because the statute was class legislation; and fourth, because it deprived the defendant of his property and liberty without due process of law. This is said to be the first case in which a State Supreme Court has sustained such a law. The decision of the Federal Supreme Court will be watched with great interest, as settling a question of constitutional construction of the highest importance.

The Appellate Division of the Supreme Court, Third Department, has just rendered an important decision which settles a mooted question as to what constitutes a manufacturing corporation. It appears that in the case referred to, the entire capital of the New England Dressed Meat and Wool Company employed within this State was used in buying sheep and converting them into mutton, refrigerating the mutton by such processes as improved the quality and preserved it, transporting and selling the meat, and also in converting other parts of the sheep into marketable products. State Comptroller Roberts held that the corporation was not engaged in manufacturing in this State; that the production of the mutton as stated was not a manufacture, and hence he imposed

the tax. The court, by Justice Landon, decides that the company was engaged in manufacture within the State, and was, therefore, not subject to a tax upon its capital stock under the laws of the State of New York. Another decision of general interest as settling the law with reference to the service of process upon non-resident corporations has just been rendered by Judge Lacombe in the United States Circuit Court. The question involved was whether a foreign corporation, doing no business and having no property within this judicial district can be brought from its legal domicile and be forced, frequently at great expense and always with much inconvenience, to defend a suit in New York State. Judge Lacombe, in the opinion handed down, grants the motion to set aside the service of the summons, holding that a foreign corporation doing no business within this State and having no property here cannot be sued in this judicial district for a cause of action which did not arise here.

Two recent English decisions affecting bicyclists are of interest on this side of the water. At Chesham County Court, Judge Marten gave an opinion in an action brought by a boot and shoe manufacturer, George Barnes, against Charles Edward Pearce, a grocer, for damages to a bicycle through defendant's negligence, the amount claimed being £4 10s. 7d. It appeared that Mr. Barnes rode from his factory to the post-office to send a telegram, leaving his bicycle outside. Defendant's horse and cart were standing some twelve yards away, in charge of Pearce's son. The horse bolted, dashing into the bicycle and damaging it. The judge decided that the plaintiff, in leaving his bicycle on the highway, as he had done, was not guilty of contributory negligence, and gave a verdict in his favor. In the other case referred to, a somewhat novel point affecting cyclists, to which brief reference has heretofore been made in these columns, was decided by Judge Emden, at Lambeth County Court. According to the Law Times, a clerk named Jackson, of Camberwell, sued Mr. William Jeffery, a cabowner, of Camberwell,

to recover £8 8s. for damage occasioned to his bicycle while traveling in a hansom cab belonging to the defendant. The plaintiff engaged the defendant's driver at a railway station to convey him home, together with several articles of luggage and his bicycle. At the end of the journey it was found that the bicycle had been injured, which, the plaintiff alleged, was occasioned by the unskilful driving of defendant's driver while passing through Great Dover street, Borough. Mr. Stanley P. Edwin, solicitor for the plaintiff, asked his honor to say that the negligence of the driver entitled his client to damages. For the defense, Mr. Crawford, barrister, raised the point that bicycles were not passengers' luggage such as cabmen are required by statute to carry at a stipulated charge, and that in the absence of a special contract to carry the machine the plaintiff could not recover. He pointed out that one of the London stipendiary magistrates recently held that bicycles were not luggage. Judge Emden said he was clearly of opinion that Mr. Crawford's contention was correct, and suggested that, in view of the fact that cycles could not be legally defined as luggage, cyclists should, before intrusting their machines to cabmen, have a clear understanding that they were being conveyed on the same conditions as luggage. Judgment was given for defendant.

### Notes of Cases.

A constitutional question of considerable interest to the medical profession has lately arisen in Ohio, and has just been argued at Columbus, before the Supreme Court of that State. It involves the validity of an act of the legislature establishing a State medical board, by which medical practitioners must be licensed, and under whose provisions unlicensed practitioners are liable to prosecution and punishment. The Constitution of Ohio expressly declares that the judicial power of the State is vested in a Supreme Court, Circuit Courts, Courts of Common Pleas, Courts of Probate, justices of the peace and such other courts inferior to the Supreme Court as the general assembly may from time to time establish. It is contended that this provision has been violated by attempting to give the State board judicial powers in respect to the qualifications of doctors.

The statute is also attacked, because it discriminates in favor of resident and against non-resident practitioners. It has been held in other States, however, that a distinction in favor of residents may properly be made in legislation of this sort, as a physician who has practiced in the State will naturally know more about the local conditions and prevalent maladies than a newcomer.

In *State v. Slack*, decided by the Supreme Court of Vermont in July, 1897 (38 Atl. R. 311), it was held that the State may impeach its own witnesses in criminal cases, on account of the obligation resting on it to bring forward all witnesses obtainable for a criminal prosecution, irrespective of their character. The court said in part:

"In *Thornton's Ex'rs v. Thornton's Heirs* (39 Vt. 122), where it was held that a party calling a subscribing witness to prove a will could impeach him by showing prior contradictory statements, as the law compelled the party to call him, the court said that many, but not all, of the reasons for permitting that kind of impeachment applied to an impeachment of a general nature, but that the authorities had in many instances made a clear distinction between permitting an impeachment of the general veracity of a witness and an impeachment by showing declarations of the witness inconsistent with his testimony, but declines to express an opinion as to the soundness of the distinction, but says that the fairness of holding a party estopped by reason of an act concerning which he has no choice, or by an indorsement that he does not make of a witness whom the law calls and makes current whether the party indorses him or not, may well be questioned. This strongly tends against any such distinction as the court says some of the cases make, and we think no distinction can logically be made; for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fail in part and stand in part — fail as to one mode of impeachment and stand as to another mode. It is indivisible, and stands or falls as a whole. This view is sustained by *Williams v. Walker* (2 Rich. Eq. 291). There, in tracing the complainant's title, it became necessary to prove a mortgage. His solicitor stated to the court that the character of the attesting witness was such as not to entitle him to credit, and proposed to prove the mortgage by other testimony; but the court held that the attesting witness must be called, as he was at hand, and thereupon he was called, and testified that the mortgage was executed and delivered at a time subsequent to its date. The complainant then tendered testimony



to impeach his general character, which was excluded, for that a party could not impeach his own witness. But the Supreme Court said that, in the circumstances, the complainant ought to have been allowed to show that the witness was undeserving of credit; referring to what Lord Ellenborough said in *Rex v. Inhabitants of Harringworth* (4 Maule & S. 350), that the testimony of a subscribing witness is not conclusive, for he may be of such a character as to be undeserving of credit, and then the party calling him may prove him such, and call other witnesses to prove the execution. As the public, in whose interest crimes are prosecuted, have as much interest that the innocent should be acquitted as that the guilty should be convicted, we hold it to be the duty of the State to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light upon the transaction under investigation, and aid the jury in arriving at the truth, whether it makes for or against the accused, and that therefore the State is not to be prejudiced by the character of the witnesses it calls. (*State v. Magoon*, 50 Vt. 333; *State v. Harrison*, 66 Vt. 523; 29 Atl. 807.) This doctrine, carried to its logical result, exempts the State, in criminal cases, from the operation of the rule in question, and places it in the position of a party calling an instrumental witness, and for the same reason. We are aware that in many, if not most, jurisdictions, the rule is applied to the State in criminal cases, but it is upon the ground that the State stands like any other party, and accredits a witness by calling him, from which we infer that they do not hold, as we do, that the State is bound to call all the witnesses, but is at liberty to choose, and to call whomsoever it will. We are the more satisfied with the conclusion here reached because we think the State ought not to be hampered by such a rule. Prosecutions are carried on by the government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is to faithfully execute their trust, and do equal right and justice to the State and accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentality by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice, the State should be at liberty to remove it, and by trampling upon it if necessary."

The Supreme Court of Michigan held, in the recent case of *Beecher v. Common Council of Detroit*, reported in the *Detroit Legal News*, that a taxpayer may elect his residence as a matter of right, and that the domicile is acquired by the

combination of residence and the intention to reside in a given place, and can be acquired in no other way. The court said: "The residence which goes to constitute domicile need not be long in point of time. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. \* \* \* The rule is laid down by Mr. Justice Cooley, in his work on *Taxation*, page 369, as follows: 'It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another, and *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile if not controlled by more conclusive facts fixing it in another place.'"

#### LORD ESHER'S RETIREMENT.

LORD ESHER'S long judicial career has at length closed, says the *Law Journal*, London. He will be seen at least no more in that branch of the Court of Appeal over which, as master of the rolls, he has presided with so much vigor and geniality, though we may hope that he will still lend his experience to the Privy Council and the house of lords. At such an event there will be but one sentiment—that of sincere and widespread regret; for his retirement removes from the bench a great judge, whose unique personality it will be impossible to replace. These are the days of specialists. We have the company lawyer, the admiralty lawyer, the commercial lawyer, the bankruptcy lawyer; Lord Esher was all these and more in one. He knew admiralty law as well as any expert practitioner in Mr. Justice Barnes' court; as a commercial lawyer he hardly had a rival; he was a match for the Old Bailey advocate in the technicalities of the criminal law or the rules of evidence; in bankruptcy he was as much at home as the judge in bankruptcy himself, and, needless to say, he was a master of the common law under which he was nurtured. And to this versatility Lord Esher has added a quality without which learning may avail little for the administration of justice: he has been ever "rich in saving common-sense." He once declared that the business of a judge is to find a good legal reason for the conclusions of common-sense, and this dictum is the

key to the success of his judicial career. He has never been one of the Pharisees of technicality who think that man was made for the law, and not rather the law for man; he has ever striven to mold the law to meet the exigencies of business and the changes in civil society. His shrewdness, his knowledge of the world, has enabled him to see what justice required, and he has bent all the resources of his fine intellect and his legal learning to do that justice.

This freedom from technicality, this readiness to welcome reforms and loyally carry them out, is the more remarkable and the more honorable when we remember the system and the traditions under which Lord Esher was trained; that his career reaches back to the days when "right and justice and substance," as Lord Russell of Killowen lately said, "were sacrificed to the science of artificial statement," the pseudo-science of special pleading; to the days when *Jarndyce v. Jarndyce* was dragging its weary length along in an unreformed Court of Chancery, and law and equity were on worse terms than Katherine and Petruchio in the early days of their courtship. Called to the bar more than half a century ago, what a retrospect is his; what kaleidoscopic changes of law and life have passed before his view! Yet through them all Lord Esher has come, not only ripe in experience, but almost unscathed by time. With all his burden of more than eighty years, the master of the rolls is still — or was till yesterday — the youngest judge on the bench, the most light-hearted and the most popular. Whatever attractions there might be in other courts, Court of Appeal No. 1 was always full. His genial wit played round all alike — his brothers on the bench, attorneys-general, eminent queen's counsel, confident juniors — piercing often to the heart of the case: *ridentem dicere verum quid vetat?* But it was "beautifullest sheet-lightning," as Carlyle says, "never condensed into thunderbolts." Those who were hardest hit never felt the sting rankle, for no venom winged the shaft, as they knew, and kinder heart never beat beneath the ermine. The anecdote which we recently reproduced showed how keenly he could feel for those whom it was his duty judicially to condemn.

Retirement must always be blended with sadness, both for the judge who quits his illustrious post and for those who remain behind to regret him; but it ought to be no slight consolation to the master of the rolls to feel, as he may justly feel, in retiring, that he has added not a little to the greatness and glory of the noble edifice of English law by his judicial record, and that he carries with him into his well-earned repose the respect, the admiration and the love of every member of the legal profession.

The promotion of Lord Justice Lindley to the office of master of the rolls has received the hearty approval of the whole profession. He is the only

son of the late Dr. John Edward Lindley, F. S. R., who was professor of botany at University College, London, where the new master of the rolls was educated. He is 69 years of age, having been born at Acton Green in 1828. The period of his active connection with the law is only three years short of half a century. He is the author of several legal works, including "The Law of Partnership" and "Study of Jurisprudence."

A writer in the London Law Times thus pays a poetic (?) tribute to the retired jurist:

Farewell, Sir William Baliol Brett —

Farewell, the more familiar Esher —

For thirty years, through storm and fret,

You've been our Monitor and Teacher.

Yes, thirty years' judicial life!

With men as colleagues wise and weighty,

You've borne your part in lordly strife,

Till numbering years exceeding eighty.

Curled darling of the Common Pleas,

Robuster lord of Court Appellate,

With honors you took all degrees —

No law too crude for you to spell it.

Then at the Rolls, a British peer,

You sailed your last and grandest vessel,

And proved that you could deftly steer

The course made difficult by Jessel.

With him you sat — with Mellish, James,

Hershell and Fry, A. L., and Bowen —

And pulled, as in our English games

You pulled when first you mastered rowin'.

The bar looked on and laughed at times

But very serious was at others —

When you denounced forensic crimes,

And chortled with your learned brothers.

Farewell! Farewell! The die is cast —

You doff your bright judicial armor,

And glancing proudly on the past,

Become a jovial Watford farmer.

We've criticized and groaned and wept

When far and wide your shafts were flying—

Perhaps 'twere well our words had slept,

Or vanished while the ink was drying.

Those are but spots upon the sun,

Which blazes in his mid-day glory;

Fresh breezes braced Appeal Court 1,

Though storms at times complete the story.

No one can say that Justice failed

To find there full imperial measure;

In law for all time will be hailed

As rare the mastership of Esher.

#### POSTSCRIPT.

Goes Ludlow with you, good, my lord?

Or will time pass before he slopes?

Men at the bar are all abroad.

So friendly is the name of Lopes.

---

**COURT OF APPEALS CHIEF JUDGESHIP.**

---

JUDGE ALTON B. PARKER TO SUCCEED HON. CHARLES ANDREWS ON THE FIRST OF JANUARY, 1898.

---

JUDGE ALTON B. PARKER, Democrat, of Kingston, was, on Tuesday last, elected chief judge of the Court of Appeals, over Judge William J. Wallace, Republican, of Albany, to succeed Chief Judge Charles Andrews, who, by the provision of the Constitution, is compelled to retire from the court with the close of the present year, having reached the age of 70 years. Rain generally prevailed all over the State on the day of election. In many instances the Republican pluralities of a year ago were reduced one-half, while in several counties, notably in Judge Parker's home county, Ulster, the turn-over was much greater. Judge Parker's plurality in the State is estimated at 50,000. The ALBANY LAW JOURNAL has already published a full biographical sketch of the successful candidate, who will enter upon the discharge of his duties at the age of 46, ideally equipped, and enjoying



CHIEF JUDGE-ELECT ALTON B. PARKER OF THE N. Y. COURT OF APPEALS.

the respect, confidence and esteem of the people and the profession in a very marked degree. Judge Parker will be the seventh judge of the Court of Appeals, and the fourth Democrat to hold that high office. The others of his party have been: Sanford E. Church, elected in 1870; William C. Ruger, elected in 1882, and Robert Earl, appointed by Gov. Flower in 1892. The Republican chief judges have been Chas. J. Folger, appointed by Gov. Cornell in 1880, and elected by the people in the following November; Charles Andrews, appointed by Gov. Cornell in 1881, and again, after an interval of eleven years, Charles Andrews, elected by the people in 1892.

Five justices of the Supreme Court were also elected on Tuesday, three of them Democrats and two Republicans. In the first district Charles H. Van Brunt, Democrat, was re-elected to succeed himself, and Francis M. Scott, Democrat, was chosen in the place of George P. Andrews. Willard Bartlett, Democrat, in the second, Pardon C. Williams, Republican, in the fifth, and Henry A. Childs, Republican, in the eighth, were all re-elected, the two latter without opposition.

## JUDICIAL WIT.

## SOME OF THE BEST OF ANCIENT AND MODERN INSTANCES.

THERE are three classes of people who can deliver a jest with absolute assurance that the same will be properly appreciated. They are the acknowledged wit, the wit judicial, and the scholastic wit. At the former's remark to laugh is the thing; at the judge's remark to laugh is a relief; at the form-master's joke to laugh is diplomacy. Upon the acknowledged wit and the wit of the class-room says the London Standard, we have no intention to enlarge, but by citing several leading witticisms delivered from the bench we hope to prove our case that the wit judicial is not so bad as those make out who would have us believe that the laugh of the court is the laugh of sycophancy. A few months ago Mr. Justice Day, in the Queen's Bench Division, had a case before him of some duration and many technicalities. Towards the conclusion of a long speech, counsel said, and the saying may be taken as a specimen of what had preceded it: "Then, my lord, comes the question of bags; they might have been full bags or half-full bags; or, again, my lord, they might have been empty bags." "Or," interrupted the sorely tried judge, "they might have been wind bags."

Appropos of the verbosity of some counsel, and the difficulty of checking them, the following story is told: In a case that was brought before the late Master of the Rolls, a point was raised for the first time, whereupon the master asked why it had not been raised before the judge in the court below? "His lordship stopped me, m' lud," replied the loquacious counsel. "However did he manage to do that?" inquired Sir George Jessel eagerly. "By a species of pious fraud, m' lud: by pretending to be with me," was the reply. It was the same judge who is reported to have said, when an unsuccessful litigant threw an egg at him in the corridor of the court, "I think that must have been intended for my brother Bacon." Mr. Justice Bacon sat in the same court. When a judicial witticism has the honor of being introduced into an original musical comedy, there can be little doubt that the bench is an acknowledged seat of humor as well as of learning—at least we hope there cannot. A few years ago when the long-winded counsel remarked, "We will now address ourselves to the furniture" (concerning which the case was about), and the long-suffering judge replied, "You have been doing that for some time, Mr. Dash," a well-known comedian, taking the part of a judge, brought the anecdote into a play then running at the Prince of Wales Theater with the greatest success, which was, of course, very flattering to the judicial bench.

To be able to carry off an untoward incident with an impromptu witticism of the first water is

a gift that belongs to few. We think we are correct in stating that it was Sir J. W. Chitty who exclaimed, when a piece of the ceiling fell down on his desk when he was in the midst of giving judgment: "*Justitia fiat ruat calum*" (Let justice be done though the heavens fall), a remark that compare very favorably with the interpolated gag of a celebrated actor when a globe fell on to the stage of a provincial theater: "Hello! the glass is falling—we shall have rain." We would not say that the magisterial bench is without humor, but it must be admitted that when the royal arms behind the bench in a London police court almost fell upon the occupant thereof, that individual had nothing to say that could, strictly speaking, be classified as humorous. The magistrate's court, however, enjoys plenty of good laughs, and the following dialogue is a fair specimen of the police court joke. The prisoner having pleaded guilty to stealing some lead piping, the magistrate asks him if he has anything to say. The prisoner (contumaciously): "You can have all the 'say' to yourself." The magistrate: "Well, my 'say' is twelve months' hard labor" (laughter—in that part of the court where the prisoner was not).

When one has a reproof to deliver, it is as well (from the reproofed's point of view) that the same should be administered like the powder in the infantile jam—in as palatable a form as possible. Perhaps that idea struck the present Master of the Rolls, Lord Esher, when a junior cited the "Law Reports" as "2 Q. B. D." When Lord Esher said, "That is not the way you should address us," the junior protested that he intended no disrespect, but that the formula was an abbreviation for "the second volume of the Queen's Bench Division reports." "I might as well," replied the master, "say to you, 'U. B. D.'" Another instance that occurs to us is the case of a barrister who had almost been called to order on several occasions for having branded his client's husband (the defendant) in terms hardly compatible with courts of law, but luckily managed to escape until he said, "It is pardonable to be ugly, but there are limits. Now these limits Mr. X. has overstepped outrageously. I do not believe there is an uglier man in the world than Mr. X." "Sir," said the judge reprovingly, "you forget yourself."

If there is any truth in the popular idea that the inhabitants of Scotland are without any sense of humor, the courts of law, one would imagine, would especially be devoid of wit, but in refutation of the theory, numerous incidents replete with humor could be quoted. The house of Boswell, for instance, supplied several examples, as Boswell, senior, and Boswell, junior—he who acted as cicerone to Johnson when touring in Scotland—were both to be met with in the law courts. Pleading on one occasion before his father, who was "Ordinary on the bills," which sounds like a menu, but was not, he said something with which

his lordship differed. "Ye're an ass, mon," said the bench genially. "No, my lord," replied the biographer, "I am not an ass; but I am a colt; the foal of an ass!" "And not only did you murder him, whereby he was bereaved of life, but you did thrust, or pierce, or push, or project, or propel the said weapon through the belly-band of his regimental breeches, which were his majesty's." Such were the words used by the famous Lord Eskgrove once when summing up. A grim example of unconscious humor.

The story of the unfortunate judge who said to a diminutive counsel, "Sir, when a barrister addresses the court he must stand," and on receiving the reply, "I am standing on the bench, my lord," apologized at length, and immediately told another barrister of considerable height to sit down, only to receive the meek but overwhelming answer, "I am sitting, my lord," reminds one of the case of a diminutive Scotch counsel who had a stool brought into court upon which he stood when pleading. On one occasion the judge demanded to know what the stool was for, and upon having the matter explained to him observed that, "that was one way of rising at the bar." It was of the two former barristers that the following epigram was written:

"Mahaffy and Collis, ill-paired in a case,  
Representatives true of the rattling size ace;  
To the heights of the law, though I hope you will rise,  
You will never be judges, I'm sure, of a(s)ize."

It was Lord Justice Clerk Braxfield who enlivened the Court of Session in Scotland on one occasion by demanding to know what excuse a certain judge had given for not being present. "My lord," said the president, "he has lost his wife." Braxfield replied with a heartfelt sigh: "Has he! That is a gude excuse, indeed; I wish we had a' the same." The tales of Lord Erskine are numerous and good, though perhaps the best are told of him in his private character. Having become the proud possessor of a Sussex estate on which grew nothing but birch trees, he had the same cut down and converted into brooms; on one of his broomsellers being hauled up before the magistrate for having no license, Erskine undertook his defense, and stated that there was a clause to meet the very case. On being asked what it was he replied, "The sweeping clause, your worship, which is further fortified by a proviso that 'nothing herein contained shall prevent any proprietor of land from vending the produce thereof in any manner that to him shall seem fit.'" Dr. Parr, who was very great at writing Latin epitaphs, or imagined himself so to be, was on one occasion so carried away by Erskine's conversational abilities that he called out to him, "My lord, I mean to write your epitaph." Erskine, who was three years younger than Parr, promptly

replied, "Dr. Parr, it is a temptation to commit suicide," which was very graceful, and exceedingly witty.

#### AN AMERICAN JURIST'S IMPRESSIONS OF A FAMOUS ENGLISH COURT.

JUDGE W. W. Goodrich, of the New York Supreme Court, recently returned to his home in Brooklyn from a very pleasant European trip. To an "Eagle" reporter he gave some interesting impressions of his travels. What will particularly interest the legal fraternity is Judge Goodrich's experience at the opening of the Central Criminal Court at the Old Bailey, in Newgate Prison, London. "Sir Charles Hall is the recorder of London and holds the chief criminal court, sometimes in association with the lord mayor. Sir Charles will be remembered in New York as the chief English delegate to the International Maritime Conference, of which I was also a member. I came to know him somewhat intimately and learned to have a very high regard for his abilities, so that I always call upon him when I am in London.

"He invited me to go down and see the opening of the court, an invitation which I very gladly accepted, especially as he told me to be sure to bring Mrs. Goodrich with me.

"The court room is very old. It is a square interior room with little light or ventilation apparently, but the air was kept sweet and fresh by a very simple contrivance, the relic of an old plague in London some two hundred years ago, when the jail fever broke out in Newgate Prison and was communicated in the close air of the court room to several of the judges, who died therefrom. The room has ever since been disinfected, so to speak, with sweet herbs, sweet majoram, mint, anis, etc., mingled with roses. These are plentifully scattered all over the floor of the court room and on the desks and tables.

"Along one side of the room, which is, perhaps, thirty or forty feet square, is a high, narrow bench, so high that a short man has some difficulty in touching his feet to the floor, and on the same line is the bench where the judge sits.

"We had some difficulty in obtaining entrance. Indeed, it was only after producing my official card and saying that I came at the invitation of Sir Charles that we were permitted to enter. This admission, however, was gained and we were shown to the seats reserved for distinguished guests—three narrow benches in a box, which had room only for twelve persons. The only other occupants of the box were the attorney general of India, a full-blooded native of that country, and a lady accompanying him. On the other side of the partition of this box were some rude benches for the general public, space being allowed for about twenty-five persons. Down below in a sort of cock-pit was the table for the lawyers,

clerks, etc., and opposite, the high erection known as a jury box, like what we see in the well-known English picture of 'The Jury.'

"Presently the court entered, preceded by several tipstaves bearing maces, drawn swords and other paraphernalia of office — then the judge in a scarlet robe, trimmed with the traditional ermine, his head covered with a horse hair wig of large proportions and qualified to make the wearer exceedingly unhappy in a hot August day. Then followed the Lord Mayor of London with twelve aldermen, each in a red robe trimmed with brown fur and each carrying a large conventional bouquet of roses, marigolds and daisies surrounded with lace paper, just like those which are sold in Fulton Market for ten cents.

"These officials ranged themselves along that uncomfortable narrow bench and tried to persuade themselves that they were happy, and I believe that they were supported in their straightened posture by the fact that they were serving the public in the discharge of duty.

"As soon as they were seated the sheriff opened the court. I omitted to say that the sheriff was also in the procession and he wore a silver jeweled chain of great value and of veritable antiquity, and he also bore a great sword.

"Thereupon the Lord Mayor and aldermen retired. I noticed that they did not carry out their bouquets nor the sweet herbs scattered on their tables, and these continued to permeate the atmosphere with a faint peculiar odor that suggested cleanliness and health giving.

"There is a curious custom in respect of the charge to the grand jury differing so much from our method that it is well worthy of notice. Instead of having a calendar of indictments made up for use at the term, the clerk makes up a printed calendar containing the names of the persons in Newgate awaiting trial with a short description of the crime for which they are incarcerated.

"On the retiring of the aldermen the judge sent me an invitation to go up and sit with him on the bench. When I had taken my seat with him he briefly explained to me that he was about to charge the grand jury. This is done, not as is usual with us in a perfunctory and general manner, but with particularity and detail, the judge stating to the jury the general outline of each of the charges against the principal prisoners, so that when they had retired to the jury room the grand jurors had a general idea of the crimes which they were to investigate. This seems to me to be a much more effective and just way of having indictments prepared, as the mind of the court is brought into immediate and intimate communication with the jurors before any person is indicted.

"During the charge, which occupied about an hour, the judge desired that the women in court should retire while he called attention to the cases of gross immorality. Accordingly, the two women

who had graced the dusky recesses of the court room, were shown out with courtesy and ceremonial observance and remained outside during the remainder of the proceedings.

"Such is a hasty description of a most interesting ceremony which has about it all the flavor and romance of ancient custom. It was certainly as impressive as it was curious — a sight not to be seen in young America, which left ceremonies in State and church in a large measure behind it when it embarked in the Mayflower for Plymouth.

"All the same, it was instructive and suggestive of the great length of time during which the English people have lived, and the quaint mixture of ceremony and pomp which have come down to them from our common ancestry.

"After all, I said to myself, our plain methods and manners are best for a democratic people and government. We may possibly endure gowns in the upper courts, but horsehair wigs, never; and as for drawn swords and scabbards, the ballot and the press will best conserve the public welfare."

#### "THE TERM QUASI-CONTRACT."

CRITICIZED AND REPUDIATED AS VICIOUS, MISLEADING AND TENDING TOWARD THE ENCOURAGEMENT OF "FICTIONS" IN LEGAL TERMINOLOGY.

IT goes without saying that false nomenclature is as vicious as a debased currency, or rather as counterfeit itself. At this stage of the law, when the necessity for legal reform is being recognized universally, it is no longer incumbent upon the writer to refute the exploded fallacy and solecism, viz., "That a discussion of terminology is mere word-play." Centuries ago Lord Bacon placed the dangers of an imperfect and artificial system of classification as among the most invidious of the enemies of science. Now, as the organic structure of the law is so intricate, it is in *rerum natura* that a large part of its component elements should be in a degenerate condition — suffering from every species of disease.

It is in an humble spirit that the writer ventures to criticize a somewhat newly-established and doubtful phrase in our law. The term "Quasi-Contract" is deemed objectionable for the following reasons: First, it is not founded upon logic and legal principle, since it is difficult to see how one class of "obligations imposed by law" should be distinctively designated and isolated from all other classes whatsoever, since it is a truism that all legal impositions are legal obligations.

Holland's Jurisprudence, page 220, correctly lays down the following: "The obligation" (quasi-contract) "attaches by express judicial declaration whatever may be the ground for it." Quoting Bentham, the same author writes: "This title to

indemnity is founded upon the best reasons. Grant it, and he by whom it is furnished will still be a gainer; refuse it, and you leave him who has done the service in a condition of loss."

Accordingly, it seems perfectly clear that whatever be the ground for granting a remedy by express provision of law, whether the same be termed "Quasi-Contract" or "Quasi-Tort," is entirely immaterial. Of course a statute enacted to cover each remedy sounding in "quasi-contract" would effectually wipe out this legal anomaly, but more than that, while this class of remedies remains a branch of the common law, it should either be properly classified under appropriate headings, in the various subjects, into which it spreads its ramifications, or completely and finally merged in the broad stream of "legal obligations," of which it is at best but a small fraction. The difficulty under which judges and legal writers seem to labor is, strangely enough, an elementary one. While they generally recognize that religion and positive morality are a sufficient foundation for most legal obligations, yet in this one instance, at least, they confuse and, in fact, totally fail to grasp the fundamental conception of the grounds upon which the remedy of "quasi-contract" is based. Thus it comes that this false term and its definition, to wit, "Implied Contract in Law," is retained as a monstrous growth in what would be a harmonious system. It is much more scientific, accurate, and decidedly simpler to base the rights and remedies arising out of the relations of (1) father and son, (2) guardian and ward, (3) trustee and *cestui que trust*, etc., upon the broad foundation of justice and right, than upon the narrow, flimsy and specious doctrine of an artificial and forced classification, having neither any authorized legal or sensible existence. What greater authority is there for placing the theory of consideration upon conceptions of ethics and justice than that of the class of "legal obligations" discussed *supra*? Who is there that would say that the remedies in tort require any other justification than morality and justice? They are complete in themselves and demand no fanciful theory or display of doctrinaire to sustain them. It is respectfully submitted that the rights and remedies hitherto classed under the pseudo-doctrine of "Quasi-Contract" fall as naturally under already received and sanctified terminology as any of the other legal obligations.

It is furthermore submitted that the lame attempt of the courts and text-writers to manufacture an apology for the phrase, "Quasi-Contract," in the form of a no less equally vicious set of words, viz., "Contract Implied in Law," is as reprehensible and unscientific as the term which it professes to explain and amend. Accordingly, the futile effort to construct a name to represent a doctrine or an idea which does not exist is as ridiculous as the now antiquated and fossilized fic-

tions in the technical processes of fine and recovery. To excuse the invention of such terms for the reason that they have a technical significance, acknowledged and accepted, is equally absurd, for since the days of the wretched fictions and maxims themselves (semi-fictions) judges and writers learned in the law have vied with each other in misconstruing them.

ALEXANDER HIRSCHBERG.

NEW YORK, Oct. 25th, 1897.

#### WHAT THE LAW DECIDES.

The offspring of a bigamous marriage contracted in Illinois, where it is void, are held, in *Leonard v. Braswell* ([Ky.] 36 L. R. A. 707), to be entitled to inherit lands in Kentucky, where the parents live, by virtue of the Kentucky statute legitimating the issue of the marriage.

The right of a carrier receiving blasting powder for transportation to insist upon such limitation of common-law liability as it sees fit is sustained, in *Cleveland Powder Works v. Atlantic & Pac. R. Co.* ([Cal.] 36 L. R. A. 648), on the ground that a common carrier is not obliged to receive and transport such dangerous articles.

A claim that a bank was bound to apply to the payment of a note which it held a deposit of the first indorser was denied in *First Nat. Bank v. Peltz* ([Pa.] 36 L. R. A. 832), where the note was made for his accommodation so that he, and not the apparent maker, was, as between themselves, primarily liable upon it.

A statute including brothers and sisters in the list of those who are made liable for the support of a poor person whose pauperism is not the result of intemperance or other bad conduct, is upheld, in *People ex rel. Peoria County v. Hill* ([Ill.] 36 L. R. A. 634), although the statute transforms an imperfect moral duty into a statutory and legal liability.

Notifying a party not to haul any more sand or gravel from certain premises, with a claim of ownership thereof, although this causes the breach of a contract between the other party and a third person to haul such sand or gravel, is held, in *Glencoe Sand & G. Co. v. Hudson Bros. Com. Co.* ([Mo.] 36 L. R. A. 804), insufficient to render the party giving the notice liable for causing the breach of the contract.

The regulation of a carrier for collecting fares or tickets on a suburban train which prohibits passengers from going past the conductor into the part of the train where he has completed his collection of fares, unless they satisfy him that they have already paid fare, is held, in *Faber v. Chicago Great Western R. Co.* ([Minn.] 36 L. R. A. 789), to be a reasonable one, which the conductor was justified in enforcing, even as against a passenger who had no previous notice of it.

**Legal Notes of Pertinence.**

A Long Island bicycle thief was recently overhauled by a trolley car, the wheel recovered and the man arrested.

At Danville, Ind., the other day, in the Circuit Court, a jury found a verdict of \$54,333.33 against J. H. Gernand, a wealthy widower, for breach of promise to marry Mrs. Carrie Corbett, a widow, aged about 34.

The statute under which for several years the police department of Denver, Col., has at will seized, confiscated and destroyed gambling implements, has been declared by Judge Allen in the District Court to be unconstitutional and in conflict with Federal statutes.

For ten days a woman has been governor of Idaho, not as the result of election, but governor, nevertheless, empowered with executive authority, and exercised it. This woman is Margaret Reeve, private secretary to Secretary of State Lewis. She acted during the temporary absence of the governor and most of the State officials, who had left signed documents in blank for her to use.

The most expensive chicken on record is probably one that the once famous Lady Anne Clifford extorted from one of her tenants. By old custom, the tenants of her lordships of Skipton and Appleby paid a tribute of 800 boon hens in addition to their rent. A rich clothier among the tenants refused his assessed contribution of one hen. Lady Anne "lawed" him at York assizes. She got the hen, but it cost her £200 and the defendant probably a good deal more.

A verdict of acquittal has been reached in a libel suit for \$25,000 damages brought by Max Heinrich, the singer, against the Hartford (Conn.) Times, which charged him with intoxication while singing in an oratorio. As a basis for damages, the defendant testified that the attack on him had resulted in a reduction of his annual income from \$10,000 or \$12,000 to \$800. In reference to the charge itself, he insisted that he was not guilty of intoxication. He undertook to explain his extraordinary conduct on the stage by saying that he was suffering from a severe bronchial cold and had in consequence taken troches and other medicines. But the evidence against him was overwhelming.

They were discussing various things in the clerk of the Supreme Court's office the other day—that is, a party of judges were. Finally the talk drifted on to the subject of coining words and phrases. Mr. Justice Allen made the remark: "I coined a new word the other day. It is a good one, I think, and perfectly natural, but I have been unable to find it in any dictionary. The word is 'enforcibility.'" The lawyers present studied awhile, and finally all agreed that the word would be very useful, and fit certain cases exactly.

Chief Justice Doster declared that he once used a word that exactly described a certain case, and it seemed to him that it was by far the best term to apply. The word he used was "obtention," meaning the act of obtaining. Judge Doster finally discovered the word in a rare old work on interstate law.—Topeka Capital.

The Supreme Court of Michigan has just announced a decision sustaining the validity of the statute of that State which requires railroad companies to issue 1,000-mile tickets to passengers at the rate of two cents a mile, and receivable for fare from any member of the purchaser's family. The judges were not unanimous, however, two out of the five members of the court deeming the law unconstitutional. The decision is of much interest to the railroads in this State, in view of the existence of a similar statute in New York, which was enacted in 1895 and amended in 1896, and forms section 37a of the Railroad Law. This statute has been enforced by the courts occasionally, and, so far as we are aware, its constitutionality has not been attacked. The mileage tickets issued under it are available for the use of the purchaser "or any member of his family or firm, or a salesman of such firm."

The New York Court of Appeals, in denying a motion to dismiss the appeal in the case of Samuel Bachrach against the Manhattan Elevated Railroad Company and another, appellants, handed down a memorandum saying: "This is a motion by the plaintiff to dismiss the appeal upon the ground that the judgment has been unanimously affirmed by the Appellate Division as to the facts, and that the exceptions in the case are frivolous. This motion is one of a large class imposing much labor upon the court, and ought not to be made. An exception must be so obviously frivolous on its face as to require no argument to demonstrate it. In this case briefs are submitted, citing authorities to support the opposing views. The fact that such a course is necessary is evidence that the motion should be denied. The rule in motions of this character is similar to that applied to a party asking judgment on a frivolous pleading. This memorandum is handed down in order that the bar may understand the strictness of the rule."

It is an established rule of the law of negligence that a defendant is chargeable only for an omission of duty which is the proximate cause of the injury suffered by the plaintiff, says the New York Sun. A proximate cause of an event has been defined to be a cause which, operating in a natural and continuous sequence, produces that event without the intervention of any new cause. The Supreme Court of Pennsylvania has recently rendered a surprising decision on this subject of proximate cause in negligence cases. An intending passenger had purchased a ticket from the de-



fendant railway company and stood waiting on the station platform for his train. As it came up the locomotive struck a woman who was trying to cross the track, and tossed her body against the plaintiff, inflicting the injuries upon him for which he sought to recover damages. The court holds that even though the railroad was negligent in killing the woman and throwing her body upon the platform, such negligence cannot be deemed the proximate cause of his injuries.

Here is Grover Cleveland's advice to a young man about to enter the legal profession:

"If I were to tender any advice to a young lawyer, or to a young man about to become a lawyer, as to how he could become a successful one, I think I could not refrain from asking him to dismiss from his mind the idea that the practice of the law is made up, in an important degree, of oratory and eloquent addresses before courts and juries. No one should enter this profession who is not prepared to do very hard work, continuous and often irksome work. I shall follow this advice by saying that there is no mistake about another fact, to wit: In the practice of the law, as in everything else, honesty and frank, fair dealing are not only enjoined by good morals, but are the best policy. It is a delusion to suppose that the noble profession of the law can be faithfully pursued or successfully practiced by trickery or overreaching subterfuges."

This advice is sound enough and broad enough to apply to any occupation in life.

### English Notes.

The Law Times refers to the Land Transfer Act as "that half-hatched chicken."

Mr. Ruggles-Brise, the chairman of the prison commission, recently left England for New York, with the object of visiting some of the principal penal institutions of the United States. He expected to remain in America about six weeks.

Sir William Leece Drinkwater, one of the deemsters of the Isle of Man, has, says the *St. James's Gazette*, been celebrating his jubilee as a judge of the Manx High Court. Sir William, who is 85 years of age, was appointed second deemster as long ago as 1847, and some ten years later was promoted first deemster.

The vacant judgeship has been filled up as anticipated, and the selection is one which will meet with general approval, says the *London Law Journal*. Sir Lewis Cave is succeeded by Mr. J. C. Bigham, Q. C. The new judge will add considerably to the strength of the Queen's Bench Division, especially in its dealings with commercial matters.

Lord Denman, C. J., once said: "I remember

an action tried before Gibbs, C. J., brought against Alderman Wood by a man whom he had sentenced to be imprisoned; and it was contended that the imprisonment was illegal, because the sentence did not also direct that he should be whipped." Gibbs, C. J., said to the jury: "Give the plaintiff the full damages he has sustained by reason of not having been whipped." (*Whitehead v. The Queen*, 14 L. J. 166, M. C.) — *Law Times*.

*Nihil habeat forum ex scenâ* is one of Bacon's maxims; but he there refers to fictitious cases brought into the courts in order to determine points of law. Sergeant Maynard, who died in the reign of William III, is said to have had "the ruling passion strong in death" to such a degree that he left a will purposely worded so as to cause litigation, in order that sundry questions which had been "moot points" in his lifetime might be settled for the benefit of posterity. — *Law Times*.

The latest rumor that Lord Esher, master of the rolls, has resigned, is generally credited. Lord Esher is now 82 years of age, and has occupied a seat on the bench for thirty years. While his retirement has been expected for some time, no failing in mental power and vigor was noticeable in the learned judge during the past year. The statement that Lord Justice Lindley is to be Lord Esher's successor is not yet confirmed. The *Law Journal* says the only doubt that could possibly be entertained in connection with his promotion would proceed from his age. The *Law Times* pays this tribute to the retiring master of the rolls: "A great, robust personality will disappear from the bench. A well-stored mind, marvelous grasp, unbounded courage and supreme independence are characteristics and qualifications which have always placed Lord Esher high among his peers. Genial, yet aggressive, there has always been a breezy atmosphere in his court which could be found nowhere else. He will be missed much by the profession and the public."

"An Old Bailey Sessions Paper of Two Hundred Years Ago" is the title of an article in the *Westminster Review*, and the extracts given by Mr. Vellacott, who contributes the article, show that the difference in the nature of the offenses tried and the defenses raised differ but little from those with which modern judges are accustomed to deal. He says: "If we compare these sessions papers with any of our own time, we shall notice points both of likeness and unlikeness — likeness, because human nature is very much the same in all ages, and there is in legal phraseology a rugged conservatism; unlikeness, because criminal law and criminal procedure have altered with the embracing fabric of civilization. Some offenses are now obsolete; other new ones have sprung up. If the clippers of coin are no longer hanged and burned, the counterfeiter and the utterer are sent to hard labor and penal servitude. The murder

of a husband is no longer petty treason, benefit of the clergy is gone, and the infamous branding which was its outcome. No more is the convict transported to the American plantations or the West Indian sugar islands. The receiving of stolen goods is more dangerous than in times of yore. The acquisition of money by false pretences, is thoroughly established, receives a more specific, it not more effective, punishment than the pillory."

### Communications.

*To the Editor of the Albany Law Journal:*

"A" causes the arrest of his wife, "B," and asks to have the justice of the peace hold her to bail to keep the peace, because of an alleged assault upon him and threats to kill made by the wife. The wife secures counsel, to whom she asserts innocence of the charge, and that she was the victim of an assault by him. While the matter is pending before the justice, the husband solicits the wife to occupy rooms and take meals with him at his hotel. Peace is declared, and "A" withdraws the warrant.

*Quære.*—Is the husband liable for the fees and expenses of "B's" counsel, necessarily incurred to protect her rights? Yours truly,

SYRACUSE, N. Y., Oct. 30, 1897. C. H. S.

[On the facts stated, it would seem that the husband would not be liable for the fees of the attorney employed by the wife. This opinion, however, is based rather upon analogy than upon any rule that we now recall. The question frequently comes up in divorce cases, where a like condition of affairs exists, and it has been generally conceded, although we do not know of any decision to that effect, that the attorney for the wife is remediless where a reconciliation has been effected before he has been able to obtain payment.—ED.]

*To the Editor of the Albany Law Journal:*

My authorities for saying that Charles C. Dwight sat in the Court of Appeals are the New York Reports and the Civil List of New York (editions of 1888, page 325). His opinions are found in Vols. 38 and 39, New York Reports.

Justice Dwight was not elected by the people judge of the Court of Appeals, neither was Justice Parker. Both were elected justices of the Supreme Court, and, by virtue of provisions of the Constitution, were placed upon the Court of Appeals. It is just as proper to say that Justice Dwight sat upon the bench of the Court of Appeals as to say that Justice Parker did.

In the LAW JOURNAL for October 16, page 287, you express the opinion that Judge Jackson, of West Virginia, has probably served longer than any Federal judge. There are at least ten judges

who have been on the bench for more than thirty-six years. I herewith enclose a list:

Henry Potter, North Carolina, 1801-57—56 years.

William Cranch, District of Columbia, 1801-55—54 years.

James S. Marsell, District of Columbia, 1815-63—48 years.

Willard Hall, Delaware, 1823-71—48 years.

Arthur Ware, Maine, 1822-66—44 years.

John Davis, Massachusetts, 1801-41—40 years.

John Pitman, Rhode Island, 1824-64—40 years.

Ogden Hoffman, California, 1851-91—40 years.

John McNairy, Tennessee, 1797-1834—37 years.

Humphrey H. Leavitt, Ohio, 1834-71—37 years.

C. M. FOSTER.

TOPEKA, Kan., Oct. 28, 1897.

### Before the Final Bar.

THE death of Gorham Parks, clerk of the New York Court of Appeals, which occurred with startling suddenness on the 25th ult., from heart failure, was a severe shock to his family and friends. Mr. Parks had a similar attack about a month ago, but since that time had been enjoying good health. Mr. Parks was a native of Bangor, Me. He was graduated from Harvard in 1854, and three years later admitted to the bar. He had been connected with the Court of Appeals since 1874, and its clerk since January 24, 1889, on which date he succeeded Hon. E. O. Perrin, deceased. Mr. Parks was an efficient officer and exceedingly popular with lawyers and clients. He is survived by a widow and twin daughters, six years old.

Thomas G. Alvord, known all over the country by the sobriquet of "Old Salt" Alvord, died at his home in Syracuse on the 25th ult., of old age. He was one of the oldest ex-members of the assembly in point of service, and one who had been a member as many times as almost any other citizen of the State. Mr. Alvord was 87 years old at the time of his demise. During his fifteen terms in the assembly Mr. Alvord gained an experience that made him master of the methods of legislation and parliamentary practice. His fiscal ability was notably great.

### Notes of Recent American Decisions.

Damages—Measure of Damages in Executory Contract of Sale.—A agreed to sell certain boilers to B, a corporation, of which C was the agent and largest stockholder. The goods were afterwards damaged. A refused to deliver except at the original price, and resold to a third person. C bought them on his own account. The cost of repairing was slight. In an action by B for breach of contract, held that, B having an opportunity

through its agent to purchase the boilers and repair them, it could recover only the cost of repairs, under the doctrine that plaintiff must use reasonable care to avoid the consequences of defendant's wrong. (*Cunningham Iron Co. v. Warren Mfg. Co.*, 80 Fed. Rep. 878.)

**Damages — Liability for Gratuitous Medical Services.** — In an action for personal injuries caused by defendant's negligence, *held*, that the plaintiff can recover for the value of the services of the doctors and nurses, and it is immaterial whether plaintiff will ever have to pay for such services. — *Denver & Rio Grande R. R. Co. v. Lorentzen*, 79 Fed. Rep. 291.)

**Foreign Savings Bank — Assessment for Taxation — Surplus as a Debt.** — Where the charter of a foreign savings bank and the law under which it was organized provide that its surplus or accumulated profits shall be held as a contingent fund and finally divided among its depositors, such surplus is "due to depositors," and therefore a debt, which it is entitled to have offset against its assessment for taxation on personal property. (*People ex rel. Groton Savings Bank, appl't, v. Edward P. Barker et al., Com'rs of Taxes, etc., of the City of N. Y., respondents*, N. Y. Court of App. Decided Oct., 1897.)

**Negligence — Freight Elevators — Safety Appliances.** — The proprietor of an elevator, by inviting to ride thereon one who knew it was intended for a freight elevator, does not thereby become liable for the degree of care required of a carrier of passengers. (*Hall v. Murdock* [Mich.], 72 N. W. Rep. 150.)

**Persons — Mortgage by Infant — Disaffirmance.** — A minor used the proceeds of a loan, secured by his trust deed upon certain real estate, in paying off prior encumbrances and in making substantial improvements on the property. At majority the minor, still holding the property, disaffirmed the trust deed. *Held*, that the lender could enforce the security to the extent of the encumbrances satisfied out of the loan, with interest, and also the remainder of the loan used in the improvements, in case there was any balance after the infant was paid the value of her equity in the property without the improvements. (*MacGreal v. Taylor*, 17 Sup. Ct. Rep. 961.)

**Persons — Infancy — Estoppel.** — In an action to foreclose a mortgage, *held*, that the defendant was not estopped from denying his infancy, because he had falsely represented himself to be of age and thereby induced the plaintiff to make the contract. (*New York Building Loan Banking Co. v. Fisher*, 45 N. Y. Supp. 795.)

**Trusts — Special Deposit — Insolvent Bank.** — X deposited on June 20 to the account of bank C a specific sum in bank B, the correspondent of C, and directed C to pay the amount by telegram to D. B placed the money to the account of C, but

did not send it directly to C. C failed on June 22, without making the payment directed. *Held*, C was a trustee of X, and the money could be recovered as a special deposit. (*Montagu v. Pacific Bank*, 81 Fed. Rep. 602.)

**Torts — Deceit — Negligence as a Substitute for Scienter.** — Defendant, a bank president, having abundant opportunities to know the financial condition of the bank, made statements untrue in fact as to the value of its stock, in order to induce plaintiff to buy some of the stock from a third party, and plaintiff did so buy and was damaged in consequence. *Held*, that defendant was liable, even though he believed his statements to be true, if he had no reasonable grounds for his belief. (*Trimble v. Reid*, 41 S. W. Rep. 319 [Ark.].)

### The Magazines.

The November number of *The North American Review* is notable for the variety and importance of the topics dealt with. Rarely has a periodical had the privilege of publishing so important an article as that contributed by the Hon. Hannis Taylor, late United States minister to Spain, who, in "A Review of the Cuban Question," enters most thoroughly into a discussion of the aims and policy of the Spanish government, the temper of the Spanish people, and their intentions regarding their revolted colony. Mr. Edmund Gosse furnishes a scholarly and delightful essay on "The Life of Tennyson," the just published memoir of the great poet, while "The Commercial Value of the Shipyard" is strongly set forth by Mr. Lewis Nixon. Under the title of the "Effect of the New Gold Upon Prices," Mr. Charles A. Conant treats of the economic problems connected with the anticipated infusion of a great mass of new gold into the currency systems of the world, and his excellency M. Romero, Mexican minister to the United States, contributes a carefully prepared article on "The United States and the Spanish-American Colonies." A paper of immense practical value is that on "Thirty Years of American Trade," by Michael G. Mulhall, F. S. S., the recognized authority throughout the world upon statistics, while the important question of "Leprosy and Hawaiian Annexation" is ably considered by Dr. Prince A. Morrow. A thoughtful summarization of "The Present Railway Situation" is given by Mr. H. T. Newcomb, and "Woman's Political Evolution" is eloquently dealt with by Mrs. J. Ellen Foster, president of the Woman's Republican Association of the United States.

The November number of the *Century* begins a new volume of that magazine. A new serial novel of New York life, "Good Americans," by Mrs. Burton Harrison, is begun, and will run for half a year. It deals with contemporaneous social types and tendencies. The first part of a serial

poem by James Whitcomb Riley is printed, accompanied by illustrations by C. M. Relyea. Mr. Riley calls the poem "Rubaiyat of Doc Sifers," and in it he tells in characteristic vein of a quaint and lovable village doctor, giving anecdotes and descriptions of the doctor's ways and doings from the point of view of an old fellow-townsmen. Hon. A. W. Terrell, lately United States minister at Constantinople, contributes an "Interview with the Sultan," in which he reports verbatim the Sultan's views on the Armenian question, etc. The Swedish journalist, Jonas Stadling, describes, as an eye-witness, "Andrée's Flight Into the Unknown," and accompanying the article are a number of pictures from photographs of the balloon and its departure. Mrs. Cornelius Stevenson, a young American woman, whose home was in Philadelphia, happened to be in Mexico during most of the period of the French intervention, and she has written for this number the first of several papers on Maximilian and his court. The paper is entitled "An Imperial Dream," and deals with Napoleon's schemes for gaining glory on this continent. A dramatic paper by Miss Anna L. Bicknell describes with a great deal of vividness "The Last Days of Louis XVI and Marie Antoinette." "The Story of Chitral," by Charles Lowe, has timely interest. A new story by Chester Bailey Fernald, "The Cherub Among the Gods," introduces some of the characters made familiar in "The Cat and the Cherub." "The Romance of a Mule-Car" is a characteristic story by Frank R. Stockton. A poem by Bret Harte and a letter from Mark Twain are other features of the number.

Harper's Weekly for November 6th will contain an article entitled "With the North Atlantic Squadron," being an account of the recent fleet-maneuvres, with four full-page illustrations by Rufus Zogbaum. The letter from Tappan Adney, the Klondike special correspondent, describes the train from Dyea as far as Sheep Camp. There will also be included a map specially prepared by Cyrus C. Adams, comparing Nansen's route with those of previous explorers.

Harper's Monthly for November is a notably excellent number. To it Richard Harding Davis contributes a very interesting article entitled "With the Greek Soldiers," embellished with numerous illustrations from photographs taken by the author. Toru Hoshi, the Japanese minister to the United States, tells about "The New Japan." The author deals with the origin of the present government, the position Japan has achieved among the leading nations, and the future relationship of Japan and the United States, with especial allusion to the Hawaiian question. "The Century's Progress in Biology" is treated in a scholarly article by Henry Smith Williams, M. D., who traces the development of the theory of evolu-

tion, which he regards as having created the greatest revolution in thought in modern times. Hon. Carl Schurz, in a notable article on Daniel Webster, gives the first adequate estimate of the life, character and motives of the most complex of the American statesmen of the past generation. The serials are the second instalment of "Spanish John," a novel of adventure dealing with the fortunes of the Scotch pretenders to the English throne, by William McLennan, illustrated by Myrbach; and "The Great Stone of Sardis," by Frank R. Stockton, illustrated by Peter Newell, which reaches its final instalment. The short stories are "A Pair of Patient Lovers," by W. D. Howells, illustrated by Albert E. Sterner; "Joshua Goodenough's Old Letter," by Frederick Remington, illustrated by the author; "Who Made the Match?" by Ruth Underhill; "Number 1523," by Willis Boyd Allen; and "The Quarter Loaf," by Margaret Sutton Briscoe, illustrated by A. B. Frost.

On some accounts the most important feature of the American Monthly Review of Reviews for November is an illustrated article entitled "From the Lakes to the Sea," by Carl Snyder. Mr. Snyder describes the various inventions which have made feasible, through cheapened methods of construction, a great ship canal connecting the Great Lakes with the Atlantic Ocean. It would appear from the figures and estimates set forth in Mr. Snyder's article that the Chicago Drainage Canal has been a fruitful object-lesson to engineers. It shows how cheaply and rapidly canal construction can go on with the new devices for cutting and dredging. Arthur McEwen contributes a character sketch of Henry George, which, in view of the almost tragic death of Mr. George, on the eve of the great New York election, is most timely. There are other interesting leading articles. Among the topics discussed by the editor are the Greater New York political campaign, other municipal elections, the "Referendum" in American elections, the foreclosure of the Union Pacific, the crisis in Spain, recent events in Cuba, England's attitude towards bimetalism, the proposed international sealing conferences, politics in Eastern Europe, Australian federation, and the careers of Charles A. Dana, George M. Pullman and Neal Dow.

Mark Twain's new book, "Following the Equator," which is issued by the American Publishing Company of Hartford and the Doubleday & McClure Company of New York, is in the old vein of "Innocents Abroad," only not so fresh, nor so full of merriment.

### New Books and New Editions.

A Manual of Medical Jurisprudence, by Alfred S. Taylor, M. D., lecturer on Medical Jurisprudence and Chemistry in Guy's Hospital, London.

New American Edition, of 1897, from the Twelfth English Edition. Thoroughly revised by Clark Bell, Esq., of the New York Bar, 1897. Lea Brothers & Co., New York and Philadelphia.

This, the twelfth edition of a standard work, coming so soon after the preceding edition, which, as is well known, included not only the admirable work with which Dr. Thomas Stevenson had enriched the twelfth English edition, but was also a thorough revision of all previous American and English editions, is the best possible evidence of its hold upon professional favor. The steady demand for the book indicates that it is the authority accepted as final by the courts of all English-speaking countries. This is the important consideration for medical men, since in the event, more or less certain to occur, of their being summoned as experts or witnesses in medico-legal matters, it strongly behooves them to be prepared according to the principles and practice everywhere accepted. Mr. Clark Bell, of the New York bar, than whom few, if any, are better qualified for the difficult task, has again revised this standard and classical work to the date of issue. Space does not serve to go into detail, but among the important additions to the previous edition may be mentioned, particularly, "The Red Blood Corpuscle," p. 220 *et seq.*; "Insanity and Responsibility," pp. 700 *et seq.*, 746, 755, 762 *et seq.*; "Inebriety and criminal Responsibility," pp. 770 *et seq.*, 774, and "Medico-Legal Surgery," ch. 49, pp. 790 *et seq.*, 797. The work, as heretofore, will be found to be thorough, authoritative and modern.

American State Reports, Selected and Annotated by A. C. Freeman and the Associate Editors of the "American Decisions." San Francisco: Bancroft-Whitney Co. 1897.

This is Vol. 56 of the American State Reports, and contains cases selected and re-reported from Alabama, California, Florida, Illinois, Indiana, Kentucky, Maine, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, Pennsylvania, Tennessee and West Virginia. Among the principal and characteristic notes in this volume are those to *De Martin v. Phelan* (115 Cal. 538; 56 Am. St. 117-119) on the fiducial relations of mortgagee and mortgagor; *Smith v. S. F. & N. P. Ry. Co.* (115 Cal. 584; 56 Am. St. 138-153), on agreements to control the future voting of stock at corporate elections; *Baltimore, etc., R. R. Co. v. Scholes* (14 Ind. Ap. 524; 56 Am. St. 312-316), on architects' certificates and engineers' estimates. *McCall v. Hampton* (98 Ky. 166; 56 Am. St. 339-361), on assignment of expectancies; *Harris v. Murphy* (119 N. C. 34; 56 Am. St. 659-672), on subsequent parol agreement to vary a writing. *Cooper v. Hamilton* (97 Tenn. 285; 56 Am. St. 798-803), on acknowledgments — interest of officer disqualifying him from taking; *Southern Build. &*

*L. Assn.* (97 Tenn. 367; 56 Am. St. 806-810, on liability of owners of elevators used for passengers or employees; *Stout v. Philippi M. Co.* (41 W. Va. 339; 56 Am. St. 853-878), on the law of *lis pendens*.

A Treatise on the Law in Relation to Promoters and the Promotion of Corporations, by Arthur M. Alger. Boston: Little, Brown & Co. 1897.

This is, we believe, the only book devoted exclusively to the subject of the reciprocal rights and obligations of the promoter of corporations and the corporation, and of the shareholder and the promoter. The subject is of first importance because of the fact that a very large proportion of the business undertakings of the present time are inaugurated and carried on under the form of corporate organization, and the further fact that the public is constantly responding to the invitations of the promoters of such corporate enterprises to contribute the funds necessary for their prosecution. In view of these conditions, the subject is worthy of fuller treatment than has been accorded it in the text-books on corporations. To this full treatment Mr. Alger has brought careful study and research, as well as an extensive experience as counsel. The book, an octavo volume of 300 pages, is not a mere digest of decisions, but is a careful analysis of the cases, and classification of the principles deducible from the cases.

Celebrated Trials, by Henry Lauren Clinton, author of "Extraordinary Cases." New York and London: Harper & Brothers. 1897.

This work contains sketches of various celebrated trials with which the author (the distinguished New York lawyer) was professionally connected between the years 1857 and 1874. For the last hundred years there have been no trials in this country of more intense and thrilling interest than some of those recorded in this volume, especially the trial of Mrs. Cunningham for the murder of Dr. Burdell, in 1857; the trial of Dr. E. M. Brown, in 1863, for the murder of Clementina Anderson; the trial of Isaac Van Wart Buckout for the murder of Alfred Rendall, in 1869; the trial of William M. Tweed, in 1873, for official misconduct (which resulted in his conviction and imprisonment); the case of John Kelly, the distinguished leader of Tammany Hall, against Mayor Havemeyer for libel (the mayor died during the argument of the case); and the trial of Richard Croker, the noted politician, for the murder of John McKenna, in 1874. This work is full of humorous, startling, thrilling and tragic incidents, as well as of interesting and spicy anecdotes, some of which we may, at a future time, quote for the benefit of our readers. The book is gotten up in the highest style of the "art preservative," being embellished with numerous portraits of famous lawyers, and would grace the shelves of any lawyer's library.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, NOVEMBER 13, 1897.

### Current Topics.

THE subject of "Expert Testimony" is receiving a large amount of attention not only from lawyers and judges, but from the press and the public. It would be useless to attempt to deny that the result of nearly every important trial, in which these experts constitute a factor, is to still further discredit the experts as well as to condemn the system, or perhaps we should rather say, the lack of system under which they give their evidence. It is a common thing to witness these battles of the experts, who are employed for the purpose not simply of testifying to facts within their personal knowledge, but to give their own inferences from those facts. That these inferences should be contradictory and conflicting is no more to be wondered at than the fact that they are favorable to the side of the case by which the respective experts are retained. It is human nature that this should be so. The state of things herein referred to is witnessed in almost every case in which expert testimony is called in, whether in regard to disputed handwriting, alleged administration of poison, or, as in the famous Luetgert case, to which we made reference recently, the identification of certain remnants of bone, claimed by one side to be those of a human being, and by the other to be those of a hog. The cost of this class of testimony, great as it is, is perhaps its least objectionable feature; for it cannot be denied that the wordy battles of partisan expert witnesses, and their inev-

itable positive contradictions of each other tend to discredit the administration of the law and to defeat the ends of justice. Several remedies for this state of affairs have been proposed, the one which appears to meet with the most favor being the proposition to change the statute so as to require all medical testimony called in medico-legal cases to be brought in the form of a commission to examine the subject and the matters to be brought to the attention of the jury in the trial; that the medical experts in a case should be appointed by the court as referees are, and be paid by the county without being allowed to receive fees from either prosecution or defense. It would certainly seem that in some such way unbiased and independent experts would be far more likely to be obtained than by the present plan. We do not at all agree with those members of the profession who, while conceding the growth and existence of some abuses under the present plan, argue in favor of "letting well enough alone." Some remedy is certainly called for, both in the interests of humanity and justice. The so-called German method has found not a few advocates in this country. It is a modification of the plan above referred to, contemplating the appointment of permanent experts by the State, without official title or regular salary. In most cases the expert is appointed by the particular judge sitting in the case. He may appoint any man suggested by both parties, or he may also appoint a third person not suggested by either; but if both parties agree on one man he must be appointed. The serious, if not fatal, objection to this method is that it denies the right (a constitutional right in this country) of a party to select his own witnesses. If this objection could be obviated, the plan, or some modification of it, ought to be tried. Certainly, under the present lack of system, whereby it is not only possible, but the ordinary thing, to see equal numbers of doctors and other experts testifying exactly opposite to each other, one cannot greatly blame the court if, following the example of the presiding judge in a recent trial in the city of New York, it instructed the jury to put all the expert testi-

mony out of their minds, and pay no attention to it. When large numbers of experts flatly contradict one another on vital points it is quite natural for the jury to disregard this class of evidence altogether. Expert testimony should be "the colorless light of science brought to bear upon the case." As has been well remarked by another: "The scientific witness should come into court with clean hands and a pure heart; with sincerity of purpose; with a tendency and desire to ascertain and recognize truth wherever it may be found; to conceal nothing; mindful of his oath, which requires him to speak not only the truth, but the whole truth." Unless perfectly independent, honest and unbiased, experts can be, in some way, obtained, the public will be fully justified in regarding all proceedings connected with them as worse than farcical.

The announcement that the annual address before the New York State Bar Association, on January 23, 1898, will be delivered by the Hon. John G. Carlisle, former secretary of the United States treasury, will be hailed with pleasure by members of the association and of the profession generally. The subject chosen has not yet been announced, but that the production will be an intellectual entertainment of the highest order goes without saying. Mr. Carlisle is an eminent jurist, statesman and orator. As a senator in congress from Kentucky, he did honor to his State and himself. As a cabinet minister, though his career elicited the usual criticisms from political opponents, he exhibited abilities which gave him the highest rank as a national fiscal officer. The high appreciation in which the New York State Bar Association is held by distinguished statesmen, jurists, orators and scholars, many of whom have accepted invitations to address its members at the annual meetings, has frequently been shown in the past. Among the eminent speakers who have made addresses at these annual meetings we find the following: David J. Brewer, justice of the United States Supreme Court; Hon. Thomas M. Cooley, of Michigan; Hon. Joseph N. Dolph, of Oregon; Rt. Hon. John W. Mellor, Q. C., of

London, England; Hon. Alton B. Parker, chief judge-elect of the New York Court of Appeals; Hon. Henry Hitchcock, of St. Louis; Hon. David Dudley Field; Hon. Adlai E. Stevenson, former vice-president of the United States; Hon. William L. Wilson, former postmaster-general of the United States; Hon. N. C. Moak, of Albany; Hon. Robert G. Ingersoll. To these might be added a long list of distinguished members of the association and of the profession, who have read papers on vital legal subjects before the association, standing among institutions devoted to legal learning and the elevation of the legal profession. The State Bar Association, notwithstanding some disadvantages and puerile objections to it, has steadily made its way to a position that ranks it first among all similar institutions in the United States. At the recent annual meeting of the American Bar Association a very high compliment was paid it by one of the most distinguished members of that body. Its quarters in the capitol of the State, adjacent to those of the State library, are the favorite resort of its members and the profession throughout the State, who always find a courteous welcome and ready accommodations in furthering the legal business that brings them to the capital.

Governor Black will have still another important judicial appointment to make on January 1st next, when, by the elevation of Justice Alton B. Parker, of Kingston, from the Supreme bench to the chief judgeship of the Court of Appeals, a vacancy will be created in the office of justice of the Supreme Court for the Third Judicial District. The appointment will hold until a successor of Judge Parker can be chosen at the next general election, the successful candidate at that time serving until December 31, 1900. There is no dearth of aspirants, as might be expected, for the position is one naturally much coveted by members of the legal profession. Ulster county, the home of Chief Judge-elect Parker, is understood to have two candidates — Judge A. T. Clearwater and Deputy Attorney-General G. B. D. Hasbrouck. The

former was a candidate before the last judicial convention of the Third District, but was defeated. The name of State Senator Hobart Krum, of Schoharie, is also mentioned as a candidate. It will be remembered that Senator Krum was the regular Republican candidate in 1884, being defeated by Justice William L. Learned, of Albany. Other members of the profession whose names have been mentioned in connection with the vacancy are Judge J. Rider Cady, of Hudson, and Assemblyman Robert G. Scherer and Arthur L. Andrews, of Albany. Troy has at least two candidates — George Wellington and Edward Douglass. While Troy has already one justice of the Supreme Court in the person of Judge Edgar L. Fursman, whose term does not expire until 1905, Governor Black may decide to appoint a Trojan, and in case he does so conclude, it is believed that Mr. Douglass, who was a candidate before the last judicial convention, but gave way, it is understood, at the request of Governor Black, because it was believed the position belonged to Albany, has a very good chance of securing the appointment.

In the so-called McHugh will case, decided by the Wisconsin Supreme Court on October 22d ult., the court declared invalid the bequests for masses. The heirs-at-law of the deceased began an action to recover the property bequeathed to Bishop Messmer, to be used for masses for the repose of the soul of the deceased and certain of his deceased relatives. The lower court, in its findings, decided that the bequests to the Roman Catholic bishop of money to be used for masses for the repose of the soul of the deceased and other souls "is void for indefiniteness and uncertainty, and because there was no ascertainable beneficiary, but that the remainder of said bequests of \$4,150 — viz., the sum of \$500 to be used and applied for the Catholic Orphan Asylum at Green Bay, Wis. — is valid."

The Supreme Court of Ohio, in the case of *France v. State*, held the Medical Registration and Examination Law constitutional upon every point raised against it. The court was unanimous. The principal points

in which it was claimed that the law infringed upon the State Constitution were that it conferred judicial powers upon ministerial officers, and interfered with the rights of physicians living in other States who might wish to practice in Ohio. According to the Ohio Law Journal, about every point of consequence which might be urged against the law to show its invalidity was brought forward in this case, and it may be safely assumed now that the State Medical Registration Law will remain on the statute books. The powers conferred by this law (92 O. L. 44-49) were held to be administrative in character, and not judicial, within the meaning of section 1 of article 4 of the Constitution of Ohio; that the act is prospective in operation, and in no respect obnoxious to section 10 of article 1 of the Federal Constitution, which forbids the enactment of *ex post facto* laws and bills of attainder by the States; that the regulations adopted by this statute are proper, and do not infringe upon those privileges and immunities guaranteed by section 2 of article 4 of the Federal Constitution to citizens in the several States, nor those secured to citizens of the United States by the fourteenth article of amendment of that Constitution.

Our interesting and vivacious namesake, the Canada Law Journal, thus refers to the coming publication, as a supplement to the ALBANY LAW JOURNAL, of the great legal romance, "A Living Dead Man; or the Strange Case of Moses Scott:"

An enterprising contemporary hailing from the United States is on the eve of a new departure. The wise man these days is never surprised at anything. Peace of mind is only possible by a mental attitude of resigned acceptance of what the demon of change may inaugurate. If we have bicycles, roller boats, departmental stores, trolley cars and other electric appliances approaching the prophecy of Bulwer Lytton's "Vril" man, why should not a legal journal publish a legal romance. The name chosen by the author is after all comparatively tame, at least it is hardly up to, though it smacks of, the dime novel resplendent in many colors beloved as well by the bowery girl as by the cowboy of the wild and woolly west. It is simply "A Living Dead Man; or the Strange Case of Moses Scott, an Accurate and Truthful Narration of the Complications Caused by a Liti-



gant's Return from the Lethæan Shore." Warren's "Ten Thousand a Year" pales before it, and the upturned nose of Tittlebat Titmouse will be out of joint, and his carrotty hair forever remain green with jealousy.

We are under deep and lasting obligations to our contemporary for this very excellent "ad." and expect, as a consequence, a lively demand for the story from the Province. We are able to assure our Canadian friends that, while not at all of the dime-novel order, the story will be intensely interesting, and on the subject of which it treats will cover a large amount of very good law.

It will hardly be necessary to call the attention of the profession, particularly members of the bar of New York, to the article which we publish in this issue of the ALBANY LAW JOURNAL, in which is described the holding of the first term of the Supreme Court in Western New York. In this paper the scholarly author, Mr. L. B. Proctor, of Albany, has given a vivid picture of the pioneer judicial work of John Sloss Hobert, a distinguished jurist, whose name will be forever linked with the early history of jurisprudence in the Empire State. The article, we are able to assure our readers, will be found intensely interesting, and well worthy of permanent preservation. In addition to the learning which characterizes it, is the fine scenic description of the circumstances attending the laying of the cornerstone of jurisprudence in western New York.

One of the acts of the legislature of Massachusetts, at its last session, was the passage of a resolution providing "that the governor, by and with the advice and consent of the council, shall appoint three persons, learned in the law, to investigate and report upon a plan for the simplification of criminal pleadings, and prepare a schedule of pleadings to be used in criminal cases." In accordance with this legislative mandate, Governor Wolcott has nominated Henry E. Copple, of Brookfield; Judge Henry L. Sheldon, of Boston; Frederick E. Hurd, of Boston, and Joseph H. Beal, Jr., of Cambridge. This commission, which, as will be seen, includes a judge of the Superior Court, is

generally conceded by the profession to come up to the standard of ability necessary to do the work required. The fact is mentioned by the Boston Transcript, in giving credit where credit is due, that the movement in the direction of this much-needed reform is due as largely as to any other man in the State, to the Hon. Franklin G. Fessenden, of Greenfield, who, in speeches and writings, has ably advocated the simplification of pleadings. "In criminal indictments," says our contemporary, "especially in capital cases, we have been following too closely in this State old English law. Some of these instruments have long seemed absurd to the layman on account of their redundancy and technical involutions, and an escape from them that should not violate the declaration of rights would be welcomed by bench and bar and certainly by the juries. In England an act of parliament gave relief forty-five years ago. One of the reasons urged at that time for a change in procedure was that offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case. So many crimes were formerly punishable by death that the clemency of the judge provided the prisoner with the safeguard of an indictment that protected his rights at every point, but in following the old custom under modern conditions justice is frequently cheated, and the legitimate rights of the accused are no better cared for. To conform to the declaration of rights it is only necessary that the crime "shall be fully and plainly, substantially and formally described." Judge Fessenden believes that with proper legislation the present formal requirements can be done away with and the substantial matters only retained. But 'the work of reform should not be confined to procedure. Much ought to be done with reference to the substantive law of crimes. For example, the technical distinction between larceny, embezzlement and false pretences — which are merely different forms of theft — should be abolished.'" The new commission has an opportunity to perform a most important service for law and justice in the Commonwealth.

## Notes of Cases.

In *Clowdis v. Fresno Flume & Irrigation Co.*, decided by the Supreme Court of California in September, 1897 (50 Pac. R. 373), it was held that knowledge of servants put in charge of a bull to drive him to a certain place, that he is vicious, is knowledge of the owner, so as to make him liable to a stranger injured by him. It was further held that servants put in charge of a bull to drive him to a certain place, who on the way learn that he is vicious, render the owner liable to one thereafter injured by him on the trip, by continuing to drive him without taking precautions against accidents. The court said in part: "It is quite true that knowledge by or notice to a servant charged with no duty in the matter, of the vicious propensities of an animal owned by the master is not notice to the master. The rule, however, is that a servant's knowledge, to whom an animal is intrusted, of its ferocious disposition, is knowledge of the master sufficient to render the latter liable (*Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695; *Cooley, Torts*, p. 406, and note). In the present case *Lovelace and Treece* had been put in complete charge of the bull. It is a fundamental and most important principle of the law governing the responsibility of masters that whatever duty they owe to the public (or to their employes) must be performed, and a failure to perform, or improper performance, cannot be excused by a showing that execution was delegated to a servant, even of approved carefulness, knowledge or skill. It must further be shown that the servant, in the particular matter, exercised the full degree of care and showed the requisite amount of skill. And this is true, however subordinate or menial may be the rank of the servant. Whatever be his position, in that special employment he represents the master, and within its scope his knowledge is the master's knowledge, his acts the master's acts (*Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041; *Donnelly v. Bridge Co.* [S. F., No. 623], 49 Pac. 559). Every one, whether acting individually or through agents, is bound to exercise ordinary care to prevent injury to the person or property of another (Civ. Code, secs. 1708, 1714, 2330, 2338). Therefore when, as here, *Lovelace and Treece* had been sent upon an independent mission, and put in complete charge of the animal, they stood in the performance of their task in the place of the defendant, and the question of defendant's responsibility will be answered as may be answered the inquiry, What would have been the master's responsibility and liability had he personally been in charge of the animal? To this there can be but one answer: He would have been liable. Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness, and of the knowledge of that fact brought home to the master. There is yet another

and independent view of the matter which may be taken, and in this is eliminated all question of the master's knowledge. That view turns upon the master's liability for the negligent performance by a servant of a duty within the scope of his employment. The driving of the bull upon the highway was not within the employment of *Lovelace and Treece*, but it was their express task. In the performance of his duty, if injury was occasioned to one without fault by reason of their negligence, the master was liable. At the outset of the drive, when the men may be assumed to have believed that the beast was gentle, if it had suddenly and unexpectedly attacked and injured some person, it might well be argued that they were performing their task with due care, and that for the unexpected onslaught the master was not liable. But when thereafter, while engaged in this undertaking, they acquired knowledge of the animal's evil propensities, it became a question of fact for the jury whether or not they exercised the requisite degree of care in their subsequent management of it. The circumstance that the additional knowledge was acquired by them after the employment was undertaken, and was not known either to them or to their employer at the time it commenced, would not exonerate the latter. If the conductor of a passenger train should at any time during the journey discover a defective wheel, and, continuing the trip, injury should thereby result, the company would not be exonerated because the knowledge was acquired after the train had started. Yet there is no difference in principle between the cases, and what difference exists is merely in the degree of care exacted by law. Precisely such a cause of action as the one which we have been considering was that of *Ficken v. Jones* (28 Cal. 618); and another in which the question is considered with much elaboration is that of *Barnum v. Terpening* (75 Mich. 557, 42 N. W. 967).

A summons in a suit brought by *Bernard F. Martin* in the Municipal Court of the city of Rochester, to recover for goods sold to *David Goldstein*, was served Saturday. The defendant appeared in this action solely to object to the jurisdiction of the court, mainly upon the ground that, being a Jew, he uniformly observed Saturday as "holy time." The plaintiff set up by affidavit that the summons being made returnable on Saturday was, through inadvertence, without malice. A judgment rendered in favor of the defendant, vacating the summons and warrant of attachment, has been reversed by the Fourth Appellate Division, which held, in an opinion by Justice Adams, Justice Ward dissenting, that section 271 of the Penal Code, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or maliciously procures any civil action to which

such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor;" when construed in view of the fact that the first and third clauses of the section contemplate that the acts there recited should be done maliciously and on the principle that penal statutes should always be construed in favor of civil liberty, and that the section occurs in that part of the Penal Code defining crime against religious liberty and conscience, and that to constitute a crime there must be not only the act itself, but a criminal intent must accompany it, did not apply in this case, where the summons was inadvertently issued.

In the case of *Bond, Administrator, v. Hollo-way*, the Supreme Court of Indiana held that the transfer of a note payable in bank by one joint payee to the other, by a written indorsement signed by him, stating that "I assign over my interest in the within note to such co-payee," does not render the assignor liable as an indorser either to his co-payee or to a third person to whom such co-payee afterward, but before its maturity, sells the note and transfers it by a similar indorsement, with the addition of the words, "without recourse after maturity," and that subsequent purchasers take such a note with notice from the form of the indorsement that it is a mere assignment of the interest of one who does not become bound for the payment of the note.

The question of the right of the proprietor of a mineral spring to empty its waters into a stream flowing across the land of another, after the water has been used for bathing purposes, has recently been decided by the Supreme Court of Indiana. The mineral water spring was accidentally discovered near Martinsville in 1888 by persons boring for natural gas. The medicinal qualities of the water proved so valuable that an artesian well was constructed to bring it to the surface, a sanitarium was established and large numbers of patients visit the place to drink the water and also to take baths there. After being used for bathing purposes, the water is allowed to flow into a stream which crosses land not belonging to the owners of the mineral spring and sanitarium. One of these adjoining landowners sued them in equity for an injunction, asking that they be restrained from permitting any water to flow into the stream "which shall have been used in bathing and cleansing persons afflicted with infectious, syphilitic, or other similar disorders." The trial court granted the injunction, but the Supreme Court set it aside and directed judgment for the defendants, because the undisputed proof was that although the water had an unclean, slimy and repulsive appearance in some parts of the stream, it was in no way poisonous or injurious to live stock or human beings.

In *Henry W. Sage, appellant, v. The Mayor, etc., of The City of New York*, the Court of Ap-

peals rendered an important opinion on the subject of riparian rights. The following is from the official syllabus: "When lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark. The grantees in the Nicolls charter of 1667 to the inhabitants of New Harlem took title to the uplands lying upon the river, but not to the tideway or to any land below high-water mark. In other words, they became simply riparian proprietors upon tide water, with such title, rights and privileges only as belong at common law to the owners of upland washed by waters where the tide ebbs and flows. While the title of such owners did not extend beyond the dry land, they were entitled, as against all but the crown, as trustee for the people at large, to certain valuable privileges or easements, including the right of access to the navigable part of the river in front, for the purpose of loading and unloading boats, drawing nets and the like. These riparian rights were property belonging to the riparian owner, who could not be deprived of them without his consent or by due process of law, although he could only use them subject to the rights of the public. In the absence of a grant the city of New York has the absolute power to improve the water front for the benefit of navigation, free from any interference by the riparian owner, whose sole right as against the State or its municipal grantee, as the trustee for the public, is the pre-emptive right to purchase, in case of a sale, when conferred, by statute. The following cases explained and distinguished: *Rumsey v. N. Y., etc., R. R. Co.* (133 N. Y. 79); *Saunders v. N. Y. C., etc., R. R. Co.* (144 N. Y. 75); *Langdon v. The Mayor* (93 N. Y. 129); *Williams v. The Mayor* (105 N. Y. 419); *Yates v. Milwaukee* (10 Wallace, 497). In this State, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tide-water for the benefit of commerce. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public as organized and represented by government, they have no rights that do not yield to commercial necessities except the right of pre-emption when conferred by statute, and the right to wharfrage when protected by a grant and covenant on the part of the State. When any public authority conveys land bounded by tide-water, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare. The purpose for which the supreme authority holds the title to lands under tide-water is inconsistent with the power to grant any easement or right to those lands that will prevent it, when the necessities of commerce demand, from

"wharfing out" to deep water, so that vessels can load and unload and the interests of navigation be promoted. Under the facts of the present case, in which the title of the city to the tideway is derived from the Dongan and Montgomerie charters, plaintiff, the upland owner, whose land is embraced within the Nicolls grant to the inhabitants of New Harlem, has no easement over the tideway as against the city, for no such limitation upon the prerogative of the sovereign was intended, and the conveyance of the uplands in question to a subject should, from public considerations of the highest importance, be held to have been made with the implied reservation of the right to freely improve the navigation of the great seaport, within the general limits of which said uplands were situated. The permanent control of navigable waters, if alienable at all by the State or sovereign, should only be so by an instrument showing a clear and undoubted intention to that end, and in the absence of express language the strict construction required by law in favor of the sovereign, as trustee, limits the effect of the grant by reserving or excepting therefrom the right to fill in the land out to deep water and build wharves thereon in aid of navigation and as an indispensable incident to commerce. The provisions of the Dongan and Montgomerie charters in reference to the grant to the city of New York of the lands in the tideway were confirmed by the colonial legislature by Laws of 1732, chapter 584, and also by the first Constitution of this State, in 1777, which was the result of all the legislative power that the people of the State of New York, untrammelled by any higher law, could exert, and which did not require compensation for private property taken for public use. The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as the ordinary action of water, but does not apply to land reclaimed by man through filling in and making dry land once under water. The city of New York was not a wrongdoer in filling up the water front and constructing piers, as its action was justified by its ancient charters as well as by legislation, to which there is no constitutional objection. The land thus made, without trespassing upon the rights of any one, did not become the property of the adjoining upland owners through accretion, but remained the property of the city for the benefit of the public as dry land just the same as when it was land under water.

The constant publication of cases in support of clear law is excessively tiresome, and irresistibly calls to mind the amusing colloquy in "Much Ado About Nothing:" Don Pedro—"I think this is your daughter." Leonato—"Her mother hath many times told me so." Benedick—"Were you in doubt, sir, that you asked her so often?"—*Law Times* (London).

## THE FIRST TERM OF THE SUPREME COURT IN WESTERN NEW YORK.

By L. B. PROCTOR.

NO part of the history of Western New York is invested with more interest than is found in the annals of the legal profession of that populous and progressive portion of the State. Though the fame of lawyers and judges is almost as fugitive as the Sybilian leaves, a careful examination of the fading reminiscences of the bench and bar of Western New York brings into clearer view the character and career of jurists distinguished for learning, eloquence and legal accomplishments that have outlived their day, embellishing the civil and legal history of the State of New York. But no event in the history of the western section of the State has greater interest than the one we are about to relate, when John Sloss Hobert, a learned and distinguished judge, left his delightful home in the city of New York and traveled westward through distant forests, crossing lakes, journeying along the shores of rivers, over the warpaths of the Indians, to the country of the Genesees. His object in making this long, tedious and dangerous journey was to hold the first term of the Supreme Court of the State of New York ever held west of Cayuga lake. That memorable term held its sittings at Geneva, then a little hamlet, on September 20, 1795. Judge Hobert was commissioned October 17, 1777, a few weeks after John Jay was appointed chief justice of the State of New York. With Jay, Hobert pronounced the law from the bench until the former was appointed chief justice of the United States, September 26, 1784. In scholarly attainments, legal learning and judicial ability, Hobert was the equal, if not the superior of Jay. As a judge he had an intuitive sense of the real facts and principles involved in the cases tried and argued before him. His charges to juries were characterized by sagacity, learning, discretion and simplicity. There are two modes of charging juries—one by stating the facts and the law in a general manner; the other by collating carefully arguments on both sides, so as to exhibit their relative bearings, and then applying the law to the actual facts.

Hobert adopted the latter course. In all exhibitions of his intellectual strength there were happy, energetic combinations with a well-disciplined imagination, polished wit and humor. As a speaker and writer there was a corresponding simplicity and energy in his style. Though he had a prolific fancy, he used it sparingly, for he understood that although the most beautiful of these flights interspersed through argument or address may give an audience or a jury momentary delight, the transient thrill they create produces no lasting effect; that,

on the contrary, they break the unity and divide the force of an argument.

Hobert's opinions, especially those pronounced after his appointment as a judge of the United States District Court, were always equal to any occasion which demanded rare judicial accomplishments.

As a statesman and diplomat John Jay stands in history high among illustrious Americans. The many important official positions he occupied called into action all his talents, learning and energies. He promoted the general interests of the colonies during the early years of the Revolutionary struggle, at intervals from 1774 to 1779, as a delegate to the continental congress. As minister, at different periods, to Spain, France and Great Britain, and as chief justice of the United States, he was much in the public eye. His career as governor and chief justice of the State of New York has passed into enduring history. As one of the authors of that great work, the *Federalist*, his pen was equal to those of Hamilton and Madison.

There was a period in the career of John Jay in which he experienced the mutability of popular favor in a most signal manner — a period in which he was one day the idol of the people and the next day an object of their volcanic hatred and furious denunciation, followed by riots and popular outbreaks unprecedented in our history. Nor was this popular storm confined to Jay alone, for Washington, then president of the United States, shared in the storm of denunciation which swept over the country. Time has shadowed this singular event into forgetfulness.

The treaty of 1783, which terminated the Revolution, provided that the British should evacuate all forts within the territory of the United States, many of which were on our frontier. But for some reason they disregarded this important provision of the treaty; not only this, England openly authorized privateers to seize neutral vessels trading in the French West Indies, and insisted upon the right of search and impressment of seamen, which she claimed as an international right, while boldly and impudently disregarding her own obligations. Early in the year 1794, not long before Jay was elected governor of New York by the enthusiastic vote of the people, Washington appointed him minister extraordinary to Great Britain, for the purpose of negotiating a termination of these outrages, if need be, by a new treaty. Jay embarked at New York on his all-important mission, with an enthusiastic demonstration of popular favor, and he was received in England with all the respect due his distinguished character and office. Negotiations were opened with the British ministry, which resulted in a treaty, known as "Jay's Treaty," apparently satisfactory to both nations; but, unfortunately, as we shall see, for some reason the British retained a most important advantage

under the treaty. This was the recognition, by implication, of the right to search our vessels on the high seas. The result of Jay's efforts was submitted to the senate for ratification in June, 1795, and, strangely enough, received the sanction of that body, and soon afterwards the signature of Washington. The treaty provided for the speedy evacuation of the forts on what was then our northern and western frontier. It arranged for compensation for illegal seizures and regulated commercial questions to some extent, but, as we have said, it recognized, by implication, the right to search our ships on the high seas. When it is remembered that permitting the British this right, so humiliating to our national pride, was the principal cause of a future war with her, known as the War of 1812, we can easily see how it aroused the indignation of the American people, so soon as they became aware of the real terms of the treaty. Jay landed in New York before the terms of the treaty had become fully known. He was then governor of the State, and was received with unprecedented marks of public favor. Within a few days, however, the real condition of the treaty which he had been instrumental in negotiating became public, and then the popular indignation rose to a fearful pitch. Copies of the treaty and effigies of Jay were, in many parts of the country, publicly burned. And the most bitter charges were made against Washington, "in terms," as he said, "so exaggerated and indecent as could scarcely be applied to a Nero, a notorious defaulter, or even to a common pickpocket." But in this case the wild populace had the "Father of their Country" and John Jay, one of their greatest statesmen, to deal with. Washington, believing the treaty, on the whole, the best that could have been obtained under the circumstances, sustained it with all his influence, and the house of representatives, on April 22, 1796, by a vote of 51 to 18, decided to carry it into effect; but the popular outbreak against it had largely subsided before congress took this decided action. This result was largely due to the influence, exertions and eloquence of John Sloss Hobert, who, in frequent addresses to the people, demonstrated to them (the belief held by Washington) that the treaty, on the whole, contained the best policy which could then be adopted. No speaker was, perhaps, better prepared to subdue tumultuous popular excitement than was Hobert on these occasions. His eloquence consisted in the apparently deep self-conviction and emphatic earnestness of his manner, the natural energy of his style, the close and logical connection of his thoughts, and the ease with which he enchained the attention of his hearers.

The relations between Jay and Hobert were intimate and confidential. We have already seen what powerful support he gave Jay and his treaty in the fierce, tumultuous attack of the people upon them. There was still another occasion upon which Ho-

bert became the successful champion of Jay in an almost frenzied attack of the clergy upon him, for what they deemed a high-handed invasion of their rights. They were not alone in this attack, as we shall see.

On November 12, 1795, Jay, who had recently entered upon his duties as governor of the State of New York, issued his famous Thanksgiving proclamation, the first executive instrument of the kind which appeared in this State, or perhaps in any other. Prior to this time Thanksgiving proclamations had always been appointed and solemnly announced from the pulpits by the clergy. This announcement enabled them to display their eloquence and their pious fervor, to take occasion to rebuke certain short-comings and delinquencies in their flocks, and to interweave severe castigations upon public transgressions. All this was suddenly extinguished by Jay's proclamation. The indignant clergy preached against it; they prayed against it; they composed, and caused to be sung, hymns against it; they arrayed the solemn-visaged deacons against it; but their most powerful allies were the ladies of their congregations. They fairly shieked their indignation against it, and sneered significantly at Jay, who was only the governor of the State, and had nothing to do with Thanksgivings, except to devour his turkey — and they asserted, with emphasis, that he was a great gormand. Some of the newspapers espoused the cause of the clergy. The war upon Jay and his proclamation grew so fierce that matters began to assume a serious aspect for the once popular governor.

At this juncture John Sloss Hobert came to the rescue. He was a favorite with the people, and his written as well as his oral productions were always received with favor by the people. He wrote a series of articles, entitled "Thank-Offerings," in which he proved that the executive of the State was the proper, indeed, the only source whence Thanksgiving proclamations should come.

On November 18, 1795, Hobert wrote his famous letter in defense of Jay and his treaty, which virtually terminated the controversy in favor of both. In style it was elegant, in argument profound, flexible and convincing; in sarcasm and irony it was as pungent as the letters of Junius or the satires of Juvenal; in wit and humor it was unequalled. Byron's burning attack on the "English Bards and Scotch Reviewers" was not more effective in subduing his gifted, bitter and malignant critics than Hobert was in silencing the assailants of Jay and his Thanksgiving proclamation. Hobert closed this singularly effective and interesting letter as follows:

"The times and the pugnacity of the clergy, among whom many theological bullies exist, remind me forcibly of the famous burlesque in Hudibras on the enraged, pragmatistical clergy of his day:

" 'When gospel trumpeters abounded,  
And long-ear'd rout to battle sounded;  
When pulpit drum ecclesiastic  
Was beat with fists instead of stick,  
Then did the preachers abandon dwelling,  
And out they ran, hell-bent on quarrelling.' "

Such was the distinguished jurist to whom was assigned the duty of presiding at the first term of the Supreme Court in that now beautiful region — Western New York — then almost an interminable wilderness. His presence, and the events which ushered in the dawn of jurisprudence, in what is now a great State of itself, were invested with much that gives almost dramatic interest to the history of the bench and bar of the State of New York.

At the time of which we are writing, and until after the adoption of the Constitution of 1821, the judges of our State Supreme Court, including the chief justice, were compelled to visit all parts of the State where there was a county seat to hold their courts, often making their journey on horseback through dense forests.

Chief Justice Kent, before he was appointed chancellor of the Court of Equity, when on his way to hold court at Canandaigua, on one occasion lost his way in the forest through which he was obliged to travel, his route being through what was known as bridle paths. Darkness came on, and he would have been compelled to spend the night in the gloomy woodlands had he not discovered a light reflected from the log cabin of an early settler, near which he found himself in his wanderings. In this humble abode he obtained shelter for the night, while his horse was comfortably provided for in a hovel called a barn.

To reach Geneva, Hobert, after leaving Cayuga lake, over which he and his horse were conveyed by a primitive ferry-boat, was obliged to travel through what may be called primeval forest, which he termed "a beautiful though uncultivated region." He had traveled but a short distance when his horse lost one of his shoes, which his rider regarded as a great calamity. A little later he met a man with a gun on his shoulder and a number of beautiful pheasants which he had killed strung on his other shoulder.

"Can you tell me, my friend, where there is a blacksmith shop?" asked Hobert.

"Why, yes; you are all right. You are already in the shop of a very good blacksmith. You'll find his forge a little way on," said the man.

Hobert continued on his way. After traveling a half-hour he came to a man hammering a hot iron on an anvil. There was a bellows stationed between two trees and a general invoice of very good tools lying about. After politely saluting the man of iron, the judge said:

"You are a blacksmith, I see. Where is your shop?"

"My shop? Why, man, you've been in my shop

ever since you crossed the lake out there. I've got the biggest shop in all the country. But my tools and things are in this part of my shop. You see I've got all the room I want. I need a few boards overhead here, but there is nothing of that kind hereabouts. My work is all right, just the same. Anything I can do for you? You've got a likely looking horse there. I've got one out here; he's as gay as a lark. Ever do anything in the way of swapping horses, sir?"

"No, my friend; I am not much of a horse-trader. But you could do me a great favor by putting a shoe on one of my horse's feet," said the judge.

"I'll do it, sir, and it will stay when I get it there."

It was not long before the man placed a shoe on the horse's foot in a manner that delighted the judge. He paid the man's charges, mounted his horse and continued his journey.

There was a kind of magical pleasure to Hobert in his journey through the woodlands. He was traveling at that season of the year when the leaves of summer begin to wear varied colors and fall from the trees like the hopes of early years, which often fade and fall before the autumn comes. Leaving the more dense forest on his near approach to Geneva, a beautiful and striking picture opened to his view, which he described in a charming, almost prophetic, letter to Governor George Clinton, in part as follows:

"As I issued from my woodland route a few miles from Geneva the scenery before me was as beautiful as a soft Italian landscape. The little settlement of Geneva is as charmingly situated as its Switzerland namesake. From it the lake, that takes its name from the settlement, is seen in all its unequalled loveliness. It extends in a southerly direction until nearly lost in the distance, and the delightfully wooded hills sloping gently from its shores appear in misty outlines. Here, in this Sylvan place, more inspiring to the poetic muse than to the genius of jurisprudence, I am to hold the first court of record ever held in it."

How glorious is the thought that the law goes hand in hand with the advance of civilization.

Judge Hobert found himself at Geneva at the close of a pleasant September day. Comfortable quarters had been prepared for him in the famous Patterson Hotel, which was constructed entirely of unhewn logs. It was only one story in height, but covered considerable ground, and it was roomy and comfortable. The circumstance of holding a term of the Supreme Court at Geneva, presided over by a great judge, a friend of the governor of the State and of a chief justice of all the State courts, created profound attention throughout the country. A large log building was erected for a court-house, in one corner of which was the county clerk's office, and in another was the sheriff's office. The bench was of roughly-hewn logs.

with logs more carefully hewn for a seat for the judges. Behind the bench there was an opening that looked out upon the lake and admitted light and air. The jury-box consisted of logs hewn to render them seats. The next morning, at the sound of a horn, the judge was escorted to the court-house by the sheriff and the members of the bar present. He took his seat on the bench with the ease and grace with which he sat on the bench in the metropolis of the State, surrounded by a brilliant bar and all that renders a temple of justice impressive. The crier made the usual proclamation, and the first term of the Supreme Court of the State ever held in Western New York was opened for business.

To Judge Hobert the assembly in the courtroom was of singular interest. There was the farmer from the fields from which the forest trees had just been cleared; there was the shrewd adventurer, the hunter of the deer, the beaver, the panther and the bear; the fisherman and trapper from the lakes; there, too, was the stalwart Iroquois, whose tribes formed the most powerful Indian confederacy ever known in America — so powerful that for over a century it held the balance of power in the struggle between France and England for the possession of North America. Over each and every one in the room there presided a sense that they were in a temple dedicated to justice, and that they were in the presence of one of its ministers, invested with the power to enforce its awful mandates, which protected them and their homes in the distant wilderness. Over all there was an air of respect and veneration for the place and its surroundings.

With dignity, urbanity and judicial precision Judge Hobert delivered his charge to the grand jury. It was full and minute in regard to their duties, admirably adapted to their minds and their situation in life. On the whole, it was a model as well as a historic charge: "There is much in the occasion which has brought you here; much that places upon me a responsibility more weighty than has ever been placed upon me in my judicial career, and you, gentlemen, share this responsibility with me. Humble as are our surroundings, they rise into a degree of grandeur, not so much from the importance of the work you are to perform here as from the thought that you are the first grand inquest ever impaneled in Western New York, a region which time will embellish with cultivation, by intelligent people, institutions of learning, art, science and all that adorn and elevate society. We are here to lay the corner-stone of jurisprudence, not only for the present, but for the future of this beautiful region, which is now, may I say, a magnificent wilderness, and to set the grand machinery of the law in motion for all time. You have come here, gentlemen, as members of that great institution, the jury, the glory of American law, which places and preserves in the hands

of the people a share in the administration of justice, which prevents the encroachment of the powerful upon the weak. Your participancy in this occasion will in future years come to you as a proud reminiscence of the past."

After the petit jury were sworn there was a cause taken up which occupied the attention of the court for that day.

During the forenoon of the second day of the term two gentlemen on horseback arrived at the hotel. Dismounting, they gave their high-spirited horses to the care of an attendant who accompanied them, and inquired for the landlord, who soon made his appearance. To the question of one of the gentlemen whether he could entertain him and his friend for a day or two, he replied that he would do the best he could for them, but his accommodations were not such as their appearance gave him to understand they were accustomed to receive. He was answered that any accommodations he could give them would be satisfactory.

The dress, manner and bearing of the strangers indicated that they were men of distinction. One of them was apparently about forty-two years of age; the other was perhaps three or four years his junior. There was something in the appearance of the elder stranger that attracted the attention of the people in and around the hotel—an easy self-possession, an unassuming natural superiority in his bearing, and a military precision in his step. His features were striking, his broad, high forehead and presiding brow indicated thought and courage, while a quick, clear glance from a piercing black eye seemed to penetrate the very thoughts of those upon whom he directed his attention. His frame was below the medium height, well-knit and finely proportioned.

The younger stranger was tall and commanding in person. In his presence there was something that inspired respect. His countenance was handsome and bore the impress of intelligence, determination and courage.

After dinner the two gentlemen proceeded to the court-house. As they entered a courteous bow of pleasant recognition passed between the judge and the elder gentleman. Taking seats politely furnished them by the sheriff, they gave their attention to the proceedings of the court. Their appearance, and the salutations that passed between the judge and the elder stranger, created much curiosity in the minds of the people present.

"Who are they?" "What are they?" "What brought them here?" were questions that silently ran through the room.

"Are they government land surveyors or explorers? I think that small man is a lawyer. If he is, I tell you he is one of the best. Did you notice the polite bow the judge gave him when he came into the room? That means something,"

whispered one of the court officers to a man standing near him.

But to a juror on the panel, before whom a case was on trial, the elder stranger was an object of such deep and absorbing interest that it was difficult for him to give proper attention to the case. His eyes were constantly fixed on the stranger with a pleasant, yet startled, expression. Thus matters continued until court adjourned for the day.

The moment the juror was released from his duties he hastily approached the object of his interest, exclaiming: "Col. Burr! My old commander! Quebec! Montgomery! God bless you!"

Surprised and somewhat startled at the vehement joy the man manifested, Col. Burr (for it was that distinguished character whom the man addressed) extended his hand to him, saying:

"I am glad to see you, sir. Your face is familiar. I am sure we have met before. From your expression concerning Quebec and Montgomery you must have been near me when our gallant general fell," said Burr.

"Near you? I was very near you when we were driving the British before us like sheep. I can almost hear our cheers for the Continental Congress now. On they ran, until, for some reason, I never knew what, we came to a halt, and one of their gunners ran back and fired a cannon loaded to the muzzle with grapeshot, killing our general and all who were near him but you and one or two others. Don't you remember, when you were trying to carry off the dead body of the general, who fell facing the enemy, back to our lines, a soldier came to your assistance? Well, that was myself. We didn't carry him away, for we were surrounded by the British, but we got his sword, though he held it in his hand with an iron grasp. Now don't you remember me?" said the man.

"Indeed I do. Your name is Sidney Chapman, and I remember how you saved my life by shooting a British soldier who was about to run me through with his bayonet as I was trying to lift the general from the ground. Forget you, my brave, brave friend! I have never forgotten you for one moment. I have often wished to meet you since we parted after our long march through that wilderness. I have often related that dreadful struggle over the body of Montgomery, though I seldom speak of my service," said Burr.

"But your soldiers often do. They love to speak of you as the best fighter in the army—one that they would follow in any charge up to the muzzle of the enemy's guns and the point of their bayonets. It was an awful struggle, as you say, over the general's body. I have often wondered why we were not killed, when nearly every one else around us was, but the way you used your pistols and sword, and the way I punched about



me with my bayonet saved us," said Chapman.

Burr was deeply affected by this interview with the old soldier. It brought before him the picture of Montgomery falling when victory was in his grasp, his dead and dying comrades, and the awful struggle that the soldier related. Together they repaired to the hotel, and there fought their battles over again.

Soon after the close of the war Chapman emigrated to Western New York, then a dense wilderness, took possession of lands to which he was entitled for services as a soldier during the Revolutionary War, and made the desert bloom. He became a highly respected citizen, and as such was drawn as a juror for the first term of a court of record in Western New York. He was a brother of the Hon. Lemuel Chapman, who at a later period emigrated to Western New York and settled near Canandaigua. With Sir Charles Williamson, the great landholder of the Pultney estate, he represented the county of Ontario in the assembly of 1796-'97-'98.

The gentleman who accompanied Burr to Geneva was the celebrated Comfort Tyler, who, as an eminent engineer, laid out the fortifications at West Point and superintended their construction, and who subsequently accompanied Burr in his memorable trip down the Mississippi. He was tried with Burr for high treason, and with him was acquitted.

Burr and Tyler visited Geneva during the sitting of the court we have described in the interest of a company organized for the purpose of constructing a bridge over Cayuga lake, at that time and long after regarded as a Herculean undertaking. He and Tyler were the principal stockholders in the company. After encountering many difficulties, they succeeded in obtaining a charter for their company from the legislature of 1798. As soon as this was obtained, Burr, Gen. John Swartout and Comfort Tyler took the entire stock of the company, which amounted to \$375,000. On May 17, 1799, work on the bridge was commenced, and it was completed October 20, 1801, at a cost of \$285,000.

This great bridge, then the largest in the Union, erected largely with the means and influence of Burr, was an avenue that led to the rapid settlement of Western New York, and, we may well say, of the far west.

At Geneva Burr met, by appointment, Sir Charles Williamson, who, as we have seen, was the principal manager of the Pultney estate and representative of the Holland Land Company, which, with the Pultney estate, owned nearly all the land in Genesee county, embraced in the territory of what is now Western New York. Burr's business with these men was connected with the plan of constructing a turnpike from the western termination of the great bridge to Canandaigua.

Burr and Tyler remained at Geneva four days,

when Judge Hobert's court adjourned, and with him they left Geneva on their route homewards.

As we have said, Hobert was appointed judge of the United States District Court in 1798. His learning and rare judicial ability adorned the bench down to the time of his death, which took place January 19, 1805. His opinion in the famous case of *Raymond Rodney v. The Atlantic Transportation Company*, which was tried in New York city in September, 1799, was regarded as one of the ablest judicial efforts of the times in which he lived. It was so regarded by Josiah Ogden Hoffman and many other eminent lawyers engaged in the case. But there was nothing in all the long and distinguished life of Judge Hobert to which he referred with more pleasure than the first term of the Supreme Court of the State held in the wilds of Western New York.

On a beautiful monument erected to his memory is an inscription, written by John Jay, closing with these words: "This tablet is placed to the memory of John Sloss Hobert, by one to whom he was a friend as dear as a brother."

#### LITERATURE IN BLACKSTONE.

HOW is it that Blackstone's Commentaries, whatever the deficiencies of their author, stand apart from and far above all our other legal treatises? The answer is that Blackstone was an eminent man of letters, and, by virtue of literary genius, favored by the circumstances of his time, produced a treatise on the law of England which at once became and will forever remain a part of English literature; the commentaries live by their style.

Even the best English writers of the nineteenth century are apt to lack clearness of aim, and are unable to place clearly before their eyes the exact object which they seek to attain; they have not made up their minds what is the precise character of the audience they intend to address, or what is the precise scope of the work they hope to produce. This planlessness mars the writings of an author so eloquent as Froude and of a writer so capable and interesting as Mr. Lecky. But the fault which detracts from the merit of even the best literary work of our day is, or rather has been (for in this matter there has of recent years been a great improvement), the special vice of all but a very few of our writers on law. The vast mass of legal treatises are utterly without plan; their writers have generally collected together a vast mass of information, but they have no clear notion what is the class for whose benefit they are writing. At one moment they have in their minds the wants of an ignorant student. At another moment they wish to meet the requirements of practitioners. They have formed, again, no conception of the scheme on which their subject is

to be treated. No sane man would ever dream of seriously examining or criticising the arrangement of a book such as Chitty on Contracts, and this for the simple reason that of anything like logical distribution of a subject — such, for example, as is displayed by Sir Frederick Pollock in his admirable work on the “Law of Torts” — the author had probably no idea.

Now from all this vice of planlessness Blackstone is utterly free; his book is addressed to a definite and, from a literary point of view, to an admirably chosen class of persons. He addresses educated gentlemen who, for one reason or another, wish to study the law of England, and to understand its principles; these men may be students who wish to go to the bar; they may be magistrates who take part in the administration of justice; they may be members of parliament, or persons who hope to shine in political life. In any case they are assumed to be an audience who are neither on the one hand practitioners who want to learn the details of their business, nor men who had not acquired the elements of a liberal education. Blackstone writes, in short, for educated men who desire to become acquainted with the principles of English law. He knows not only who are to be his readers, but also what is his precise design. His book is written on a carefully considered plan.

Few persons will nowadays entirely approve his scheme of arrangement, but the scheme is never out of his mind. His intention is to cover in outline the whole field of the common law. He distributes his subject into four books, each of which is intended to deal with a separate branch of law. His arrangement is open to very severe criticism from a logical point of view, but for literary purposes it has some strong recommendations. Knowing, as he does, both the persons for whom he is writing and the exact scope and plan of his books, he avoids the faults of books which are, often mistakenly enough, called “practical,” and of still more worthless books which aim at being what is termed popular. He makes no attempt to supply the details for which you must properly refer to books on practice, and he does not, on the other hand, aim at meeting the wants of uneducated ignorance. He aims at producing, as he has produced, a book on law which may interest men of education and intelligence.

Neither Blackstone's command of language nor his clearness of aim would have enabled him to succeed in the performance of the task he had set before him had he not been endowed with the gift of literary judgment or tact. This is the quality in which even excellent writers often fall short. It would be possible to point to one book after another which contains extremely good writing, and which is formed in accordance with a thoroughly sound design, but has never achieved complete success because of the writer's want of

tact. This defect may show itself in various ways. It may easily take the form of pedantry. An author who has been at great pains to acquire information finds it all but impossible not to make use of the facts which he has laboriously collected, and therefore intrudes upon his readers' statements, which it may have been well worth while to verify, but which are not necessary for the treatment of the matter which he has in hand, and which do not interest those whom he addresses.

Learning is a means, not an end, and the useless display of learning is the vice of the pedant. Want of judgment, again, may well take the form of an exaggerated desire for completeness. There are books, no doubt, which ought to be in the strictest sense exhaustive, and such works fall short of their end if they do not deal with every part of their topic. But a treatise belonging to this class must, almost of necessity, be written for, as it will assuredly be read only by, experts, and the exhaustive method of treatment is utterly unsuited for literature which is intended to meet the wants of a wide though educated public. Blackstone, at any rate, has realized to the utmost the worth of the well-worn dictum that the half may be more than the whole. His omissions are one main source of his literary success. — *The Nation*.

#### THE LAST EXPERTS IN COURTS.

WHATEVER opinion one may have as to the guilt or innocence of Luetgert, no one can have any doubt that the trial was a miscarriage of justice. A failure of the jury to agree is always this. The entire object of a trial is to present all the facts so clearly that twelve fair men will agree either as to guilt or innocence. If nine men held one way at Chicago and three the other, if hours of wordy pleas outside and wordy discussion inside the jury-room brought no agreement, it was first and briefly because of the expert testimony. This disagreed flatly on all points, and it disagreed and was intended to disagree so as to confuse the jury and cloud the chief issue.

In this particular trial the fragments of bone found in the vat were the pivot of the case, because on their character depended the proof that a human body had been dissolved in the caustic soda with which the vat was filled. This was an issue of fact which in France or Germany would have been impartially passed on by a permanent commission of experts appointed by the government, called on by the judge, paid by the year and making their report independent of either side. This commission would have had no interest in the case one way or the other. Its report would have been scientific and impersonal. When made, it would have been accepted by the jury and the court as settling the particular facts at issue.

Unfortunately, this is not our way of getting at

such facts, as only expert testimony can pass upon. Each side at Chicago had its experts. Each found, by sufficient payment, men of science willing to support its view. Dr. George A. Dorsey, of the Field Columbian Museum, positively identified a fragment of temporal bone as part of a human skull. Dr. Allport, the chief expert for the defense, admitted that it was a fragment of a temporal bone, but denied proof of human origin. Prof. Norval H. Pierce traced the fibrous sheath of the auditory nerve in it. Mr. Paul D. Howes, an osteological expert, found nothing which could not be part of a hog. Dr. B. L. Riese found, by experiment, that a human body could not be dissolved. Dr. Charles B. Gibson found by experiment the reverse.

The medical experts were, in short, in this trial, as much on opposite sides as the lawyers. They were paid in the same way. They saw and testified only what related to their own "case." There was an utter absence of the fine definition of medical expert testimony by Dr. Wilbur, of Syracuse: "Expert testimony should be the colorless light of science brought to bear upon any case where it is summoned. It should be impartial, unprejudiced. There should be no half truths uttered, and the suppression of the whole truth is in the nature of false testimony." On this standard one-half of the experts or the other lied lamentably at Chicago. But most unfortunately this is not a definition of expert testimony as it is, but as it should be.

Expert testimony of all sorts in our courts has become disgraceful. The law in many States has now recognized the necessity of paying more than the ordinary witness fees to experts, so that there is a pecuniary recognition of its value. The three experts in the Barbieri trial in New York received from the county \$7,250. The fees given experts yearly in any one of our large cities would probably pay twice over the annual salary of permanent experts; but at present there is nothing permanent about an expert but his fee. Certain experts have the knack of putting their views so that it catches the jury, and a few, a very few, cannot be shaken into blunders by adroit cross-examination. As every lawyer knows, an expert with this skill comes high. The hypothetical question is another pitfall. It is a favorite New York device, the decisions there favoring it. No one has any doubt that it is an illusive device to get the truth and a useful corkscrew by which to extract a medical lie. The New York Medical Society and the Medico-Legal Society have both urged its abolition, but it continues to befog juries with its sophisms.

The remedy for all this is simple. The French and the German plan is a permanent corps of experts, paid in money and honor, who pass impartially on technical issues. A board of experts, one from each side, and they to select a third, has

been proposed by a noted expert, Dr. Victor C. Vaughan, but it is inferior to the continental plan. The mere selection of experts by the court and their payment by the State, as proposed by Dr. Landon Carter Gray, would be worth something. Any plan which took expert testimony out of the mire of prejudice and paid opinions in which it now wallows would be an improvement. Use has blunted indignation; but for any expert to permit himself to be the tool of a side for a fee is really nothing but constructive perjury, and there is not a prominent trial with experts in which this does not appear.

The first State which reforms this crying abuse by giving the judges in each county the appointment of permanent paid experts will be instantly followed all over the country. The medical profession is most befouled and belittled by the present system. Why does not the College of Physicians here have a model statute drawn and press it for passage? The doctors of the State could secure its enactment in a winter. — Philadelphia Press.

#### LAWMAKERS IN JAPAN.

THE Japanese parliament consists of a house of representatives, known as the shingi-in, and a house of peers, known as the kizoku-in. There are 300 members in the lower house, who are elected for four years, and about 200 members in the house of peers, whose term of office is seven years.

There is no positive number set for the membership of the upper house, because there are many hereditary members, and their number may be augmented at any time by appointment at the hands of the emperor. All marquises and dukes are members of the house of peers by virtue of their titles; the members of the imperial household and imperial princes are also members of the house of peers. Barons, counts and viscounts are eligible to election to the upper house, but none of these ranks may be represented by more than one-fifth of its total membership. In addition to these there are the various persons whom the emperor rewards for distinguished services with a seat in the upper house.

The members who are elected are chosen from among the largest taxpayers in the various districts. Fifteen men whose taxes amount to a certain sum a year are elected in each district, and they elect one of their number. He must be at least 30 years old, and may be a merchant, manufacturer or a member of one of the learned professions. The president and vice-president of the upper house are appointed by the emperor.

Members of the lower house are all elected by popular vote. Every male of the age of 25 years who has lived one year or more in the district in which the election takes place may vote, provided

he has paid at least fifteen yen in direct taxes, exclusive of what he paid in local taxes. When the voter is 30 years old he is also eligible to membership in the lower house without any further qualifications. But a man who already holds an office in the judiciary, police or correction department, who has an office in the imperial household or is in any way connected with the custom-house, may not become a candidate for the house of representatives.

### Legal Notes of Pertinence.

A decision by Judge Freeman, of Illinois, declares for the absolute secrecy of the ballot. No citizen, he says, under oath or in any other way, can be compelled to state for whom he voted.

Former Attorney-General Garland, who has been ill in Little Rock, Ark., has returned to Washington and is at Garfield Hospital. The hospital physicians say he is mainly in need of rest.

Judge Charles B. Ernst has just been re-elected police justice of Rochester, N. Y., by nearly 4,000 plurality, after a very spirited canvass. He is a graduate of the Albany Law School, class of 1880, and a lawyer of ability. His popularity with the people, which has been tested in many a political battle, is evidently as great as ever, and his administration of the office appears to have been quite acceptable to the great mass, if one is to judge from the election returns.

A valuable feature of the Bulletin of the department of labor, which is issued from the government printing office at Washington every other month, is a synopsis of the current decisions of the courts affecting labor. These are classified into the decisions based upon particular statutes in the several States and the decisions based upon the doctrines of the common law which prevail throughout the Union generally. This compendium is most useful to lawyers and all others who would keep acquainted with the development of the law in its relation to employers and employed. In the September number of the Bulletin thirty decisions are digested, and there is also a list of all the laws relating to labor which have been enacted in the various States since the 1st of January, 1896. — New York Sun.

The brief decision recently rendered by the Court of Appeals in the case of Birdie S. Sternberger is of much more importance than can be appreciated without a knowledge of the proceedings in the courts below. It definitely fixes the limits of the jurisdiction of the Court of Appeals and the Appellate Division of the Supreme Court

in *habeas corpus* cases involving the custody of children. The controversy arose between a husband and wife who were living apart, and it related to the custody of a boy and girl seven and eight years of age, the children of the marriage. Testimony was taken before a referee, who reported in favor of awarding the custody to the mother. The court at Special Term refused to confirm the referee's report, and made an order committing the children to the care of the father. An appeal was taken by the mother to the Appellate Division in this city, which reversed the Special Term order and restored the children to the mother's custody. The father then appealed to the Court of Appeals. That tribunal has dismissed his appeal on two grounds: First, because the order of the Appellate Division was discretionary, and therefore the Court of Appeals has no power to review it, and, secondly, because the Appellate Division had unanimously decided upon the facts that it was for the benefit and welfare of the infants to be confided to their mother's care, and the Court of Appeals must assume that the evidence was sufficient to justify that conclusion. — New York Sun.

The act to promote the safety of employes and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, among other things provides: "After the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, without requiring brakemen to use the common hand-brake for that purpose. And it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. That when any person, firm, company or corporation engaged in the interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by the act."

### English Notes.

The news of the death of Dean Vaughan has been received in all the inns with deep regret.

The business awaiting the judges at the commencement of the legal year 1897-8, the *Law Times* says, is formidable. There are 159 appeals and 2,054 causes and matters for hearing.

The retirement of Lord Esher from the bench reduces the members of the judiciary who are of the Order of the Coif to five—Lord Penzance (judge of the Arches Court), Lord Ludlow, Lord Justice Lindley, Mr. Baron Pollock, and Mr. Justice Hawkins.

Prof. Maertens, of the University of St. Petersburg, is the umpire and president selected by the arbitrators in the Venezuelan boundary arbitration. His appointment completes the arbitration court, which will assemble in Paris in the late summer or the autumn of next year. Great Britain and Venezuela each submitted a list of acceptable jurists, and the name of Prof. Maertens was the only one which appeared on both lists. Mr. Justice Henn Collins is the arbitrator appointed by Great Britain.

Mr. Joseph William Dunning died suddenly on the 15th inst., at his residence, 4 Talbot square, Hyde Park, W. He was the only son of Mr. Joseph Dunning, a Leeds solicitor, and was born in 1834. He graduated M. A. at Trinity College, Cambridge, in 1859, and was called to the bar at Lincoln's Inn in 1861. He was a pupil of Mr. Eastwood, the celebrated conveyancer, and assisted Mr. Chapman Barber, one of the counsel in the Tichborne Case. He was editor of "*Hayes and Jarman's Concise Forms of Wills*," and for several years before his retirement from practice, which ill-health made necessary some eight or nine years ago, he enjoyed a large practice in the Chancery Courts.

The lord chief justice, Lord Russell of Killowen, figures as a "Celebrity at Home," in the *World*, where his country seat, Tadworth Court, Epsom, and its surroundings are pleasantly sketched. "Guests," we are told, "are constantly to be found at Tadworth Court every week-end in the summer. Lord Russell finds it more convenient to remain in Harley street during the week than to undertake comparatively long journeys twice daily. He, however, always spends the week-end at Tadworth, surrounded by his numerous family and 'troops of friends.' These he delights to take over his stables, for, like every true Irishman, he is a lover of horseflesh."

At Whitchurch County Court, on the 16th inst., Mr. Whittingham, of Nantwich, applied on behalf of Mr. Thomas Henry Smith, solicitor, of Audlem, for an injunction restraining Claud Herbert Lisle, solicitor, Audlem, from practicing within

ten miles of Audlem. Mr. Smith gave evidence showing that the defendant, during the last fourteen months, had acted in preparing cases for hearing; and Mr. Thomas Henry Middleton, assistant clerk to the Nantwich magistrates, produced a minute of a court held at Nantwich in November, 1896, from which it appeared that Mr. Lisle represented the complainant in a case. Mr. Whittingham produced a deed of covenant in which the defendant disposed of his practice to applicant in the year 1888, and entered into an agreement not to again practice within a radius of ten miles of Audlem. His honor granted an injunction, and allowed costs on the higher scale.—*Law Journal*.

A quaint ceremony was observed before the queen's remembrancer at the law courts, on Wednesday, when the secondary of the city (Mr. Roderick) and the city solicitor (Mr. H. Homewood Crawford) attended to "render rent services" due to the crown on behalf of the corporation of London. The ancient custom of chopping the faggots and counting the horseshoe nails has been observed for many centuries past, and it owes its origin to the peculiarities of land tenure at a remote period. Walter le Brun, a farrier, was permitted to have a forge in the Strand, in the parish of St. Clement Dane, and he rendered to the exchequer every year six horseshoes and sixty-one horseshoe nails. Nicholas de Mord held a piece of land in the county of Salop, for which he was to cut in twain one faggot with a bill-hook and another with a hatchet. The proclamation in respect to the first runs as follows: "Tenants and occupiers of a certain tenement known as the Forge, in the parish of St. Clement Dane, come forth and do your service;" while in the latter case the formula is: "Tenants and occupiers of the piece of waste ground called the Moors, in the county of Salop, come forth and do your service." Mr. Pollock, in the course of the proceedings, said the custom had been in existence for over 500 years, and he hoped it might long continue. As her majesty had given no directions as to the retention of the implements used on Wednesday in carrying out the custom, the corporation have presented them to Mr. Baron Pollock, the last survivor of the ancient Court of Exchequer, before which, in the olden times, the services used to be rendered. Last year the queen herself expressed a wish to receive the hatchet, billhook and other articles.—*Law Journal*.

### Legal Laughs.

A certain well-known Brooklyn attorney is noted alike for the number of languages he speaks and his ready Irish wit. Recently he defended an indictment for perjury, which caused much public interest. While waiting in the court-room for the

trial to come on, a brother attorney asked him how he was going to make out. He replied: "With a little more perjury and some ingenuity, I think I'll get my client off." And he did.

In a bill for pulling down the old Newgate in Dublin, and rebuilding it on the same spot, it was enacted that the prisoners should "remain in the old jail till the new one was completed."

Here is another Judge Gary story: It was a bigamy case, and the accused man, after living two years with the second woman, had agreed to plead guilty. But this was only after he had secured solemn assurance from the State's attorney that his consequent sentence would absolutely divorce him from wife No. 2. He wished it understood that he was willing to suffer a term in the penitentiary if, on release, that superfluous woman, whom he had taken as a result of great misapprehension, would have no possible claim upon him. So he went into court.

"You fully understand what the plea of guilty means, do you?" asked Judge Gary, regarding the devoted man with great kindness.

"Yes, your honor."

"It will be my duty, in that case, to sentence you to the penitentiary. You understand that?"

"Yes, your honor. Anything to get free."

Judge Gary seemed to be writing a moment, and then he said grimly and without looking up: "I suppose there are some things beside which prison would be a relief. Any relative or friend of the defendant in court?"

A solitary woman stood up in the benches and said in a rasping, nerve-shattering voice:

"I'm his second wife, judge."

The man of law looked at her without lifting his head or suspending his pretended writing. Then he said in his usual searching tone: "Some things beside which prison would be a relief. You ought to be willing to take three years." The prisoner nodded cheerfully. "Then I will give you one year. You seem to have had the other two before they arrested you." — *Chicago Post*.

A prominent lawyer particularly well known in criminal cases was trying a case before a local court. It was a case of simple assault, one of those common "tea parties" so dear to the hearts of a certain class of people. The defendant, a stout little woman, was accused of kicking her neighbor, a tall, strapping lass, in the abdomen. This the plaintiff testified to, and the lawyer arose to cross-examine her. He inquired insinuatingly if the witness thought it possible to kick so high. "Now, Mrs. —, do you think it possible for you to kick as high as that yourself?" he asked. "Come up here and I'll show you," was the wrathful response. The judge leaned over his desk. "Come, Mr. —," said he, "everybody knows a woman can kick high." "It may be within your honor's knowledge," was the quick retort, "but I

assure your honor it is not within mine." And his honor was not quite positive whether he should laugh or reprimand. — *Chicago Law Journal*.

### Notes of Recent American Decisions.

**Adultery.** — A "maiden," named in an indictment for adultery, held to mean merely an unmarried woman, and not necessarily a virgin. (*State v. Shedrick* [Vt.], 38 Atl. 75.)

**Newly Discovered Evidence.** — Where a lost writing is found after the trial of an action therein, in which the secondary evidence as to its provisions was conflicting, it is newly discovered evidence of such a character as to entitle the unsuccessful party to a new trial. (*Mercer v. King*, Ky. Court of App., 42 S. W. R. 106.)

**Riparian Rights — Navigable Waters — Trespass — Rights of Hunters.** — In *Hall v. Alford*, decided by the Supreme Court of Michigan in September, 1897 (72 N. W. R. 137), it was held that a person cannot anchor his boat in the shallow waters between an island, owned by a riparian proprietor, and the channel of a navigable stream, and engage in shooting wild fowl from such boat, with the aid of decoys anchored in such waters, against the protests of such proprietor.

**Sales.** — Where the seller notifies the buyer that he will not deliver the property purchased, and the buyer purchases the same kind of property from another at its then market value, and at the time delivery was made to be the market value was below contract price, the buyer cannot recover such advanced price paid. (*York Draper Mercantile Co. v. Lusk* [Kan. App.], 49 Pac. 788.)

**Salvage — Unloading and Delivery of Cargo — Severance of Interest.** — Where a vessel is stranded near the end of her voyage, so that the cargo may be unloaded and delivered to the consignees, and such unloading is equally necessary for the lightening of the ship in order that she may be got off, and for the safety of the cargo, this part of the salvage operation is to be regarded as done in the common interest and for the common benefit, and the award, therefore, borne in common; but that by such unloading and delivery there is a severance of interests, and the subsequent expense of getting the ship afloat must be borne by her alone. (*Merritt v. The St. Paul*, U. S. Dist. Ct., S. D. New York, 82 Fed. R., 104.)

**Sheriff — Unwarranted Arrest — Liability for Subsequent Destruction of Property.** — Under a civil warrant issued under the forcible entry and detainer act against the husband, father and uncle of plaintiff, the sheriff arrested not only the parties named in the warrant, but also the plaintiff who was the only other occupant of the house. The night after the arrest, and while the house was vacant, defendant Haskins, at whose instance the warrant was issued, together with other parties,

broke into the house, took the furniture out and took possession, injuring and destroying a considerable amount of furniture in so doing. This action was brought against the officer and Haskins for unlawful arrest and imprisonment. *Held*, (a) That the conduct of the officer in leaving the house without protection by means of an unwarranted arrest, with knowledge that the complaint and warrant were secured by Haskins for the purpose of getting possession of the premises, was sufficient to connect him with the breaking in of the house, and could properly be taken into consideration by the jury in determining his responsibility for the breaking in by Haskins after the arrest was made. (b) Defendant Haskins, having admitted gaining possession of the house and throwing the furniture out, was not injured by the testimony of the wife as to what her husband told her in regard to the furniture being thrown out. (c) It was proper for the jury to consider the damage done to the household furniture as evidence of malice and in fixing exemplary damages. — Ed. Detroit Legal News. (Hendricks v. Haskins, Sup. Court of Michigan. Opinion filed Sept. 14, 1897.)

### Notes of Recent English Decisions.

Company—Issue of Debentures—No Profits—Debenture Interest Paid Out of Capital—No Obligation to Recoup Capital Out of Profits of Subsequent Year Before Paying Dividend.—The principal mine of a mining company fell in, rendering further working impossible without a previous expenditure of large sums of money in re-opening it. To obtain the necessary funds for this purpose the capital of the company was increased by the issue of shares and debentures, and ultimately the mine was re-opened and working recommenced. From the date of the issue of the debentures to the date of the re-opening of the mine the company made no profits and the interest on the debentures was paid out of capital. When the working recommenced profits were made, and the debenture interest and all outgoings were paid out of income. The directors then proposed to pay a dividend out of the profits for the year, and to carry over the remainder to a sinking fund which they opened with the object of recouping the amount paid out of capital for interest on the debentures. Upon a motion for an injunction to restrain them from paying a dividend out of profits until the amount paid out of capital for debenture interest in previous years had been repaid: *Held*, that the company were not bound to apply profits in replacing the amount paid out of capital for debenture interest in previous years, before declaring a dividend. (Bosanquet v. St. John D'El Rey Mining Co., H. C. of J., lxxxvii L. T. R. 206.)

Contract—Employment—Breach of—Music-Hall Artiste—"Perform Every Evening"—Sunday—"Not Perform at Any Club"—"Perform," meaning of.—The plaintiff K., a music-hall artiste, entered into contracts with each of the three defendant companies by which she agreed to perform for ten weeks certain, commencing at a certain date, every evening at the time notified by the management, in "her usual entertainment as mimic" in two of the contracts, "as singer and mimic" in the other, at a salary of £8 per week in respect of each hall, subject to the following conditions (*inter alia*), viz., "that the said artiste shall not perform before nor during this engagement at any theatre, music-hall, club, concert, or place of entertainment within one mile of the said music-halls respectively." At the end of the contract was this clause: "In the event of the above-named artiste not observing these conditions in every respect, the company shall have the option of cancelling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club one Sunday evening within a mile of these music-halls by invitation. Nobody except members and their guests were admitted to this club, and no admission money was paid. At this concert she sang a song and danced for a few minutes. The following night she performed at the halls, but at one of them the manager asked if she had sung at the club, and she replied she had done so. He told her it was against the rules, and that she must not do it again. The following night a letter was handed her cancelling the three engagements, and signed by the manager of the halls. These actions were then brought by the plaintiff to recover damages for wrongful dismissal and for breach of contract. *Held*, that the word "engagement" did not include Sundays, that day in such contracts being a *dies non*. That the performance was not within the meaning of the word "perform" as contemplated by the parties, for the plaintiff did not use her powers of mimicry. That although singing was included in one contract, singing before a private audience such as the present case was not a performance. (Kelly v. London Pavilion, H. C. of J., lxxxvii L. J. R. 215.)

### Literary Notes.

The new gift edition of Tennyson's "In Memoriam," with descriptive and analytical preface by Dr. Henry Van Dyke, the volume lavishly illustrated with drawings made for it by Harry Fenn, will be issued by Fords, Howard & Hulbert on Wednesday, November 17. Printed with great care on a heavy coated paper of extra strength, bound in silk, with gilt top, uncut edges, this book will supply something hitherto unattainable — an edition of this great poem, by itself, in beauty and elegance suitable for presentation.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, NOVEMBER 20, 1897.

### Current Topics.

WE notice that the last opinion rendered by Honorable Charles W. Walton, senior Associate Justice of the Supreme Judicial Court of Maine, reported in the 90th volume of Maine Reports, now in press, is the last case reported in that volume. Mr. Justice Walton retired from the bench this year upon the expiration of his term of office, having served thirty-five years in all. His retirement after so long a service, unprecedented in Maine as well as many other States, is an event of unusual interest. Besides the extraordinary length of his term of service on the bench, the event recalls the fact that his opinions have been models of vigorous and terse writing, and are frequently cited in other courts besides those in Maine. He has had twenty-four associates upon the bench, all of whom, except seven, he now survives. He went upon the bench May 14, 1862, and retired May 15, 1897. Among his associates have been Tenney, Appleton and Peters, Chief Justices; and as Associate Justices, Cutting, Rice, Kent, Dickerson, Barrows, Danforth, Virgin, Libbey, Symonds, Emery, Foster, Haskell, Whitehouse, Wiswell and Strout.

The Maine Reports show that he has delivered upwards of one thousand opinions, and that he has not delivered a single dissenting opinion. The high appreciation in which Judge Walton is held by his associates upon the bench is happily expressed in a recent, just tribute of Chief Justice Peters:

VOL. 56 — No. 21.

"Judge Walton has been a most able lawyer in all the places he has occupied at the bar and on the bench. In the latter place he has been a great and shining light, and finishes a career of judicial life which has conferred honor and extraordinary benefits upon his native and much-loved State. He will be able for the rest of his life to enjoy the reflection that he has fought the good fight bravely and well, and that the people of the State, in their estimation of his character, will ever recognize his distinguished public services. May his future years, and many of them, be attended with that freedom from labor and care which will, according to the philosophy of Cicero, make the evening of his life serene and enjoyable."

Amid all the changes that the country has passed through, during the thirty-five years of his judicial life, Judge Walton has borne his full part in deciding all the great questions of law and liberty that have arisen out of them in his court, and so aided in their decision that they are now at rest as finalities. Of no judge can it be more safely asserted that, in his retirement, he carries the respect and good will of the bench and bar, and the higher reward that arises from the consciousness of duty well done.

The Supreme Court of Pennsylvania decided, in *McNulty v. Pennsylvania Railroad Company*, reported in xli Weekly Notes of Cases, 105, that an employe of a railroad company, while he is being carried by the railroad company under a contract of service, is a passenger, and that the company owes to him all the duties which are due to a passenger. The case of *O'Donnell v. Railroad Company*, 59 Pa. 239, was followed. It appears, from the facts of the case, that the plaintiff's husband, John McNulty, was employed as a day laborer on the defendant's railroad. He lived at Bristol and worked at various places along the line of the road. By the terms of his contract the railroad company, in consideration of ten hours' labor a day, agreed to pay him \$1.20 and carry him on a passenger car to and from his labor each morning and evening. On the even-



ing of October 28, 1894, he entered a passenger car of the defendant company to go to his home. While on the way a collision occurred and he was killed. The court found that the contractual relations of the parties were not susceptible of any other conclusion than that the transportation of the plaintiff's husband from and to his home was part of the consideration moving from the company to him, and given him with the \$1.20 in payment of a day's wages. This being so, he had virtually paid for his passage home in the car in which he was riding at the time of the collision, and was therefore a passenger and not an employe as soon as his day's work was done and he entered the car for the sole purpose of being carried home.

In dismissing the proceeding against the alleged coal trust, which were instigated under the Anti-trust law enacted by the last legislature, the Appellate Division of the Supreme Court, Third Department, has taken the action which seems to have been generally anticipated. The judges who voted to dismiss the case were Merwin, Putnam, Parker and Herrick. Justice Landon dissented. The proceedings, it will be remembered, were brought by the Attorney-General against Robert Oliphant, president of the Delaware and Hudson; Samuel Sloan, president of the Delaware, Lackawanna and Western; Thomas P. Fowler, president of the New York, Ogdensburg and Western; J. Rodgers Maxwell, president of the Jersey Central; Joseph Harris, president of the Reading, and A. P. Wilbur, president of the Lehigh Valley, Railroad Company, under the law, by an application to Justice Alden Chester for the appointment of a referee to take testimony to determine whether a coal monopoly existed in this State. Walter E. Ward, of Albany, N. Y., was appointed referee, and subpoenas were issued. They were served on all but the two last above named, they being non-residents of this State. Instead of answering the subpoenas the officials served secured orders from Justice Chester requiring the attorney-general

to show cause why the original order citing them to appear should not be vacated on the ground that it was issued under an unconstitutional law. After a hearing Justice Chester decided that this law was unconstitutional, in that it made a Supreme Court judge party to a proceeding which was not judicial and clothed him with powers other than those prescribed by the Constitution, which declares that a Supreme Court judge shall be limited in his scope to powers which are purely judicial in character. An appeal was taken, which was decided on the 10th inst. The decision of the Appellate Division does not affect the constitutionality of the anti-trust law as did the decision of Justice Chester. It decides the case adversely to the attorney-general simply on the ground that his affidavit in instituting the proceedings was not sufficient under the statute.

Justice Herrick's memorandum, concurring in the dismissal of the proceedings, is as follows: "I concur with Justices Landon and Merwin in the conclusion that they have reached, that the legislature had power to confer upon a justice of the Supreme Court authority to issue an order like the one in question, and that the power so conferred is a judicial power. I also concur with Mr. Justice Merwin in the conclusion that he has reached that the affidavit of the attorney-general is insufficient under the statute. I cannot concur with Mr. Justice Landon in holding that a witness cannot question the constitutionality of the act, or the legality of the proceedings by which it is proposed to bring the witness before the court or referee. This is not a case where the witness raises a question as to whether the party subpoenaing him has or has not a case, but where he raises the question as to whether the law under which the proceedings are taken is or is not in fact a valid law, and also whether the proceedings to bring him before the court or referee have been legally taken under such law, just as he might question the regularity of attachment proceedings brought against him to compel his attendance in court in any action. Compelling a person to stand before a court or magistrate and give evidence is a restric-

tion upon that person's liberty of action, but when done pursuant to the law of the land is unobjectionable and is necessary interference with the liberty of the person for the purpose of due administration of justice and is for the common good of all. But every person has a right to insist that he shall not be taken from his lawful pursuits and restricted in his freedom of action except by lawful authority, hence he is permitted to question whether a statute under whose authority it is proposed to interfere with the liberty of action is a valid or void statute, whether, in fact, it constitutes a part of the law of the land, and also to question as to whether, assuming it to be a law, the proceedings against him have been duly and regularly taken; and the raising of such questions by him is not interfering with the merits of the case or determining whether the party subpœnaing him has or has not a good cause of action. The majority of the court having reached the conclusion that the order herein was properly vacated because of the insufficiency of the moving papers, and hence it being unnecessary to discuss the other questions raised in this case, under the well-settled rules of the court, that a question of the constitutionality of a statute will not be passed upon unless necessary for the decision of the case. I refrain from discussing those questions, although it is to be regretted that the substantial parts of the statute under these proceedings are not passed upon."

The attorney-general, it is understood, will take the case at once to the Court of Appeals.

The superiority of good paper to parchment, as a medium for the preservation of legal and other documents, is not open to much question. The Solicitor's Journal (London), intimates that even the ultra-conservative solicitors of the British metropolis are rapidly losing faith in the sheepskin, and instances the fact that recently a factory was burned which contained a safe in which were some deeds on parchment, and also some documents engrossed on paper. The parchments were found, after the fire, shriveled up

so as in some cases to be illegible, while the paper documents were intact and perfectly legible. The Journal also calls attention to a fact, not mentioned by its correspondent, viz.: The affection manifested for parchment by mice, and reaches the conclusion that if paper can be obtained similar in toughness to the so-called parchment brief envelopes, deeds engrossed on such paper would stand a much better chance of preservation than those engrossed on parchment.

The infernal activity of the average gas meter, that *bete noir* of the economical householder, which fairly puts to shame the traditional ant and the proverbially busy bee, appears to be the same in all countries and climes. Its ways are, moreover, inscrutable and past finding out. The peculiar penchant this devilish little device has for making mistakes—but always on the side of its bloated employer—was well illustrated in a case which was recently heard at the Clerkenwell (London) Police Court. The consumer had taken out a summons against the Gas Light and Coke Company, under the Gas Works Clauses Act, 1871, for the determination, by the magistrate, of the amount payable by him for gas consumed. Section 20 of the act referred to provides that "the register of the meter shall be *prima facie* evidence of the quantity of gas consumed," and that if the company and the consumer differ as to the quantity consumed, such difference may, on the application of either party, be determined by a court of summary jurisdiction, the decision of which shall be final. In this case it was alleged that for three consecutive quarters, the consumer's meter had registered an average of about 16,000 feet per quarter, but that in the fourth quarter, evidently ashamed of its slothful habits, and firmly resolved to make up for lost time, it "beat all records" by reaching the astounding and, to the poor consumer, the paralyzing total of 118,000 feet. The consumer swore that he had used less rather than more gas in the fourth quarter than in those preceding. The official inspector, who had tested the meter, cer-

tified that it registered in favor of the company—of course—but only to the small extent of 2.6 per cent. The company, accordingly reduced the charge first made in this proportion, but insisted upon being paid the balance. The magistrate decided in favor of the company. It further appeared that the Sale of Gas Act, 1859, makes provision for the re-testing of meters by two inspectors of other districts named for that purpose by a justice of the peace, the decision of such inspectors, if unanimous, to be final except in case of appeal to the Quarter Sessions. As this was not done in the case referred to, it must be inferred that the poor householder had reached the very wise conclusion that it was useless to carry any further so unequal a contest.

The London law journals have a way of "speaking right out" when anything is done which is contrary to their ideas of the proprieties. For example, a veritable outburst of indignation seems to have greeted the announcement that Mr. Darling, Q. C., had been nominated to fill the vacancy caused by the elevation of Mr. Justice Collins. The main objection to this appointment appears to be that it is purely political—that the appointee was rarely seen in even the courts of *nisi prius*, and never in the Court of Appeal or the ultimate tribunals. The *Law Times* asks why it is that the Common Law Bench is to-day so largely composed of men little, if at all, above what is commonly supposed to be a poor level—that of the county courts—and answers the query by the declaration that judgeships have ceased to be regarded as great offices of trust, which the nation expects to be filled by the most competent and reliable lawyers the legal profession can supply, and to have fallen into the wretched category of prizes to be given to the relatives of cabinet ministers or political partisans, wholly regardless of legal experience and judicial qualifications. Of the appointment referred to the *Times* plainly says: "It spoils the life of some ripe lawyer. It further weakens an already weak bench. It impresses a belief upon the pub-

lic mind that politics stand above every consideration even in matters closely affecting the lives, the characters, and property of the people—that, compared with political services, all the virtues and merits of a Mansfield or a Blackburn go for nothing. This is all extremely bad—bad for the government, bad for the bench, bad for the bar, and bad for the public. If the course continues to be pursued the time must soon come when confidence in the bench will die. Even now divisional courts are sometimes so constituted as to excite the laughter of the profession. A senior and presiding judge is seen to leave the judgment of the court to a competent junior colleague, whilst in courts of *nisi prius* too frequently any decision on a matter of law is carefully avoided. With the bench appointed largely on political and personal considerations nothing else could be expected. To continue the infusion of weak blood into the veins of the judicial body is to ensure its decline. That is the preliminary to the final decay of our courts until they cease to be tribunals in which litigants will be willing to have their disputes decided." The *Solicitor's Journal*, while conceding that in this appointment, Lord Halsbury has shown utter contempt for the opinion of the profession, is inclined to be charitable, and hints at the possibility that Mr. Darling may possibly falsify the apprehensions which are entertained.

Judge Grosscup, of the United States Circuit Court (Chicago), has just entered a new rule, which is directed against so-called "poor person" litigants, that class which brings personal injury suits and escapes paying or securing costs by the "poor person" affidavit. In a recent case against the Lehigh Valley Coal Company the defendant's counsel asked for a rule requiring bond for costs to be filed. Plaintiff's attorney had presented an affidavit of his client alleging that the latter was a poor person and unable to pay or secure the costs. The coal company's lawyer replied that plaintiff had assigned to his counsel a portion of the judgment to be recovered; and that such action made plaintiff's

counsel a party to the suit. And as he could give bond for costs he should do it. Plaintiff's attorney contended that the law did not permit him to be a party in interest in such manner, but Judge Grosscup held that such action was common, if not confessed, and then announced the rule:

"Hereafter the plaintiff filing such affidavit and his counsel of record will sign a stipulation to the effect that no agreement has been entered into between them guaranteeing the counsel a division of the judgment, and that no such assignment shall be made to the final disposition of the suit, either here or in the higher courts, if appealed. The stipulation shall further provide that when judgment is finally obtained, and the money is paid into court, it shall remain in the hands of the clerk and be disposed of under the order of the court. First, the costs shall be paid. Then the attorney shall receive for his service a fee determined in size by the judgment of the court. The rest shall go in cash to the plaintiff." Judge Grosscup holds that in a sense such a plaintiff is a ward of the court, and should be protected if there be merit in the case. If there be no merit — which he holds is true in four out of five cases brought — it must be discouraged with all possible speed. The new rule will, it is expected, diminish the class of litigation referred to by at least one-half. It is difficult to see how its enforcement will do injury to any one, and the example might well be followed in other courts. Speculative litigation of the sort alluded to ought to be discouraged by all proper means.

### Notes of Cases.

Judge Showalter, of the Federal Court, Chicago, handed down a decision in the case of Pillsbury and Others v. H. R. Eagle, which is of great interest to milling people generally. Judge Showalter holds that the fact that a certain line of goods is made in a certain place does not give the makers the right to the name of that locality. He said if the flour made elsewhere, though branded "Minneapolis," was made by the same method of grain, of as good quality, the manufacturer had a right to brand it or designate it as he pleased, providing he did not use the name or word of another in like business protected by direct copy-

right or trade-mark. This decision completely upsets the claim of the Minneapolis millers, who asserted a vested right to the use of the name of Minneapolis as a brand of flour.

The Supreme Court of Minnesota has rendered a decision in the case of Steenerson v. The Great Northern Railroad Company, in which it holds that the making of a schedule of rates can only be done by a legislative or administrative body; that the jurisdiction of the courts in such cases is limited to inquiring whether or not the rates fixed by the legislature or commission are so low as to amount to a practical confiscation of the property, and that for finding the amount of capital on which a company has the right to earn a reasonable income, what it would cost to reproduce the property is the sole measure, not the securities issued upon it.

Under the law of this State, a judge who refuses to grant a writ of *habeas corpus* when properly petitioned therefor is liable to forfeit to the prisoner the sum of \$1,000. "Unless it appears from the petition itself or the documents annexed thereto that the petitioner is prohibited by law from prosecuting the writ." In North Carolina there is a similar statute, which provides that if any judge authorized to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, he shall forfeit \$2,500 to the party aggrieved by the refusal. Like provisions, with differences as to the amount of the penalty, will be found in the statutes of many other States, but it is very rarely indeed that their operation is invoked. A suit under the North Carolina law, however, has recently been commenced against the Hon. Leonidas L. Greene, one of the judges of the Superior Court of that State, who refused to grant a writ of *habeas corpus*, which the plaintiff subsequently obtained from Mr. Justice Furches, of the Supreme Court. Laymen who sometimes criticize courts for granting writs of *habeas corpus* so freely are generally unaware that a judge is liable to a heavy penalty for refusing the writ, if the petition is in the form prescribed by law.

The right of a woman to resume her maiden name upon obtaining a divorce has been the subject of several recent decisions, says the New York Sun. An interesting question of a cognate character relates to the right of a woman to retain her husband's name after her husband has obtained a decree of divorce against her. In the case of Blanc v. Blanc, in which the wife was the unsuccessful defendant, the judgment dissolving the marriage expressly forbade her from using the name of her husband thereafter, notwithstanding which she called herself the Baroness Blanc. In a decision handed down during the past week, Judge Leslie

W. Russell, of the Supreme Court, holds that in so doing the defendant rendered herself liable to punishment for contempt. He sustains the jurisdiction of the trial court to incorporate the prohibition in the decree of divorce, and declares that the wife's misconduct, which has resulted in the severance of the marital relation, likewise deprives her of any further right to bear her husband's name, which she derived solely from the marriage status. Mr. Bishop, in his well-known treatise on marriage and divorce, states the law to be that a dissolution for a cause occurring subsequent to the nuptials leaves the wife still entitled to the husband's name, but the only case which he cites on this point is one where the divorce was procured by the wife.

—

An interesting suit has just been decided in the New York courts, relative to specific performance of insurance contract. Joseph R. Swan, a policy-holder of the Mutual Reserve Fund Life of New York, brought an action against it in his own behalf and in that of other policy-holders for the specific performance of a contract, contained in his policy, under the terms of which the company agreed to create and maintain from its net earnings a reserve fund, and to divide among the policy-holders the surplus of that fund above a given amount. The complaint alleged that the company had failed to create and maintain the fund, and also that it had diverted its net earnings to other purposes. A reversal of a judgment in favor of plaintiff was directed by the Fourth Appellate Division, which held, by Justice Adams, that the action could not be maintained as such allegations, in effect, charged misconduct against the company's officers and directors, required something in the nature of an accounting by the company, and the action, if successful, would compel it to change its present method of conducting business. An action having such a scope was, it was held, if maintainable, within sections 1718 and 1782 of the Code of Civil Procedure, and must be brought against the officers of the insurance company, and not against the company only. It was also within section 56 of the Insurance Law of 1892, providing that proceedings for an accounting by a domestic insurance corporation would be taken only upon the application or approval of the attorney-general, except in an action by a judgment creditor, or in proceedings supplementary to execution, and it followed that only the attorney-general or a judgment creditor of the company might bring the action.

—

Judge Jenkins of the United States Court of Appeals (Chicago) handed down a decision recently on the copyright question, holding that advertisements intended solely as advertisements are not capable of a copyright. It was in the case of

*J. L. Motts Iron Works v. James B. Clow*, of Chicago. Motts had issued an elaborate catalogue for their wares, costing them several thousands of dollars, and the Clow people had issued one similar. The Motts people sued for an injunction, asking that Clow be enjoined from publishing his catalogue, as the cuts in many instances were the same as their own. Judge Jenkins says in his opinion: "The statutes provide that the words 'engravings,' 'cuts,' 'prints,' shall be applied only to pictorial illustrations or works connected with fine arts, and no prints or labels designed to be used for any other article. To be entitled to a copyright the article must have by and of itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement. The object of the provision was to promote the dissemination of learning by inducing intellectual labor in works which would promote the general knowledge in science and useful arts. It is not designated as a protection to trades in the particular manner in which they might shout their wares. So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letter press or by picture, are not within the protection of the copyright law."

—

In *Bryan v. Adler*, decided by the Supreme Court of Wisconsin, in September, 1897 (72 N. W. R. 368), it was held that, under the Civil Rights Act of that State, providing that any person who shall deny the full and equal enjoyment of the accommodations, advantages, facilities and privileges of restaurants and other places of public accommodation or amusement to any person shall be liable in damages to the person aggrieved thereby, the proprietors of a restaurant were so liable for the refusal of a waiter to serve a guest solely because he was a colored person, although the waiter acted in violation of their express command, and they did not at the time sanction, or know of, or subsequently ratify, the waiter's act. The court said in part: "The trial court refused to direct a verdict for the plaintiff, and also refused to instruct the jury that the plaintiff was entitled to a verdict for at least the minimum sum mentioned in the law, and charged the jury, among other things, to the effect that it was undisputed that one of the waiters refused to serve the plaintiff; that such action of the waiter was inexcusable under the circumstances, and in violation of the law, and if the evidence satisfied them that such act of the waiter was ratified by the defendants, then the defendants would be liable to the plaintiff for damages. And the trial court further charged the jury that 'if you find, however, that the defendants did not ratify such action of their servant, and that the defendants did what they could reasonably be expected to do under the circum-

stances to enforce their orders to such servant, or, by not so doing, did not intend to, and did not, aid their waiter in carrying out his said purpose, then your verdict will be for the defendants.' These portions of the charge, as well as others, are based upon the theory that the defendants were not liable in damages for such wrongful and unlawful acts of their servants, unless they either ratified the same, or aided or incited or encouraged their servants in such nonperformance of duty. Such theory was in direct conflict with a well-settled rule of law constantly being applied by this and other courts, to the effect that 'a master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured.' (Craker v. Railway Co., 36 Wis. 657; Bass v. Railway Co., 39 Wis. 636, 42 Wis. 654; Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922; Rogahn v. Foundry Co., 79 Wis. 573, 48 N. W. 669; Reinke v. Bentley, 90 Wis. 457, 63 N. W. 1055.) In such a case, where the wrongful act of the servant, though wilful, is strictly within the scope of his employment, it is unnecessary that the master should at the time sanction or know or subsequently ratify the unlawful act, in order to be held liable for mere compensatory damages. (Id.: see, also, Spaulding v. Railway Co., 33 Wis. 582; Evans v. Davidson, 53 Md. 245; Burmah Trading Corp. v. Mirza Mahomed Ally Serazee, 31 Moak, Eng. Rep. 762; Limpus v. Omnibus Co., 32 Law J. Exch. 34.) This is upon the theory that what one does by his servant acting within the scope of his employment and for his benefit is the same, in legal effect, as though done by himself. But, in order to recover exemplary damages, it is otherwise, as indicated in several of the cases cited, especially Bass v. Railway Co. (*supra*)."

#### LEGAL STATUS OF WOMEN IN FRANCE. ENGLAND AND THE UNITED STATES.

##### CONCERNING MORE PARTICULARLY THE ELECTIVE FRANCHISE.

ACCORDING to M. Paul Souday, the women of France are not keeping pace with their English fraters in the struggle for social equality before the law; that while the champions of woman's rights in England are advancing the standard at so rapid a pace that they have reached the very doors of parliament with demands for admission, in France they have as yet hardly got beyond the stage of ridicule. This might seem unaccountable to any one at all familiar with the history of French revolutionary times and the part the women of France took in that great social upheaval, were it not for the very radical moral and intellectual differences between the two peoples.

As with all questions concerning personal liberty and privilege, the English-speaking people have taken the lead, so it is with the question of woman's rights; and there is now but little doubt in the minds of thoroughly intelligent people, both in England and America, that it is a mere matter of time when there shall be absolute social equality of men and women in these countries.

"Feminism," as the French writers are pleased to term it, is in a progressive mood in England, where there are many more women than men.

Individualism is a marked characteristic of the women of England, and this individualism of English women has been made the point of interest for more than one recently published novel in that country. The portrayal of prominent characters in "The Amazing Marriage" serves as an illustration of this feminine characteristic as it struck the attention of an Englishman. There is a well-defined idea to revolt against masculine tyranny—that is, the tyranny which is constitutional or statutory. In England the women have, by persistent and repeated efforts, obtained admission to nearly all careers. Indeed, this recognized competition with men has got to be somewhat of a serious problem in social economics. Women's clubs are found everywhere in England. In London they are so numerous that they almost elbow each other.

Under concentrated pressure from these numerous women's clubs the house of commons has at last voted to bestow the electoral privilege on widows and unmarried women. What the stately lords will do may be conjectured. But as these women's clubs now cut quite a figure in politics, it will not be long before even the upper house of parliament will find it advisable to temper its deep-seated prejudice against woman suffrage and trim to a course which alone will be safe in English politics.

English women now have enlarged property rights, much as they have in our own country, and far in advance of those rights enjoyed by them in France. Neither English nor American women are content with the place given to French women in politics. Take, for instance, the efforts of Mme. Jeanne Schmahl. The association over which she presides has gained much sympathy by the modesty of its demands. Their efforts are confined to the request for certain modifications of the code; for example, the doing away with the article that forbids women to be witnesses to public documents. They simply demand a revision of the laws granting greater liberality to women in matters of business.

The writer above referred to says that there are societies of "Feminists" in France whose aim seems to be solely the pecuniary and moral independence of women, an emancipation from the so-called despotism of man.

"But it is precisely these that make the con-

trast with their Anglo-Saxon coreligionists so comic. There are, with us, two or three dozen respectable dames, generally of advanced age, rarely of personal attractiveness, who unite on a vague platform whence nothing proceeds, and whose unfathomable nothingness has no equal except in the public indifference to it. Devoured with ambition and vanity, they do not even know how to systematize their demands. Sometimes they happen to attract a few curious persons, but they then indulge in such extravagancies, the bitterness of the rivalry for their presidency and vice-presidency is so great that they succeed, like the famous congress of learned societies, in only creating a laugh at their own expense." But notwithstanding the caustic criticism of M. Paul Souday, the cause of woman's rights has advanced in France. So that now the movement begun in the time of the great revolution by the women of France may be said to grow with advancing civilization. Many writers and journalists of all schools of politics are enlisted on the side of these women. Alexandre Dumas, the younger, before his death, as well as other novelists and poets, have enlisted themselves on the same side.

The legal status of women, so far as property rights are concerned, has been advanced very materially in all of these countries; so that women may be said to be very much upon an equality with men. In politics the thing seems not to be so easy of accomplishment, owing, perhaps, to moral as well as constitutional objections. But if it is conceded that to deny to women the right to the control of her own property is an act of injustice, moral or otherwise, then it might be, and is claimed by them, that to deny to them the right to help choose those representatives who have more or less control over property interests, as public officers, is morally unjust and legally objectionable. American women, no doubt, lead in the effort to gain political equality. Their property rights are pretty well settled in all of the States. And now the husband must be a decent sort of a man to be allowed even to partake of his wife's earnings, while at one time, no matter how improvident he might be, or how poor a supporter for his family, he had only to demand to receive all his wife's earnings. In her own vested property rights he has no word of control, and she may contract, sue and be sued just like a man. In fact, in nearly all business matters the wife has a separate legal existence. But the status here intended to be considered is more particularly concerning progress toward suffrage.

According to the French idea, the women of America have been like love, insatiable. They first demanded their rights in the family, then in education, in business, and finally in politics. Henry Ward Beecher regarded the question of woman suffrage as more important than the great temperance cause, and spoke of it as "dominat-

ing" all others. All of the progress in the direction of woman's rights in America has been made in the past fifty years. Before this they had no recognized individuality in any department of life. No schools of higher education were open to her. The life of a woman was confined to the domestic hearth and family training almost exclusively. When a boy reached the age of maturity a fixed sum was given to him as wages, or he might go where his labor would command the highest price. But with the girls of the family this idea did not go. Following in the steps of the wife and mother, their earnings were not set apart for them, but went into the common family purse, and became a part of the property of the head of the household. When they married these services were transferred to the husband. But under the beneficent influence of the new *regime* a married woman may, in most of our States, now perform any labor or services on her sole separate account, as her husband may; although he has the right of *consortium*.

And the wife may demand, in return for this *consortium*, that her liege lord shall provide support or maintenance of such a kind as her station in life entitles her to, and he cannot compel her to work for him in return. But she may, and does in many cases, give much of her time to the deliberations of woman's rights conventions like those started many years ago by Elizabeth Cady Stanton and Lucretia Mott. Since the time of the first convention of these women, nearly fifty years ago, women have all but attained that which they seek — complete political equality. The women of England are not far in the rear, if any. They have thrown aside the odious exactions imposed on them by the common law, and are now far, indeed, from being considered mere chattel interests of the husband.

English women of this modern school have a sort of contempt for the feeble efforts of their French sisters across the channel, and consider them retrograde. But as French women look to English women for guidance in this movement, it is in the natural course of things that English methods are bound to obtain in that country.

Constitutional objections are the greatest hindrance to the advance of the right of suffrage in the United States. In several of the States attempts have been made by constitutional amendment to give to women the general ballot, in most cases with negative results. Where enabling acts have been passed by legislatures to accomplish the same result, they have been declared void in so far as constitutional offices were concerned. But State legislatures may regulate and control all elections and determine who shall be electors in all local elections for which the State constitutions have made no provisions; so that in most of the States women vote at school elections as provided by statute, and where at any election the

test might be a property qualification, under proper statutory provision, her right to vote might be maintained.

This limited suffrage the women of America assuredly have. It is free from constitutional objection, while such right claimed under the general election law would not be free from objections.

It might, perhaps, be well to say here that there is no vested right conferred by the elective franchise. It is not one of unrestricted license. It is political, and may be granted or withheld at the pleasure of the sovereignty. It is not granted as a general privilege, under the Constitution, to the citizens of the United States.

PERCY L. EDWARDS.

Owosso, Mich., Nov. 13, 1897.

### CONTEMPT—WHAT CONSTITUTES.

#### NEWSPAPER ARTICLES—REFLECTIONS ON JUDGE—PROHIBITION—WHEN PROPER.

SUPREME COURT OF WISCONSIN, Sept. 21, 1897.

STATE EX REL. ATTORNEY-GENERAL V. CIRCUIT COURT OF EAU CLAIRE COUNTY ET AL.

J. M. Olin, A. L. Sanborn and The Attorney-General, for Relators.

T. F. Frawley and H. H. Hayden, for Respondents

1. Where a judge is a candidate for re-election, the publication in a newspaper of articles charging him with having been intentionally partial and corrupt in the trial of certain causes in his court, already disposed of, and not then pending, and the circulation of such papers among the jurors and officers of the court, is not, independent of statute, a criminal contempt of court.
2. The power of a sitting judge, who is a candidate for re-election, to punish as for a contempt, because of the publication in a newspaper of articles reflecting on his impartiality and honesty in the trial of cases already disposed of, is not necessary for the due administration of justice, and is inconsistent with the rights of free speech and free publication of the citizen's sentiments "on all subjects" (Const. U. S. Amend., 1; Const. Wis., art. 1, § 3), the right of trial by jury (Const. Wis., art. 1, §§ 5, 7), and the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action of law.
3. The publication of articles reflecting on the honesty and impartiality of a judge who is a candidate for re-election, in the trial of cases already disposed of, and the circulation of

such articles among the jurors and officers of the court, does not constitute criminal contempt, within Rev. St., § 2565, defining as criminal contempt, among other things, disorderly, contemptuous or insolent behavior during the court's sittings, "in its immediate view and presence," and directly tending to interrupt its proceedings, or to impair the respect due its authority.

4. Nor is such publication within the provision of such section making the publication of a false or grossly inaccurate report or copy of the court's proceedings criminal contempt, even if it be considered a "report or copy" of the court's proceedings, where it is not alleged that the articles are "false, or grossly inaccurate."
5. Where the publication of articles in a newspaper reflecting on the honesty and impartiality of a judge who is a candidate for re-election is not a contempt of court, and the judge has no power to punish it as such, an affidavit or return by the authors, stating that such articles are true, filed in court in response to an order of the court to show cause, etc., does not constitute a new contempt committed in the immediate presence of the court.
6. Where the publication of articles in a newspaper reflecting on the honesty and impartiality of a judge does not constitute contempt of the court, and the judge apparently causes contempt proceedings to be instituted against the authors, and threatens and is about to inflict immediate imprisonment, the writ of prohibition is the proper remedy of such authors.

Original action by the State, on the relation of the Attorney-General, upon complaint of C. Ashbaugh and L. A. Doolittle, against the Circuit Court of Eau Claire County, W. F. Bailey, Circuit Judge, C. H. Henry, as Sheriff of said County, and others, to prohibit the further prosecution in such Court of certain contempt proceedings against said Ashbaugh and Doolittle. Alternative writ made absolute.

This was an action of prohibition commenced by the issuance of an alternative writ out of this court on the 3rd day of April, 1897, upon motion of the Attorney-General, based upon the sworn petition or complaint of Messrs. Ashbaugh and Doolittle. The object of the action was to prohibit the further prosecution in the Circuit Court of Eau Claire County of certain proceedings then pending therein, wherein Ashbaugh and Doolittle were charged with having committed a criminal contempt of said court, and were threatened with immediate imprisonment therefor. Returns were in due time made to the alternative writ both by the Circuit Judge, Hon. W. F. Bailey, and by the sheriff of said county, C. H. Henry, and upon order of this court a supplemental return was



made by the circuit judge. These returns were challenged as insufficient by demurrer, and upon argument the demurrer was sustained, and judgment rendered adjudging that the contempt proceedings were in excess of the jurisdiction of the court, and awarding an absolute writ of prohibition against the further prosecution of such proceedings. The facts which appeared by the complaint and the various returns were practically undisputed, and were, in brief, as follows: In March, 1897, the Circuit Court of Eau Claire County was in session, engaged in the trial of cases, the Honorable W. F. Bailey presiding. Judge Bailey's term was to expire in January, 1898, and the election of his successor was to take place on the 6th day of April, 1897. Judge Bailey was a candidate for re-election, and two other candidates, Hon. James O'Neill and F. M. Miner, Esq., were also in the field. The petitioner, Ashbaugh, was the editor and publisher of a newspaper at Eau Claire, and the petitioner Doolittle was a lawyer in active practice at the same city. The campaign had become somewhat heated and acrimonious by the publication of newspaper articles *pro* and *con*. Both of the petitioners were strongly opposed to the re-election of Judge Bailey, and on the 11th day of March Mr. Doolittle published in Ashbaugh's newspaper an article several columns in length, charging the judge with being extravagant in the management of the court, and with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. These charges all referred to proceedings and cases already heard and decided, and not to matters then pending or on trial. On the 31st day of March an editorial article appeared in the said newspaper strongly opposing Judge Bailey's candidacy, and summarizing the charges against him which had been made at length in the Doolittle article. On the 1st day of April following, Judge Bailey made an order on his own motion requiring Messrs. H. H. Hayden and T. F. Frawley to institute contempt proceedings against Ashbaugh and Doolittle on account of the publications. Upon the same day Messrs. Hayden and Frawley presented a sworn petition to the court, setting forth the facts as to the writing and publication of the articles, and alleging that Ashbaugh and Doolittle had circulated the articles among the officers of the court and persons summoned as jurors. Upon this petition, and on the 2nd day of April, an order was made reciting that "it appears to the satisfaction of the court that H. C. Ashbaugh and L. A. Doolittle have committed a criminal contempt of said court," and requiring Ashbaugh and Doolittle to appear at 3 o'clock P. M. of the same day, and show cause why they should not be punished for said alleged contempt, and providing for the service of the order at least two hours before the hearing. This order was

personally served shortly after 11 o'clock A. M. At 3 o'clock P. M. Ashbaugh and Doolittle appeared in court. Doolittle filed an affidavit of prejudice, but the court held that no change of venue could be granted. Further time was asked for, and time was given until 7:30 o'clock P. M., when Ashbaugh and Doolittle filed an affidavit alleging the truth of the articles, and asking further time until the 5th of April to prepare an answer. Thereupon an order was made that interrogatories be made and served, and that Ashbaugh and Doolittle appear at 10 o'clock A. M. on the 3rd day of April, to which time the proceedings were adjourned. The interrogatories were made, asking whether the defendants wrote, published and circulated the articles, and such interrogatories were served at about 9 o'clock P. M. of the same day. At 10 o'clock A. M. upon the following day (April 3rd) the defendants appeared and asked further time, which was granted, until 7:30 P. M. of the same day. Upon the assembling of the court at that time the alternative writ of prohibition from this court was produced and served upon Judge Bailey. Thereupon Judge Bailey announced that he would not proceed further with the pending proceedings, but at once made an order adjudging both Ashbaugh and Doolittle guilty of a new contempt in the immediate presence of the court, by reason of having filed their affidavit alleging the truth of the articles, and committing them to jail for thirty days, such imprisonment to commence at once. The commitment was placed in the hands of the sheriff at once, but was not executed by him. Upon these facts it was adjudged that both of the alleged proceedings for contempt were in excess of the jurisdiction of the Circuit Court, and the writ of prohibition was made absolute.

WINSLOW, J. (after stating the facts). The importance of the questions arising in this case, and the imperative necessity of a wise and just decision, can hardly be overestimated. These questions involve not only the right of a court to enforce due respect for its authority, and punish acts which tend to diminish such proper respect and interfere with the performance of its important public duties, but they involve as well the preservation of personal liberty as against summary imprisonment, the right of free speech, the freedom of the press, and the proper limit which may be placed upon the discussion of the fitness of candidates for public office. Fully realizing, as we believe, the gravity of these questions, we have given the case the fullest and most careful consideration within our power, in order that no false step, involving at once consequences disastrous and far-reaching, might be taken. The questions involved upon which all minor questions depend are but two in number: First, did the publications in question constitute a criminal contempt of

court? and, second, is the writ of prohibition the proper remedy?

1. Did the publications constitute a criminal contempt of court? In considering this question it has not been deemed necessary to reproduce the articles in this opinion. It is sufficient to say of them that, among other things, they charged Judge Bailey with having been intentionally partial and corrupt in the trial of certain causes in his court. If the charges were true, the unfitness of Judge Bailey for his office was certain. That they were intemperate in tone, and well calculated to exasperate their subject, may be at once admitted. It seems probable also that from their very intemperance they were rather calculated to injure the cause which they were designed to help than otherwise. These questions are, however, foreign to the present inquiry; the question being, not whether Judge Bailey as an individual was grossly slandered, but whether a criminal contempt of court was committed. A criminal contempt at common law may be generally defined as any act which tends either to obstruct the course of justice or to prejudice the trial in any action or proceeding then pending in court. The power of courts of superior jurisdiction created by the Constitution to punish such acts is necessarily inherent in such a court, and arises by implication from the very act of creating the court. A court without this power would be at best a mere debating society, and not a court. These principles have been recognized in all courts from time immemorial. In *re Rosenberg*, 90 Wis. 581-588; *Ex parte Robinson*, 19 Wall. 505; *Rap. Contempt*, § 1. Doubtless, this power may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal. The decisions on this point are well nigh unanimous. See authorities collated in note to *Percival v. State*, 45 Neb. 741 (s. c., 50 Am. St. Rep. 568-572). It is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded, so that they be not overstepped. It is important that it exist in full vigor, it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence. The ultimate question, then, is, is it necessary to the due administration of justice by a court that the publication of such an article as the one before us

be punished as a criminal contempt? Before discussing the authorities upon this question, it will be well to state the exact facts which were charged in the petition of Messrs. Hayden and Frawley in the Circuit Court. It was alleged that the articles were written by Doolittle, and by his request published by Ashbaugh; that court was in session, with a full panel of jurors, trying jury cases, and that the articles were by the defendants generally circulated in the city of Eau Claire, and were distributed to various persons residing in this State, and were by them distributed and delivered to the officers "of said court, and to persons summoned as jurors in said court," and "were read by the officers and jurors so in attendance in said court." The articles themselves referred to no cases pending or on trial, but contained only strictures upon the general character of the judge, and his acts in former cases which had been concluded. The fact should also be remembered that a judicial election was impending, and that the judge was a candidate for re-election. It is evident that, if any contempt was committed, it was what is known as constructive contempt, as distinguished from direct contempt. *Rap. Contempt*, § 22. Numerous cases are cited which are claimed to support the contention that such publications constitute constructive contempt of court. Examination of these cases, however, reveals the fact that the great majority of them simply hold that publications of this nature, which refer to an action or proceeding then pending and undecided, constitute contempt. Such cases are *Sturoc's Case*, 48 N. H. 428; *State v. Frew*, 24 W. Va. 416; *People v. Wilson*, 64 Ill. 195; *Territory v. Murray*, 7 Mont. 251; *In re Cheeseman*, 49 N. J. Law, 115; *Cooper v. People*, 13 Colo. 373; *State v. Judge of Civ. Dist. Ct.*, 45 La. Ann. 1250. The principle on which these cases are placed is that such publications have a natural tendency to prejudice the course of justice in the particular cause then pending, and hence constitute constructive contempt. It is unnecessary in the present case, nor would it be proper, to affirm or deny the correctness of these decisions. Such a case is not now before us. The publications complained of here referred to no pending litigation, nor is it charged that they were circulated or brought into the immediate presence of the court.

Passing from this class of cases, we come to the cases which involve the consideration of adverse or libelous newspaper comments upon the acts of a court in actions already past and ended, and here we find much contrariety of opinion, not to say confusion, in the utterances of courts and text writers. Cases may be found holding directly that such publications constitute constructive contempts, and may be punished as such. *State v. Morrill*, 16 Ark. 384; *Dandridge's Case*, 2 Va. Cas. 409; *In re Chadwick* (Mich.), 67 N. W. 1071.

The reasoning upon which such decisions rest is that such publications tend to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness. This doctrine is certainly extreme. Carried to its ultimate conclusion, it would call for the punishment of any adverse criticism on the official conduct of a sitting judge, and absolutely prevent all public or private discussion of court proceedings. All such discussion, if unfavorable to the ability or honesty of a judge, must tend in some small degree, at least, to undermine public confidence in the court in the future. On the other hand, many well-considered cases may be found in which it is distinctly held that such publications do not constitute contempt, and cannot be punished as such. Some of these cases go upon the ground that, even if such publications were punishable as constructive contempts at common law, still that it was competent for the legislature to limit such power by statute, and that such power has been limited by statutes substantially similar to our own. Rev. St., § 2565. Some of the case, however, distinctly hold that under our form of government such publications do not constitute contempt, and that to punish them as such would be a serious invasion of the great constitutional guarantees of freedom of speech and of the press. The following decisions are cited as enunciating one or both of these principles: *Stuart v. People*, 3 Scam. 395; *Storey v. People*, 79 Ill. 45; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Cheadle v. State*, 110 Ind. 301; *In re Robinson*, 117 N. C. 533; *State v. Sweetland*, 3 S. D. 503; *Percival v. State*, 45 Neb. 741. In our own State the question has never been discussed in any opinion. It is a fact, however, that a case arose and was decided upon the merits early in the history of this court, while Chief Justice Whiton was on the bench, involving this very question, although for some reason no opinion was ever filed. The original records are still preserved in the clerk's office, and they disclose the following facts: In October, 1854, Messrs. Brown and Calkins published a newspaper in Madison, and during the October term of the Circuit Court of Dane county published an article charging corruption and malice upon the grand jury and the presiding judge of the court in the finding of an indictment against the School-land Commissioners. Proceedings were instituted in the Circuit Court as for criminal contempt, and, after hearing, the court adjudged that a contempt had been committed, and adjudged that a fine be imposed upon both defendants. The cause was removed to this court upon writ of error, was afterwards argued, and the judgment was wholly reversed on the 21st day of May, 1858. Upon the outside of the record appears the notation, "*Stuart v. People*, 3 Scam. 402," and in the volume of court minutes appears the notation, "Opinion by

the Chief Justice." Although no opinion was ever in fact filed, there seems to be no escape from the conclusion that this court at that time held that the publication before it, did not constitute a contempt. No other ground appears upon which the judgment could have been reversed upon the merits. But, whatever may be thought of the case just mentioned, or its weight as authority, we are well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and our reasons for that conclusion will be briefly stated. Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guarantied to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments "on all subjects" (Const. U. S., Amend. 1; Const. Wis., Art. 1, § 3); the right of trial by jury (Const. Wis., Art. 1, §§ 5, 7); also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action of law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by any one that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this "doth hedge about" a judge; certainly not when he is a candidate for public office.

Recurring to the question with which the discussion opened, namely, is it necessary that a court should possess this power? We feel bound to hold that, considering the guarantied rights of

the citizen just referred to, no such power as this is necessary for the due administration of justice. It may be freely admitted that under the common law as administered in England the mere writing contemptuously of a Superior Court or judge has been declared a constructive contempt. 4 Bl. Comm. 285. We, however, adopted no part of the common law which was inconsistent with our Constitution (Const. Wis. Schedule, § 13), and it seems clear to us that so extreme a power is inconsistent with, and would materially impair, the constitutional rights of free speech and free press. But it is claimed that the publication constituted a criminal contempt, within the provisions of our statute. Section 2565, Rev. St., defines criminal contempts, and divides them into seven classes. Of these classes only the first and the sixth have any possible bearing upon the case. These classes are: "(1) Disorderly, contemptuous, or insolent behavior committed during its sittings, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority." "(6) The publication of a false or grossly inaccurate report or copy of its proceedings; but no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, proceedings or decisions had in such court." Certainly the publication in question does not fall within the first subdivision. Acts punishable under this provision must have been in the immediate view and presence of the court, and it was not charged in the complaint of Messrs. Hayden and Frawley that any such act had been committed. It was not even alleged that the publication had been circulated in the court room. Nor does the sixth subdivision apply, because it was not charged that the references to the proceedings in court were in any respect false or inaccurate. It may well be doubted whether the publication itself could be well called in any proper sense a "report or copy" of the proceedings of the court, but, conceding that it could be so called, the charge of contempt must certainly allege that the report is "false, or grossly inaccurate," in order to make a case of contempt. This is jurisdictional. If it be not alleged, no contempt is stated. Our conclusion is that the attempt to punish the publication in question as for contempt was in excess of the jurisdiction of the Circuit Court.

But another claim was made by the counsel who so ably represented Judge Bailey in this court, which requires some attention. It appears by the return that immediately upon the service of the alternative writ upon him, Judge Bailey announced that he would proceed no further with the pending proceedings, and that they were stayed. After making this announcement, however, the judge at once stated that a new contempt had been committed by Ashbaugh and Doolittle in the im-

mediate presence of the court by the filing of their sworn return or affidavit, in response to the original order to show cause, stating that the charges in the newspaper articles were true; that this contempt was independent of the alleged contempt by publication, and was not included within the inhibition of the writ, and that he would at once punish them for this contempt. Thereupon the judge proceeded at once to adjudge them guilty of this new contempt, and sentenced them to imprisonment therefor. We are unable to agree with this contention. If, as we have held, the original publication was not contempt, and the attempt to punish it as such was in excess of the jurisdiction of the court, then certainly the defendants had a right, when summoned into court, to allege its truth. They were forced, if they were in any degree honorable men, and not mere slanderers, to allege the truth of the publication. Any other course would demonstrate their pusillanimity. It cannot be endured that a court, by unauthorized summary proceedings, should wring from a man such a declaration, and then abandon the original proceedings, and punish this forced declaration as contempt.

2. The question remains whether the writ of prohibition is the proper remedy. This writ issues only to restrain a court in the exercise of judicial functions outside or beyond its jurisdiction, and when there is no other adequate remedy. *State v. Evans*, 88 Wis. 255. Having held that the attempt to punish the publication in question as contempt was in excess of the jurisdiction of the Circuit Court, no reason is seen why the writ is not an apt and proper remedy, unless, indeed, there be other adequate remedies. We do not think that in a case like the present, where immediate imprisonment was threatened, and about to be inflicted, either writ of error or habeas corpus can be said to be an adequate remedy. In either case the trial must have been concluded, and sentence imposed, before the writ could issue, and in the case of habeas corpus the imprisonment must have actually begun. There certainly is grave doubt whether certiorari would lie in any event. *Chittenden v. State*, 41 Wis. 285. In view of these considerations, it seems certain that neither of the last-named writs would afford an adequate remedy, even conceding that they would be applicable. Prohibition has been used in other jurisdictions in similar cases. *Reg. v. Lefroy*, 4 Eng. R. (Moak's Notes), 250; *People v. County Judge*, 27 Cal. 151; *Williams v. Dwinelle*, 51 Cal. 442; *People v. Carrington*, 5 Utah, 531.

During the preparation of this opinion, the writer has been furnished with a pamphlet discussion of the Law of Contempts, prepared by Judge Bailey. Although arriving at different conclusions from those reached by us, Judge Bailey's discussion of the question bears the marks of his well-

known legal ability and industry, and it is but fair to say that it has been of much assistance in finding and considering authorities upon the interesting questions involved in this case. The judgment in this case having already been entered and executed, no mandate is necessary.

#### WHAT THE LAW DECIDES.

Persons dealing with an agent of a municipal corporation are bound to ascertain the nature and extent of the authority of such agent in all cases where the authority is conferred by statute. (*Town of Madison v. Newsome* [Fla.], 22 South. Rep. 270.)

An ordinance ordering service pipes to be laid in a street from the abutting lots, to connect with the public water main, without specifying the size or material of the pipes, is void. (*People v. Hurford* [Ill.], 47 N. E. Rep. 368.)

Where a third person makes advances to a mortgagor, pays taxes on the mortgaged lands, interest on the mortgage, and finally takes an assignment of the mortgage, there having been a mere understanding in an indefinite way that he should get his money when the mortgagor should sell the land, the mortgage cannot be held as security for the advances made before the assignment. (*Brooks v. Brooks* [Mass.], 47 N. E. Rep. 448.)

Where one contracts by instrument under seal in his own name for building on land belonging to his wife, which ownership, however, is not disclosed by the contract, a mechanic's lien cannot be had against the property on the ground that the wife is an undisclosed principal, under act July 1, 1874, sec. 1, giving right to a lien only where labor or material is furnished by contract with the owner of the land. (*Walsh v. Murphy* [Ill.], 47 N. E. Rep. 354.)

Where a mechanic performs services from time to time on a building under a continuing general contract for services with the building contractor, his work being interrupted only because of the state of the work or his employer's convenience, the "date of the contract under which lien is claimed" for the entire work by him is the date of his first work on the building; and hence, under Pub. St., ch. 191, sec. 5, such lien is superior to a mortgage recorded after that date. (*Savoy v. Dudley* [Mass.], 47 N. E. Rep. 424.)

Defendant, who had indorsed a note to a bank, agreed that the bank might accept such security and grant such extensions of time for payment as its officers might deem proper, and that the same should not affect his liability. Subsequently the maker gave the bank a mortgage to secure several notes made by him to different persons and indorsed to the bank. *Held*, that defendant's note should be credited with its proportionate share of

the proceeds on foreclosure of said mortgage. (*Home Sav. Bank v. McLaren* [Mich.], 71 N. W. Rep. 796.)

It is sufficiently evident, for the validity of the mortgage, that T is the mortgagee, though a blank is left where the name of the mortgagee ordinarily appears; it thereafter being recited that the mortgagor is indebted to the mortgagee as evidenced by a note of even date payable to T, and that the mortgage is given to secure its payment, and the habendum clause being: "To have and to hold the same unto the said party of the second part; provided, if the party of the first part pay to the party of the second part the amount of the note these presents shall be void." (*Richey v. Sinclair* [Ill.], 47 N. E. Rep. 364.)

#### Legal Laughs.

Mr. N., a struggling lawyer in a small town in Ohio, received a call from a farmer who wanted legal advice. Mr. N. took down a much-used volume from his small bookcase and gave the required advice, for which he charged the modest sum of \$3.

His client handed him a \$5 bill. With a troubled look Mr. N. took it. He flushed in the face as he passed his fingers nervously through his pockets, and his embarrassment increased as he continued his search among the papers on his desk.

"Well," said he, taking down the law book again and turning over the pages, "I'll give you two more dollars' worth of advice." — Ex.

"Mad, sir! Mad! I'm mad clear through!"

It was evident to the lawyer that he was on the verge of securing a good slander or personal damage suit, and he invited the stranger to be seated.

"Mad!" repeated the stranger. "I'm mad enough to eat Bessemer steel; I'm mad enough to put this case through if it costs me all of \$15."

"I infer," said the lawyer, "that some one has wronged you."

"Wronged me!" roared the stranger. "He's made a monkey of me! I tell you sir, he's made me look like a blooming idiot. He's given the public a wrong impression of my mental strength and the educational advantages of my youth, and I want to make him sweat for it."

"Tell me about it," said the lawyer, "and we will see what can be done."

"It all hinges on my middle name," explained the stranger. "and that name is 'Xerxes.' Now, I am not prepared to deny that that is more or less of a fool name for any one to carry around at this period of the world's history, but I can't see that I'm to blame for it."

"Certainly not," asserted the lawyer.

"Just because my parents were foolish enough to give me that kind of a name is no reason why every one I meet should think he has a license to

have fun with me, and I am entitled to the protection of the law, as I figure it."

"Most assuredly."

"Then it's a cinch I'll get big damages," said the stranger with every evidence of satisfaction at the prospect. "You see, my full name is 'John Xerxes Jones,' but of course I don't use the middle name."

"Of course not."

"I just write it 'John X. Jones,' and that's the way I put it on a big petition that is being circulated."

"What has that to do with your suit for damages?"

"Why, the big, lumbering idiot I want to sue came along and wrote 'his' above the 'X.' and 'mark' below it, and I'm either going to have him arrested or he's going to have a case of assault and battery against me." — Chicago Post.

### Legal Notes of Pertinence.

The biggest bill of expenses any candidate at the New York election has filed so far is put in by Francis M. Scott, elected justice of the Supreme Court. He owns up to having paid \$10,000 as a campaign assessment to Tammany Hall.

The Supreme Court of Arkansas, on the 30th ult., in the case of J. H. Keis and wife against F. J. Young, on appeal, decided that a husband is responsible for the debts of the wife contracted before marriage. Chief Justice Bunn dissented.

A woman, being 21 years of age, and otherwise properly qualified, may be appointed a notary public in Arizona, California, New Jersey, New York, Pennsylvania and Wisconsin. In Pennsylvania, if she marry while a notary a new commission must be issued to her. — Manual for Notaries Public, by Florian Giauque.

The last Marshall county (W. Va.) grand jury found 300 indictments against one saloon-keeper for selling liquor without a State or county license. All were based upon the testimony of one man, who said he had bought a drink from the saloon-keeper every day for a year. If the indicted has to pay the fine and costs it will mean over \$6,000 out of his pocket.

A report on divorces compiled by the State statistician of Indiana shows that 554 divorces were granted in Marion county during the last year, three out of four of which were granted to wives. There were something over 2,200 marriages in the county for the time, and thus 25 per cent. were divorced. For the State at large the divorces show about 10 to every 100 marriages.

An interesting case was decided recently in Naugatuck, Conn. A man who refused to assist a policeman in making an arrest of a troublesome prisoner based his refusal on the ground that as

he was an alien he could not be legally called upon to assist in enforcing the laws of this country. He was arrested and was fined \$10 and costs in the Borough Court, the judge holding that while a resident of this country he was subject to its laws.

Not long ago an animated discussion took place in the Volksraad (Transvaal) as to whether \$6,000 a year, the salary paid there, is a living wage for a legislator. About the same salary is paid legislators in the Argentine Republic. Salaries paid in other countries are: United States, \$5,000; Great Britain, nothing; France, \$1,800 and railway passes; Hungary, \$1,330; Greece, \$360 a session; Sweden, \$335 and passes; Prussia, \$3.75 a day; Japan, \$665.

A novel application for divorce was filed in a Denison (Tex.) court recently. The complainant states that his wife is addicted to inordinate drinking of buttermilk: that it makes him sick, and has preyed upon his mind to such an extent that he is on the verge of insanity, and it is further alleged that she snores so loud it is impossible to live in the same house with her. It is alleged that the defendant consumes a gallon of buttermilk at the three meals and on retiring at night.

It has been decided recently in one of the courts of Kansas City that hereafter no hangings shall take place on Fridays. Judge Wofford, who has made this rule, intends simply to counteract the superstitious awe in which many people hold this day. In explaining his position the judge said: "A lot of superstitious fools have the idea that Friday is unlucky simply because it has been customary for some judges to set hangings for that day. As long as I am on the criminal bench I will see that no man is sentenced to be hanged on any Friday."

The Illinois Supreme Court has just announced new rules of practice. The rule regarding admissions has been amended so as to require three instead of two years' time of study or attendance upon a school of law. Each applicant must also have passed a high school examination before being taken as a candidate. Briefs to be filed with the court must be of uniform size — six and one-fourth by ten inches. Twelve briefs must be filed, accompanied by proof of service of one copy upon the opposite party at law. Oral arguments cannot be made unless notice to argue orally has been filed with briefs. After arguing a case orally no further briefs can be filed.

Kansas has a capital punishment law, but it has proved inoperative because of the provision that the governor must sign the death warrant before an execution can take place, says the Utica Herald. Recent executives have either refused or neglected to sign such warrants. As a result, there are fifty murderers now in the State prison who

are under sentence of death. Governor Leedy declares that he will not sign their death warrants, as it was the duty of former executives to do so. He says, however, that any murderer sentenced during his term of office will be hanged. But he wants the law amended so that the death penalty may be imposed by the courts and carried out by the sheriffs of counties, instead of making an executioner of the governor.

Five important additions have recently been made to the gallery of portraits of the chief justices and associate justices of the Supreme Court of Massachusetts. They are those of Associate Justices Charles Augustus Dewey, Benjamin Franklin Thomas and Wm. C. Endicott; Justice Gray, now of the Supreme Court of the United States; and Hon. John Adams, who was chief justice of the Supreme Court for one year, having been appointed in 1775. It is a remarkable fact that Justices Endicott and Gray are the only living ex-justices of the Supreme Court of the commonwealth, and that the latter is the only surviving ex-justice who is on the bench. Justice Endicott being retired. The success which has attended the efforts of Chief Messenger Herter, of the Supreme Judicial Court, in obtaining a complete collection of portraits of ex-members of the court is very gratifying to the acting members, who are providing the means for carrying on the important work. Hon. Stephen Sewall is the only chief justice of the ten appointed before the Revolution of whom there is no picture known to exist, and of the twelve chief justices who have served since the Revolution the only one who appears never to have had a portrait of himself is Hon. Nathaniel Peaslee Sargent.

### English Notes.

The Lord Chief Justice (Lord Russell of Killowen) is at present confined to his bed by an injury to his leg. The learned judge's doctors have ordered complete rest for several weeks.

The elevation of Mr. Justice Henn Collins to a seat in the Court of Appeal is highly commended by bench, bar and press alike. He is conceded to be a sound and able lawyer, whose appointment will greatly strengthen the Court of Appeal.

Elm Court, Temple, is usually a very quiet spot. It was, however, on Tuesday afternoon the scene of some excitement. There was a crowd of men of all sorts and conditions. The secret leaked out that a barrister had advertised in the daily press for a clerk. — *Law Times*.

Five judges are now living in retirement — Lord Esher, Lord Ludlow, Lord Field, formerly a judge of the Queen's Bench Division; Sir Edward Fry, formerly Lord Justice Fry, who is now presiding over the Irish land commission; and Sir Arthur

Charles, who retired from the Queen's Bench Division during the present year.

The promotion of Mr. Justice Collins to a seat in the Court of Appeal may make a vacancy in the Venezuelan arbitration tribunal, of which he is a member. The *London Law Journal* is of the opinion that unless a new arbitrator be appointed in place of Justice Collins, the work of the Court of Appeal will be seriously affected.

Mr. Charles John Darling, Q. C., M. P., who has just been appointed to the Queen's Bench Division, to fill the vacancy caused by the promotion of Mr. Justice Collins, was born in 1849, and is, therefore, 48 years of age. He was called to the bar in 1874, and made a queen's counsel in 1885. In the same year he married a daughter of Major-General Wilberforce Greathed, R. E. In 1892 he was chosen a bencher of the Inner Temple.

In the City of London Court, on the 22nd inst., according to the *Law Times*, a claim was made by Mr. Alex. Ferguson, West Regent street, Glasgow, to recover £5 for goods supplied to Mr. R. Phillips, of the Minorities, E. C. The money had been paid by the defendant to the plaintiff's traveler. The plaintiff relied upon an intimation to the effect that all payments were to be made by check only, payable to himself. That appeared on the invoice. The defendant should not have paid the traveler in gold, as he had done. Mr. Commissioner Kerr said the defendant must pay the money over again. He was glad the plaintiff had put the notice on his invoice. Judgment for the plaintiff, with costs.

If a man has goods sent to him which he has never ordered, whether by mistake, or on approval, or by way of advertisement, he becomes a voluntary bailee, but what he is to do with the goods is a very difficult question, raised in *Hiort v. Bott* (30 L. T. Rep. 25), but purposely postponed for decision until some actual case rendering decision necessary should arise, says the *Law Times*. The question has been recently mooted in *Truth* in connection with parcels sent for advertising purposes only, and the solution offered is that the involuntary bailee should throw the goods into the street within a reasonable time after notice given to the sender to fetch them away. We think, on the whole, that this is the best solution of the problem, but it cannot be said to be quite satisfactory. The new Police Property Act, as we have already pointed out, very properly provides for the disposal of unclaimed property which may have come into the possession of the police in connection with a criminal charge, but, unfortunately, leaves unprovided for the not unfrequent cases in which lost property is brought to police stations by honest finders, and remains unclaimed.

The reopening of the courts of justice in London at the end of the long vacation this year, on

the 25th of October, was signalized by an innovation at the instance of the lord chancellor. This consisted of a religious ceremony in Westminster Abbey, which was attended by all the judges (who belong to the Church of England) in the Court of Appeal and High Court of Justice, and a large number of queen's counsel and representative members of the junior bar. "The scarlet and ermine of the judicial bench," says the London Times, "the full-bottomed wigs and court dress of judges and queen's counsel, and the brilliant academical costume of such juniors as possessed doctor's degrees, formed a picture the like of which has rarely been seen in a church in recent times." The service is described as a shortened form of matins, and lasted just forty-five minutes, and the entire observance appears to have been a dignified and impressive ceremonial. The Roman Catholic judges and members of the bar attended the red mass in Lincoln's Inn Fields, on the same day, where this service has been held for many years, and suggested the new one in Westminster Abbey. Lord Chief Justice Russell was too ill to be present.

### Notes of Recent American Decisions.

**Attorneys — Authority — Ratification.** — Where it is sought to hold liable a party for attorney's fees earned in the foreclosure of a mortgage held by such party, and the employment of the attorney is dependent on whether or not one who had authorized the commencement of such foreclosure proceedings did so with authority from the mortgagee, the burden of proof is on the attorney to establish such authority, and evidence which tends to negative the existence of such authority in the alleged agent is admissible under proper proceedings. (*Saxton v. Harrington* [Neb.], 72 N. W. Rep. 272.)

**Banks — Insolvent Bank — Deposit of Check.** — A customer who deposits a check to his credit in a bank, known by its officers to be hopelessly insolvent, may reclaim the proceeds thereof, if they can be identified and separated. (*Williams v. Cox* [Tenn.], 42 S. W. Rep. 3.)

**Banks — Money Paid on Forged Indorsement on Checks.** — In an action against a bank to recover money paid by it on three checks drawn by complainant, payable to T's order, and delivered to W, who forged indorsements thereof by T, it appeared that his transactions with W covered a period of 18 months, during which he turned over to W 35 checks, all payable to T's order, 32 of which were paid on indorsements like those on the three checks in question, and all of which complainant claimed were forgeries; that during such period his account was balanced three times, and he never examined it until after "this litigation" arose; and that he knew T's signature, and the signatures on all the checks were forgeries except

possibly two. *Held*, that recovery was not prevented by complainant's negligence, it appearing that there had been no loss to complainant or the bank on account of the 32 checks, and hence no cause to challenge an inspection of the indorsements thereon. (*Pollard v. Wellford* [Tenn.], 42 S. W. Rep. 23.)

**Corporations — Officers — Assignment for Benefit of Creditors.** — An insolvent corporation has the right to make a general assignment of its property for the benefit of its creditors, unless prohibited by its charter or some statute. The directors of an insolvent corporation may make an assignment for the benefit of creditors, without the assent of the stockholders. (*Boynnton v. Roe* [Mich.], 72 N. W. Rep. 257.)

**Criminal Practice — Fornication — Indictment.** — An indictment charged that on September 10th, and at other times, Pinzen Smith, an unmarried man, and Rachel Branstetter, at the time being unmarried, did live and cohabit together as man and wife, contrary, etc. *Held*, that the indictment sufficiently charged the offense of cohabiting in a state of fornication, although there was no direct allegation that Rachel Branstetter was a woman. (*State v. Smith* [Ind.], 47 N. E. Rep. 685.)

**Marriage — Breach of Marriage Promise — Aggravation.** — If a man forms a marriage engagement merely as a cloak to accomplish the woman's seduction, this may be considered in aggravation of damages for the subsequent unjustifiable breach of the contract by him, although the seduction be not accomplished. (*Kaufman v. Fye* [Tenn.], 42 S. W. Rep. 25.)

**Partnership — Assignments.** — A firm dissolved partnership, and one of the partners retired, severing all connection with the firm, although allowing the firm name to remain unchanged. He also relinquished all claim on his share of the capital, which was to remain in the business until a certain date, in favor of a third person. The firm made an assignment before that time. *Held*, that the third person, claiming through the retired partner, could not prove her claim in competition with firm creditors. (*Garlick v. Karger* [Wis.], 72 N. W. Rep. 223.)

### Notes of Recent English Decisions.

**Practice — Discovery — Information — Production of Documents.** — The right of the crown to discovery against a subject is the same as that which one subject has against another in an ordinary action; and in the case of an information the right of the crown to discovery is not lost because the answer is not excepted to within six weeks. The crown having claimed a part of the foreshore and bed of a river, the defendants claimed to be owners of the whole of the foreshore and bed of the river within the limits of the port, which in-



cluded the part claimed by the crown. The defendants were also conservators of the river. *Held*, that the crown was entitled to see not only the documents relating to the part claimed by the crown, but also all documents relating to acts of ownership by the defendants within the limits of the port, including their acts as conservators, as they might repel the defendants' claim. (*Attorney-General v. Mayor and Corporation of Newcastle-on-Tyne*, Court of Appeal, lxxxvii L. T. R. 203.)

### Communications.

*To the Editor of the Albany Law Journal:*

I have received a marked copy of the ALBANY LAW JOURNAL containing the article, by Mr. Walter L. Miller, on "What Should Lawyers Read?" and I have read the article with a great deal of interest.

The article itself, in its literary composition and general make-up, helps to show the advantage that is to be got from making journeys outside of the technical law-book. The lawyer who wins eminence and the highest success in his profession must have gleaned in all the fields you mention, for they all have riches to contribute. It is a pleasure, too, to invade these outlying domains. For the last week I have spent my evenings with Tennyson's "Idylls of the King," where we have the language in its utmost purity and perfection. Shakespeare I have always at hand, and sometimes speak of it as the best law-book in my collection. John Milton's great poem I never touch without feeling a degree of mental elevation and expansion. And there is, of course, the One Book, which, viewed simply as a literary monument, cannot be safely neglected in either our own or any other literary profession.

But I do not mean to rewrite on the subject which Mr. Miller has so well treated. I join in the view he takes of "what a lawyer should read."

I am very truly yours,

J. ALTHEUS JOHNSON.

WASHINGTON, D. C., Nov. 9, 1897.

### New Books and New Editions.

*Compendium of Costs, Fees and Taxes in the State of New York, as Provided by the Revised Statutes* (Banks & Bros., Ninth Edition), the *Codes of Civil and Criminal Procedure*, the *Rules of the Court of Appeals and Supreme Court*, and the *Session Laws*. By Donald Bain, of the Buffalo Bar. 1897. Banks & Bros., New York and Albany.

Mr. Bain, in this work, has sought to give, accurately and in the most readily accessible form, the costs and fees which at present obtain in this State. In compiling it he has evidently spared no pains to secure absolute accuracy, and since going

to press the subject-matter has been carefully compared and revised, and the enactments of the legislature of 1897 added. The usual dictionary or alphabetical arrangement, with marginal references, has been adopted with regard to costs and fees, as being the best for purposes of ready reference. A further valuable feature of the work is the fact that all sources of information are, in every instance, indicated in the marginal notes, and may be consulted whenever it is deemed necessary or desirable to do so. Part II embodies, synoptically, the most salient features of the Tax Law (chapter 908 of the Laws of 1896), the Insurance Law (chapter 690 of the Laws of 1892), and the Liquor Tax Law (chapter 112 of the Laws of 1896). The book will be found, without doubt, a most valuable—indeed, indispensable—aid to every busy lawyer, for its possession and use will save him much valuable time in ascertaining the amount of fees allowed by law in all classes of cases. In scope the work is comprehensive, and in arrangement admirable.

A *Manual for Notaries Public, General Conveyancers, Commissioners, Justices, Mayors, Consuls, etc.*, as to Acknowledgments, Affidavits, Depositions, Oaths, Proofs, Protests, etc., for Each State and Territory; with Forms, Instructions, etc. Second Revised Edition. By Florian Giauque, A. M., of the Cincinnati Bar. 1897. The Robert Clarke Co., Cincinnati, Ohio.

The scope of this work is sufficiently indicated in its title. In the preparation of this, the second edition, the author has found it necessary to make many changes; in fact, the admission, since the appearance of the original work, nearly ten years ago, of several territories to statehood, and innovations caused, as the author states, by the tendencies of the times, such as the placing of women, whether single or married, on the same footing as to property rights, and the progress toward securing uniform legislation throughout all the States on several subjects, including commercial paper, the execution of deeds, etc., have made necessary the practical rewriting of the work. As a compendium on the subject treated it is admirably comprehensive, covering every phase of the subjects with quite satisfactory fulness. The present edition now brings the valuable work down to date. The class of officers referred to, as well as attorneys and others, frequently need to know how to execute deeds, mortgages and similar instruments, depositions, etc., for use in other States, as well as in their own. This book tells them. The plan of arrangement chosen, which seems to be excellent, has enabled the author to condense much information into a small space—400 octavo pages—and this is aided by a compact style of printing, although it should be said that the typography is so good as to render reading a pleasure.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, NOVEMBER 27, 1897.

### Current Topics.

WHAT appears to be the first decision of a Federal court on the subject of the boycott was rendered in the United States Circuit Court of Appeals, sitting in the city of St. Louis, Mo., on the 13th inst. The case is that of the Oxley Stave Company, of Kansas City, v. J. S. Hoskins and twelve others. The defendants are all members of Cooper's Union No. 18, of Kansas city, and the Trade's Assembly of the same place. The facts appear to be that in January, 1896, the Stave company placed in their establishment a plant to hoop barrels. This action angered the defendants, who, after requesting the company to withdraw the machines and having their request refused, caused a boycott to be declared against the company. The latter, through their attorneys, secured from the United States District Court an injunction against the defendants restraining them from carrying on the boycott. The defendants appealed to the United States Circuit Court of Appeals, which now affirms the decision of the lower court. In doing so, Judges Sanborn and Thayer held that the defendants had no right to form a conspiracy to deprive the plaintiff of its right to manage its own business, for if such action were lawful, then a combination might be organized for the purpose of preventing the use of type-setting machines, presses, harvesters, threshers and thousands of other useful inventions. In other words, it was held that the boycott is not a legal weapon. The opinions in the

VOL. 56 — No. 22.

case — for the court was divided — will be published in full in these columns as soon as they can be obtained, for we regard the decision as of the highest importance, not alone to labor organizations and corporations, but to the public at large. Judge Caldwell, in a lengthy dissenting opinion, in which he inveighs vigorously against trusts, says: "All capital seeks to increase its power by combination, and to that end assumes the form of corporations and trusts. Many of these combinations are on a gigantic scale. They are the employers of the great mass of laborers. They are formed solely for pecuniary profit. They defy all social restraints that would have a tendency to lessen their dividends. What the stockholders want is more dividends, and the best manager is the man who will make them the largest. The struggle is constant between laborers, whose labor produces the dividend, and those who enjoy them. The manager is tempted to reduce wages to increase dividends and the laborers resist the reduction and demand living wages. Sometimes the struggle reaches the point of open rupture. When it does, the only weapon of defense the laborer can appeal to is the strike or the boycott, or both. These weapons they have an undoubted right to use, so long as they use them in a peaceable and orderly manner. This is the only lawful limitation upon their use. That limitation is fundamental and must be observed. It was observed in the case at bar to its fullest extent."

While the full text of the opinion is not at hand, we cannot refrain from expressing the opinion that the position of Judge Caldwell is untenable, and his reasoning unsound. Perhaps it would be more accurate to say that he is partly right and partly wrong. With respect to the strike as a legitimate weapon, legally used, in the hands of the wage-earner, in resisting proposed reductions of, or in enforcing the payment of higher wages, there can be no doubt that Judge Caldwell is right. Workmen may quit work whenever they see fit, either singly or in groups. As to the boycott, however, the majority opinion of the court, it seems to us, is not only good law, but voices the

sentiment of the great majority of the American people. The so-called boycott is an un-American, detestable method of coercing employers which ought not to be recognized as a legal weapon of offense or defense. To thus legalize its use, even in a "peaceable and orderly manner," as Judge Caldwell ingeniously puts it, would be not only inequitable but in the highest degree dangerous to labor as well as to capital and to organized society. If Judge Caldwell's opinion were to be made the law of the land, it would result in the institution and perpetuation of a system of tyranny the evil consequences of which it would be difficult to overestimate. It would be, indeed, the legalizing of conspiracy to ruin an unpopular employer or bring him to terms. It might be said, on the other side, that everyone has an inherent right not only to withhold his patronage from an alleged unfair merchant or employer, but to advise others to do the same, and that this is all that a boycott amounts to. The distinction, however, is easily made. The movement becomes a boycott—and, according to the decision under review, not a legal weapon—when it assumes large proportions through the denouncing and "blacklisting" of the merchant or employer in the newspaper organs of the labor fraternities, or in other ways which it is unnecessary to point out, and in this form it ought never to be allowed to obtain a foothold in this country.

A very interesting case relating to the liability of a railroad corporation for personal injuries sustained, as alleged, by reason of the negligence of its agents and servants, was decided, on the 1st inst., by the U. S. Supreme Court. It was that of Richard H. Fletcher, plaintiff in error, v. The Baltimore & Potomac Railroad Company, Mr. Justice Peckham delivering the opinion of the court. The evidence on the trial tended to show that on May 16, 1890, the plaintiff, an employe of the company, while standing at the intersection of South Capitol street and Virginia avenue, in the city of Washington, was struck by a piece of bridge timber which had been thrown from a flat car by one of the

company's workmen on the train, and permanently injured. The defendant had been in the daily habit, for a number of years, of running out of Washington and Alexandria a repair train of open flat cars loaded with its employes, and the train returned every evening about 6 o'clock, and drew the workmen back to their homes. These men were allowed the privilege of bringing back with them for their own individual use, for firewood, sticks of refuse timber left over from their work of repairing the road. It was the constant habit of these men during a number of years, to throw off pieces of firewood while the train was in motion, at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other persons waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt any one in throwing the wood off. The foreman of the gang was the man who usually gave such instructions. This evidence having been given, the plaintiff rested and the defendant then moved for the direction of a verdict in its favor, which motion was granted, and the judgment entered on the verdict having been affirmed by the Court of Appeals (6 App. D. C. 385), came before the Supreme Court for review. The court was not called upon to say that the defendant was in fact guilty of negligence, but thought the question whether the defendant was or was not negligent was one which should have been submitted to the jury. The Supreme Court holds that the liability of the defendant to the plaintiff for the act in question was not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not, the court thinks, bring it within this rule. While the company does not insure against the performance of an act such as that in question, it rests under an obligation to use reasonable diligence to prevent its occurrence. The persons on the train were in fact employes,

and were being transported to their homes by the company which had, during the time of such transportation, full control over their actions. Whether or not they were through with their work the court does not think material. The court says: "If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendants guilty of negligence in having permitted the act, and liable for the injury resulting therefrom, notwithstanding the act was that of an employe and beyond the scope of his employment, and totally disconnected therewith." The court thinks it was a question for the jury to say whether the custom was proved; whether, if proved, it was known to and acquiesced in by those in charge of the train as servants of the company; and whether it was a dangerous act from which injury to a person on the street might reasonably be apprehended; and if so, whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act. For these reasons the judgment was reversed and the case remanded to the Court of Appeals of the District of Columbia, with directions to reverse the judgment of the Supreme Court of the District and remand the case to that court with directions to grant a new trial.

A mooted question as to the status of expert witnesses with reference to compensation for testifying as such, has been settled by a decision in the Supreme Court of Illinois. It was an agreed case carried up from the Circuit Court of Sangamon county. Dr. J. N. Dixon, of Springfield, who was called as an expert witness in a personal injury case against the city of Springfield, refused to testify unless he was first paid a reasonable fee—presumably fixed by himself—for this service, claiming that his professional

opinion was his own property and could not be taken away from him except by due process of law, as provided by the State Constitution. Judge Creighton, of the Circuit Court, ruled against him and fined him for contempt of court. This ruling is now upheld by the Supreme Court. In other words expert witnesses in Illinois are on the same footing as all other witnesses, and must appear when subpoenaed.

The State Bar Association of Georgia, according to recent newspaper reports, has resolved to ask the legislature to make three important changes in the criminal law of that commonwealth. The Criminal Code of Georgia provides that in capital cases, or cases involving imprisonment for four years or more, the prisoner may peremptorily challenge twenty of the jurors called to try him, and in cases involving less than four years' imprisonment he may challenge twelve of such jurors peremptorily. The State, however, is only allowed one-half the number of peremptory challenges allowed to the accused. The first recommendation is that this discrimination against the prosecution be removed, and as many challenges be permitted to the public prosecutor as to the prisoner. In Georgia, a defendant in a criminal case cannot testify in his own behalf, but he has the right to make a statement to the court and jury "which shall not be under oath, and shall have such force only as the jury may think right to give it." The State Bar Association would do away with this system and permit the prisoner to be a witness for himself under oath and subject to a proper cross-examination, in accordance with the procedure in New York. The third reform advocated by the association is greater liberality in allowing defective papers in criminal cases to be amended. All of the proposed changes are in the right direction and ought to be put in force without unnecessary delay.

The plan which has been adopted in the recruiting of the board of editors of the Yale Law Journal for the ensuing year is one which will commend itself, and ought to become permanent. The selection will be

decided largely on the basis of a thesis competition, the decision being governed somewhat, also, by the quality of the class-room work of the competitors. The subjects chosen are these: "The Demerits of the Olney-Pauncefote Arbitration Treaty;" "In What Light can Stock Certificates be Termed Quasi-negotiable?" "Should the Ordinary Course in American Colleges for the Degree of B. A. be Shortened to Three Years?" "The Influence of the Penn Charter on the Institutions of Pennsylvania now Existing;" "The One-man Power in Modern City Charters." Any one of these topics, all of which are timely and most suggestive, may be selected. The theses are to be about 4,000 words in length, and handed in prior to March 1, 1898. To the author of the most meritorious thesis will be awarded a prize of \$25.00.

The Solicitor's Journal (London) mentions the fact that in the case of *Reg. v. Stormonth*, tried recently before Ridley, J., at the Old Bailey, the circumstances were almost identical with those in *Reg. v. Alison* (8C. & P. 418). In each case a man and a woman had agreed to die; poison was obtained, they divided it, drank it, and lay down together to die; but the woman alone died while the man recovered and lived to be indicted and convicted for murder. In a more recent case, *Reg. v. Jessop* (16 Cox, 204), the facts were again practically the same, though in this case both the persons who agree to die together by poison were young men. Field, J., before whom the survivor was tried for the murder of his friend, in summing up to the jury, said: "A person who administers poison to another with the intention of killing him is guilty of murder if that person dies, and if two persons agree that they will each take poison, each person is a principal and each is guilty." The prisoner was convicted in this case also, and neither decision has ever been seriously questioned. At one time a person who counseled, aided, or abetted another to commit suicide, but who was not present when the *felo de se* put an end to his life, was in the position of an accessory before the fact to murder. An accessory be-

fore the fact, however, could not at common law be tried until the principal felon had been convicted, unless he were tried along with the principal. Hence it followed in such a case that the accessory to the felony of self-murder escaped punishment, as it was not possible to try the principal. The law on the subject has, however, been altered by section 2 of 24 and 25 Vict. c. 94, which provides that an accessory before the fact to any felony may be indicted and convicted as such "whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice." If, however, as in the cases noticed, a person aids or abets another in committing suicide, and is actually present when that other takes his own life, he is guilty of murder at common law as a principal in the second degree. And as principals in the second degree and accessories before the fact are all in law equally guilty with the principal in the first degree, it follows that anyone who aids and abets another in the crime of suicide is in law guilty of murder and liable to the penalty of death. Another very interesting case, involving the loss of human life, is mentioned by the same authority as having been tried at the Old Bailey recently. The prisoner, who was indicted for manslaughter, was a member of the sect called the Peculiar People, whose tenets appear to be not unlike those of the so-called Faith Curists. These people have religious objections to calling in medical advice or to using medicine in case of illness, but instead of this they call in some of their elders, pray over the sick person, and annoint him with oil in the name of the Lord. "In this case," says the Journal, "a child of the prisoner's died without having received any medical attention, though it was sworn that the child would probably have recovered under proper treatment. At one time the law seems to have been different on this subject to what it is now. There can be no doubt that if a person who has a duty to another culpably neglects that duty, by reason of which neglect the other dies, such person is guilty of manslaughter at the least. When, however, a

parent is kind to, and careful of, his child, but nevertheless in case of illness refuses to summon medical aid, under the *bona fide* belief that the anointing with oil and prayer of elders is more likely to be beneficial to the child, it was found hard to say that the parent was guilty of culpable neglect. Therefore, in times past, it has been held (though the law was never quite settled) that such persons were not guilty of manslaughter, even though a jury was convinced that with proper medical attention the child would have lived. Section 37, however, of the Poor Law Amendment Act, 1868, provided that every parent who wilfully neglected to procure medical aid for his child, so as to seriously injure the health of such child, should be guilty of a misdemeanor, and so imposed upon a parent a positive statutory duty. After this act became law the case of *Reg. v. Downes* (24 W. R. 278, 1 Q. B. D. 25) was argued before the Court of Crown Cases Reserved. The facts were precisely the same as in the recent case, and the court held that, whatever the motives of the father were, he had wilfully and intentionally, though perhaps not maliciously, disobeyed the law by neglecting to call in medical aid. This was culpable neglect, and through this neglect the child's life was lost, therefore the prisoner was guilty of manslaughter. The section of the act of 1868 referred to above has been repealed, but the Prevention of Cruelty to Children Act, 1894, provides that any person having the care of a child under sixteen years of age who wilfully neglects such child in any manner likely to cause the child unnecessary suffering or injury to its health shall be guilty of a misdemeanor. It is clear that this provision includes the provision of the repealed section. It must be noticed, however, that, in order to convict a person of manslaughter by neglect to call in medical aid, it is necessary to satisfy the jury that, if such aid had been called in, the life of the deceased would probably have been saved, or at least prolonged. This was decided by the Court for Crown Cases Reserved in the case of *Reg. v. Morby* (30 W. R. 613, 8 Q. B. D. 571), another similar prosecution of one of the Peculiar People, in

which, however, the medical witness would not swear that the deceased child's life would have been probably prolonged by medical attention." In the recent case at the Old Bailey the prisoner was found guilty of manslaughter, as also was another of the Peculiar People charged with a similar offense. They were both released on their own recognizances, to come up for judgment if called upon — a leniency which the Solicitor's Journal thinks was a mistake on the part of the court, for, unless these Peculiar People are punished they will continue to allow their children to die for want of proper attention.

#### Notes of Cases.

In *Cleveland Nat. Bank v. Morrow*, decided by the Supreme Court of Tennessee, in October, 1897 (42 S. W. R., 200), it was held that a perpetual scholarship, granted to a person by a college in recognition of his gifts to it, authorizing him to place and keep therein one pupil without charge, is not subject to execution.

The Court said in part: The question presented is whether this right of appointment vested in defendant Morrow is such property as can be taken for debt. It is argued that it is a valuable property right; that it is perpetual; that it is unlimited as to time, and unconditional; that it can be disposed of by will or deed or other proper transfer; and that the courts can divest it out of him and vest it in another. The only question before us is whether it can be seized for debt and sold at public sale. As to whether it can be revoked by the college authorities we are not called upon to decide. Neither are we called upon to say whether Morrow may devise or give it to another. None of these questions are involved in this case, except very remotely and incidentally. We have not been furnished with any authority upon this novel question. It will be noted that it was not a case of an ordinary scholarship sold by an institution to a purchaser, with right to use or sell and transfer it as he might choose, as is often done by schools. Nor is it a power over or attached to real estate or tangible property. It is not, in any correct sense of the term, an "estate." It is merely a privilege or power to be exercised by and with consent of the college, and under its rules and regulations. Certainly the power cannot be exercised, and appointment made, except under such reasonable rules and requirements as the college might dictate. It must be subject to the charter and regulations which control the institution. Dr. Morrow, subject to these limitations, can appoint whom he pleases. He can decline to appoint al-

together. It is a privilege personal to him as long, at least, as he sees proper to exercise or refuse to exercise it. It does not appear that he has attempted to use it for any pecuniary or personal benefit. The appointment had been treated as an act of charity. If it can be sold publicly, any person might buy, and the power of appointment might thus be vested in disreputable hands. We do not think it is such a right as can be seized and sold for debt.

In *Hollenbeck v. Hall*, decided by the Supreme Court of Iowa in October, 1897 (72 N. W. R. 518), it was held that to publish of one that he has for several years owed for medical services; that his attention has been repeatedly called thereto to no purpose; that finally, being sued therefor, he, having no other defense, he has cowardly slunk behind that of the Statute of Limitations, and that such a course is not in accordance with the writer's idea of strict integrity—is not actionable within an Iowa statutory provision, defining libel as malicious defamation of a person by writing, tending to provoke him to wrath or to expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.

The Court said:

Conceding the letter to have been published, was it libelous? Our statute defines "libel" to be "the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse" (Code 1873, sec. 4097). "Defamation" is defined by Webster as "the taking from another's reputation." Odgers, in his work on Libel and Slander, says: "Words which produce any perceptible injury to the reputation of another are called defamatory." It is "a false publication calculated to bring one in disrepute" (Cooley, Torts, 193). The derivation of the word leaves no doubt as to its meaning. Was there anything in the letter injurious to the good name of the plaintiff, or tending to bring him into disrepute? It is not dishonorable to be indebted to another, nor is it libelous to publish of another that he owes money (*Reg. v. Coghlan*, 4 Fost. & F., 316). To be in debt is very common, and to be unable to make payment does not necessarily involve moral turpitude. Nor is the debtor's reputation brought into question by making a defense which the law sanctions, and which rests on sound reason and long experience. Formerly, pleading the Statute of Limitations was looked upon with disfavor. Lord Mansfield remarked, in *Quantock v. England* (5 Burrows, 2630), "that, in honesty, a defendant ought not to defend himself by such a plea." The statute is now generally conceded to be beneficial, and the defense as legiti-

mate as any other. As said by Justice Story in *Spring v. Gray* (5 Mason, 523, Fed. Cas., No. 13,259): "The defense, therefore, which it puts forth, is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practical manner, such as are ancient and unacknowledged, and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers to repel them. The natural presumption certainly is that claims that have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their overconfidence in regard to transactions which have become dimmed by age" (see 3 Pars. Cont., 61; *Penley v. Waterhouse*, 3 Iowa, 418). It cannot be libelous to accuse one of doing what the law approves. In *Homer v. Engelhardt* (117 Mass. 539), it is held that to accuse one of availing himself of the prohibitory liquor law, in order to defeat an indebtedness for liquor sold, is not libelous, the court remarking that, "the plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so." *Bennett v. Williamson* (4 Sandf. 60) is precisely in point. Since the law recognizes this defense as legitimate and honorable, to accuse one of making it would not amount to defamation (*Bish. Noncont. Law*, sec. 283).

2. The entire letter must be considered and therefrom the plain import and natural meaning as intended, and the sense in which it was understood determined. The alleged facts are clearly stated. There is no mistaking them from the opinions expressed by the writers of the letter. The characterization of the acts is based entirely on the assumption that the conduct of plaintiff in availing himself of the defense was not honest and in accord with their standard of integrity. The spirit and purpose of the letter may well be said to indicate an element of character quite as inconsistent with the golden rule as that which permits omissions in the matter of pecuniary obligations. Such a letter may be the subject of just criticism, but its publication does not expose to public hatred or contempt in the sense or to the degree required by the law of libel (See *Urban v. Helmick* [Wash.], 45 Pac. 747; *Donaghue v. Gaffy*, 54 Conn. 257, 7 Atl. 552).

The case of the Western Assurance Company of Toronto v. The J. H. Mohlman Company, recently decided by the United States Court of Appeals, involved the construction of the following clause in an insurance policy, viz.: "If a building or part thereof fall except as a result of a fire, all insur-

ance by this policy on such building or its contents shall immediately cease." The court said in reference to the construction of this clause: "Manifestly it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from fall; it stipulates for very much more, viz., that the contract which it expressly provided shall normally continue for a year, shall, in the event of a fall, absolutely cease and determine, so that if a fall shall take place, which in no way impairs the property insured, and it thereafter be destroyed by fire, happening otherwise than by destruction by fall or from prohibitive causes, the insurer is nevertheless not liable, because an event has happened which, by agreement of the parties, puts an end to the contract altogether. A clause drawn expressly to cover the case of a building falling before a fire has been inserted in the contract, and it is to be assumed that the whole intention of the parties on that subject is expressed in such clause. The circumstance that the complaint alleged that the 'fire did not happen by reason of any of the causes excepted by the terms of the policy,' did not change the situation in any way."

In *Commonwealth v. Ainsworth*, decided by the Court of Quarter Sessions, Allegheny Co., Pa., Nov. 6, 1897, it was held that a decree of divorce granted in North Dakota is no defense to an action by a wife against her husband for non-support in Pennsylvania, if the evidence fails to show that the husband ever had a domicile in North Dakota, and the inference is that he went there for the purpose of obtaining a divorce.

The court, ruling on the claim of the defendant that the decree in divorce referred to constituted a bar to the proceedings in this case, said: "We cannot concur in this claim for two reasons: First, because the prosecutrix in this case, and the respondent in the divorce proceedings, never having had a domicile in the State of North Dakota, the court of Richland county had no jurisdiction over her, or power to pronounce any decree or judgment which would bind her, consequently the decree of absolute divorce granted October 9th is void, at least outside of the limits of the State of North Dakota, so far as the same affects the rights of the prosecutrix. Second, because the evidence fails to satisfy us that the defendant is now or ever was a *bona fide* resident of the State of North Dakota. A person's domicile is the place in which he resides with intention of residence. It is his permanent, not pretended, home. It must be actual, not intended; it must be *bona fide*, not a residence taken merely for the purpose of obtaining a divorce, and to be given up afterward. The defendant was in North Dakota just five months; during that time he worked at his trade a few weeks; he neither paid taxes nor voted while there, and left that State as soon as his divorce was granted, and

returned to Allegheny city. Surely *bona fide* domicile cannot be acquired under those circumstances. For these reasons we are of the opinion that the divorce obtained by defendant in the State of North Dakota is not a bar to the proceedings in this case, and that the defendant must contribute to the support of his wife and child."

### CONVICTION OF MURDER IN FIRST DEGREE REVERSED.

EVIDENCE, TENDING TO NEGATIVE THEORY OF INTOXICATION AND ESTABLISH FACT OF INSANITY, ERRONEOUSLY EXCLUDED.

N. Y. COURT OF APPEALS.

October 26, 1897.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MARTIN V. STRAIT, Appellant.

A party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue, and if the court excludes such evidence its rejection must be regarded as substantial error for which the judgment will be reversed upon appeal, unless it can be plainly seen that the rejection could not have legitimately affected the result.

Upon the trial of the defendant for homicide his defense was insanity. When he rested his case the people gave testimony tending to show that on the day of the homicide the defendant was intoxicated, and that all his acts and conduct on that and other days relied upon by him as evidence of insanity could be attributed to his intoxication. When the people again rested the defendant offered to show, by the testimony of experts, that such acts and conduct could not be accounted for in that way, and that the effect of alcohol upon the brain was not such as to produce them. This testimony was excluded by the court, under objection on the part of the prosecution, that it was reopening the defendant's case, *Held*, error, for which the judgment of conviction should be reversed.

Appeal from a judgment of the Supreme Court entered in Chemung county upon the verdict of a jury convicting the defendant of murder in the first degree, and from an order denying his motion for a new trial made on the minutes of the Trial Court.

Hosea H. Rockwell, for Appellant.

Charles H. Knipp, for Respondent.

MARTIN, J. At a term of the Court of Oyer and Terminer, held in the county of Chemung, in November, 1894, the defendant was indicted for the crime of murder in the first degree. It was charge<sup>d</sup>



that on the 16th day of November, 1894, at the city of Elmira, in that county, he deliberately and with premeditation shot and killed his wife, Joan H. Strait. In the following May he was tried and a verdict of guilty was rendered. From the judgment of conviction entered on that verdict he appealed to this court, where it was reversed and a new trial granted. The reversal was upon the ground that the court erred in admitting improper evidence. The defendant was again tried at a term of the Supreme Court held in that county commencing December 7, 1896, and was again convicted of the same crime. When arraigned for sentence his counsel moved for a new trial upon the minutes, under section 465 of the Code of Criminal Procedure, and the motion was denied. From the latter judgment and the order an appeal has been taken to this court.

That the defendant, at the time and place alleged, shot his wife, and that she died from the result of the wounds thus inflicted, were proved and not denied. Indeed, that the defendant killed her was conceded on the trial, and is conceded here. The only issue of fact presented in the case was that of the defendant's sanity. His defense was that when the homicide occurred he was laboring under such a defect of reason as not to know the nature and quality of his act or that it was wrong.

A great amount of evidence was introduced by each party, and witnesses, both lay and expert, were called and testified upon that issue. The witnesses called by the defendant gave testimony tending to show that he was laboring under such a defect of reason as not to know the nature and quality of his acts, or that they were wrong. Upon the other hand, the testimony of the people's witnesses tended to show that he was sane and responsible for his acts. With our view of this case we deem it unnecessary to consider the facts, or to do more than examine a few of the exceptions taken by the defendant.

On the trial, after the people rested and the case had been turned over to the defendant and he had introduced his proof and rested his defense, the people proved that the defendant, to a greater or less extent, indulged in the use of intoxicating drinks, and that upon the day of the homicide he had been drinking. The court then permitted the prosecution, under the objection and exception of the defendant, to ask its expert witnesses whether all of the conditions of mental disturbance described in the hypothetical question put to witnesses for the defendant might not be accounted for on the ground of intoxication, and they testified that they thought they might. The prosecution was also permitted to prove by its experts that the conditions mentioned, which were the result of intoxication, might exist and pass away when the intoxication was terminated and the person be sane all the time.

Without referring specially to the various instances contained in the record it may be said generally that the learned district attorney made a continued and persistent effort during the entire trial of the issue to establish that the defendant drank intoxicating liquors habitually, and that he was intoxicated upon the day of the homicide. This effort was opposed by the defendant with equal persistence. The evidence, however, was admitted. The district attorney also sought to establish by the evidence of the experts called in behalf of the people that all the acts and conduct of the defendant, which were relied upon by the defense as evidence of insanity, might be accounted for on the ground of his intoxication. Witnesses called by the people were permitted to give testimony to that effect. After this evidence had been received, the people for the second time rested.

The defendant then recalled Dr. Wagner, who was a qualified expert, and offered to prove by him whether alcohol when taken internally acted upon the brain, was a direct brain poison, or was regarded as a cause of insanity. To this proof the district attorney objected upon the ground that it was reopening the case, the court sustained it and the evidence was excluded. The defendant also sought to prove that he did not use intoxicating liquors, or at least to the extent testified to by the witnesses for the people. This evidence was also objected to by the district attorney upon the same ground, and excluded by the court. To all of these rulings the defendant duly excepted. That the purpose of this evidence was to disprove the theory of the prosecution, that the acts and conditions relied upon by the defendant as evidence of insanity might be attributed to his intoxication, is manifest. It is equally manifest that the object of showing that he did not indulge in the use of intoxicating drinks, or to the extent proved by the witnesses called by the prosecution, was also to contradict and disprove that theory.

It is extremely difficult to discover any ground upon which these rulings can be sustained. An examination of the record discloses that the issue of intoxication, so far as it was a basis of explaining the defendant's acts as consistent with sanity, was one presented by the people and upon which they introduced a great amount of evidence, both as to the fact and by opinions of experts, while no such issue was, or could well have been, raised by the defendant, as it was totally inconsistent with the theory of his defense.

After the people had been permitted to introduce this evidence, including the opinions of experts, that all the conduct and conditions proved by the witnesses for the defendant might be attributed to intoxication rather than to insanity, we do not think the evidence offered by the defendant can be regarded other than in rebuttal of that given by the people when seeking to establish the sanity of the defendant, and that the court

erred in rejecting it upon the ground that it was reopening the case.

It is doubtless true, as suggested by the court, that the defendant had been combating the theory of intoxication "all the way through." But that issue was not tendered by the people until the defendant had rested, and hence he had no proper opportunity to present his evidence upon that question. Up to that time he could combat the question only by the cross-examination of adverse witnesses. He was not bound to content himself with that, but had a legal right to disprove the claim of the prosecution by witnesses who had not been called to testify against him. Moreover, not until then could he have properly proved by his expert witnesses that the effect of intoxication would not have been as testified to by the experts for the people. When the people rested upon the issue of insanity, was the first time that that class of evidence was properly admissible. Until then the case had been in the hands of the people since that issue was in fact raised. The defendant not only attempted to disprove what the prosecution had proved as to his intoxication, but also to establish by a witness who was qualified, that, if the facts were as claimed by the prosecution, it could not have produced the result testified to by its experts. That the evidence, if it had been admitted, would have had an important bearing upon the question in issue, there can be little doubt.

As the defendant's sanity was the only issue that was seriously litigated upon the trial, it cannot be said that the rejection of this evidence could not have legitimately affected the result. Upon that issue it was claimed and proved by the people that the acts and circumstances relied upon by the defendant as evidence of his irresponsibility for his acts, might well be accounted for upon the theory of his intoxication. If true, this evidence weighed heavily against the defendant. He sought to disprove it by showing, first, that he was not intoxicated, or at least to the extent claimed by the people, and, second, that it could have had no such effect as claimed and testified to by the people's witnesses. But he was prevented from introducing that evidence upon the theory that it was reopening his case. We do not think that that ruling can be upheld. It is manifest it was not a reopening of the case, but an attempt upon his part to disprove the evidence of the people given in answer to his proof upon the question of his insanity, and upon a subject which he was not required to anticipate until the evidence relating to it had been introduced by the learned district attorney.

The counsel for the defendant then asked the same witness the following question: "Now I ask you if the fact that, on the day of the commission of the homicide — I judge you have become familiar with the history of this case — the accused met certain acquaintances upon the street and bowed to

them and recognized them and even had conversation with them, during which those witnesses observed nothing peculiar in his appearance; that his appearance did not impress them as either natural or unnatural, or rational or irrational, no more than would the appearance of any other acquaintance, whether the fact of itself would afford any evidence whatever as to the sanity or insanity of the accused on that day, assuming the conditions to remain as they were when you were formerly on the stand and asked as to his condition?" This question was objected to as reopening the case, the objection was sustained, and the defendant excepted. What has already been said in regard to the exclusion of the other evidence which was objected to upon the same ground, applies with equal force to this ruling.

It is well settled in this State that a party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue, and if the court excludes such evidence, its rejection must be regarded as substantial error for which the judgment must be reversed upon appeal, unless it can be plainly seen that the rejection could not have legitimately affected the result, and if properly excepted to can be disregarded on appeal only when it can be seen that it did no possible harm. (*Hobart v. Hobart*, 62 N. Y. 80; *Foot v. Beecher*, 78 N. Y. 155; *Carroll v. Deimel*, 95 N. Y. 252, 256; *Holcomb v. Holcomb*, 95 N. Y. 316.)

The errors in rejecting this evidence cannot be disregarded under section 542 of the Code of Criminal Procedure. That section provides that on appeal the court must give judgment without regard to technical errors or to defects or to exceptions which do not affect the substantial rights of the parties. The rulings in this case clearly are not within the principle of that provision. That the rejection of this evidence was a technical error or that it did not affect a substantial right of the defendant cannot be held. That statute is but little more than a codification of the previously established rule that even in criminal cases a new trial will not be granted for an erroneous ruling, where the appellate tribunal can see that by no possibility could the error have worked harm to the defendant. (*Stokes v. People*, 53 N. Y. 164.) Neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a substantial right, even though the Appellate Court, with the rejected evidence before it, would still come to the same conclusion reached by the jury. The defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury, and have the opinion of the jury taken upon all the evidence which is proper and admissible in the case. (*People v. Wood*, 126 N. Y. 249.)

We are of the opinion that these rulings cannot be sustained, and that the judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

#### WHAT THE LAW DECIDES.

The disqualification of one of the three members of a town board to sit on a hearing for the revocation of a license is held, in *State, ex rel. Getchel, v. Bradish* (Wis.) 37 L. R. A. 289, to make a decision of the board revoking the license invalid, and the chairman is held disqualified when he has procured a person to make an unlawful purchase in order to get evidence to revoke the license.

A license to sell intoxicating liquor is held, in *Voight v. Excise Comrs.* (N. J.) 37 L. R. A. 292, to be a mere temporary permit which does not constitute property in any sense, and its revocation can be made, without anything in the nature of a judicial proceeding, on proof by affidavit that the licensee has violated the law.

Power to appoint a receiver before trial and judgment in a proceeding by the State to compel persons to desist from acting as a corporation without authority is denied, in *State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court* (Wash.) 37 L. R. A. 111.

The silence of one-half the members of a city council when a vote to confirm an officer is taken is held, in *State ex rel. Young v. Yates* (Mont.), 37 L. R. A. 205, to be equivalent to an assent which renders the mayor's casting vote unnecessary, or at least as a vote in opposition, which entitles him to give a casting vote in support of the vote of the other members in favor of the confirmation.

For the death of a boy caused by the release of a pole used at a balloon ascension, when no precautions were taken to prevent injury by it, it is held, in *Richmond & M. R. Co. v. Moore* (Va.), 37 L. R. A. 258, that a street car company which owns and manages the park is liable, although the balloon ascension is given by an independent contractor.

Insurance on a building in the name of the owner, but the premiums for which are paid by a lessee of a portion thereof, with an option to purchase the whole and have all payments of rent applied as part of the purchase money, is held, in *Williams v. Lilley* (Conn.), 37 L. R. A. 150, to belong to the latter, where he accepts the option and by the contract is required to keep the building in condition for leasing, while there is a provision that if he does not realize enough rents to reimburse him for his rent and expenses the difference shall be returned to him. In a note to this case are reviewed the authorities on the rights of vendor and vendee to proceeds of insurance.

To constitute larceny of money found in a pocketbook the intent to appropriate it is held, in *State v. Hayes* (Iowa), 37 L. R. A. 116, not necessarily to exist at the time when the pocketbook was found, if the fact that it contains money is not then known. It is sufficient if the intent is formed when the money is discovered.

The admissibility of declarations of a sick person to his physician is held, in *Williams v. Great Northern R. Co.* (Minn.), 37 L. R. A. 199, to be limited to statements of existing pain or of other existing symptoms, and exclusive of descriptions of past symptoms or past experiences. It is also held that statements to a physician by a person respecting his own virility are not admissible in evidence in his own favor, but are mere hearsay.

Nominal damages only are held, in *Lowe v. Turpie* (Ind.), 37 L. R. A. 233, to be recoverable for breach of a contract to loan money or to advance money to pay off debts and liens, although as a result of such breach the liens are foreclosed and the property subject thereto is lost.

A member of a club who shares in a "take-out" or percentage of the winnings of gambling which the club receives from the games played there, and in which he to some extent acts as manager, is held, in *White v. Wilson* (Ky.), 37 L. R. A. 197, to be such a joint wrongdoer with the winner that he cannot recover on a note for money loaned for use in the game.

An express company delivering a package of money to an impostor who represents that he is the consignee is held, in *Pacific Exp. Co. v. Shearer* (Ill.), 37 L. R. A. 177, to be not relieved by the fact that the impostor telegraphed for the money in the name of the consignee and himself received the reply, although the sender of the money believed the telegram came from the person whose name was signed to it. The authorities, which are somewhat in conflict, as to the effect of delivery by a carrier to an impostor, are reviewed in the note to the case.

A masons and builders' association which required members wishing to compete for a job to submit their bids in advance for examination by a committee of the association, and that 6 per cent. at least should be added to the amount of the lowest bid before it could be submitted in competition, is held, in *Milwaukee Masons' & B. Asso. v. Niezerowski* (Wis.), 37 L. R. A. 127, to constitute an unlawful combination, and a note of the member for the benefits and advantages which he expected to receive is held unenforceable on grounds of public policy.

An agreement to establish a railroad depot at a certain place in consideration of a right of way is held, in *Texas & P. R. Co. v. Scott* (C. C. App. 5th C.), 37 L. R. A. 94, to be satisfied by maintaining the depot there for thirty-six years, although it is then removed on account of the exigencies of business.

## DISREGARD OF TESTATOR'S INTENTIONS.

WHILE the courts in construing any difficult passages in the wills of testators are accustomed to look to the intentions of such testators, and are not in general bound by the fetters of preceding wills, there are now and then reported instances in which the clear and obvious intention cannot possibly be carried into effect. In the *Goods of Chilcott* (1897, p. 223) illustrates this. There a testatrix had made a will in 1889 disposing of her property and appointed executors. In 1892 she was minded to make a codicil, and she accordingly instructed the solicitor who had framed her will to draft one. This was done, and the solicitor, naturally enough, imagined that it would be executed in due course. As a matter of fact, it never was executed. Very shortly afterwards she instructed another solicitor to make a second will. This second will, dated 1892, revoked the former will, but after disposing of her property appointed the same parties her executors. In the following year she again desired to make a codicil, and took her instructions to the first solicitor employed by her. He drafted it, assuming it to be a second codicil to the will he had framed in 1889, in entire ignorance that there was extant the will of 1892. He accordingly inserted a clause confirming the will of 1889 and the first codicil thereto, and explicitly stating that "This is a second codicil to the will of Eliza Chilcott, which bears date the 16th of July, 1889." The question then was raised by the executors whether the will of 1892 with the codicil of the following year constituted the testament of the deceased, or whether the two wills and the codicil of 1893 were to be regarded as jointly forming the will of the testatrix.

The effect of an intention to revive a revoked will, expressed in a dubious form by reference in a codicil, was considered with some elaboration in *In the Goods of J. Steel, etc.* (19 L. H. Rep. 91; L. Rep. 1 P. & D. 575), by Sir J. P. Wilde. There had been at that time, 1868, a series of three cases in which the broad question of the revocation of a will by a substitute, and the effect of a codicil purporting to revive the former, had been brought for the court's decision. The result of the lengthy judgment then delivered was that, since the Wills act of 1837, an intention to revive must be apparent on the face of the codicil, either by some express words referring to the will as revoked and evincing a determination to resuscitate it, or by the dispositions made being incompatible with the non-existence of the former testament. There are in this case three instances in which the intention to revive was insufficiently demonstrated. A reference to these decisions is of great assistance to those called upon to advise on the operation of these overlapping and conflicting documents.

In the case now under comment, Mr. Justice

warranted the opposite decision being arrived at. The solicitor engaged in drafting the codicil to the will of 1892 imagined and stated that he was operating upon the will of 1889 and the first codicil thereto, which he presumed had been executed. There was consequently clear language pointing to revival, and therefore it was held that both the wills, together with the codicil, must be admitted to probate as jointly forming the testament of the deceased. In this case, as the learned judge expressed it, the result does not express the real intention of the testatrix, but the facts were too strong and he had to deal with the documents as they stood. It remains to be seen whether the construction of these instruments is possible without further trespassing on the testatrix's intentions.

A case which Mr. Justice Gorell Barnes regarded as an authority for this decision may be briefly referred to. In 1881 the then president, Sir James Hannen, had a case (*In the Goods of Stedham*, 45 L. T. Rep. 192; L. Rep. 6 P. Div. 205) before him where the question arose in this way: John Stedham, the testator, made a will in 1877 whereby he made certain provisions for his six children. In 1878 he made a second will, in which he directed certain deductions as regarded two of these children. In 1880 he instructed a solicitor to draft a codicil whereby these two children should be precluded from benefit. By an oversight the codicil was so framed as to be applicable to the first will, and, indeed, contained no mention of the second will. The court was invited to allow probate of the codicil with the second will only, but the president felt unable to accede, as the reference was so unambiguous, and this course would introduce nonsense, as the codicil spoke of provisions in the will of 1877 which would not be found in the will of 1878. He therefore decided to admit all the documents to probate, and to leave the interpretation to be decided by courts of construction if necessary.

Yet another instance of the same sort of thing may be cited in the case of *In the Goods of Dyke* (reported as a note to *In the Goods of Stedham* at L. Rep. 6 P. Div. 207). There the testator made a will in October, 1878, and revoked it by a will of November, 1878. The first will was taken charge of by a neighbor, while the second was in the custody of the solicitor who drafted it. In 1880 the testator sent a messenger to the neighbor, and having procured the will, executed a codicil thereto. This expressly referred to the first will, and introduced certain modifications into its provisions. The question again was which of these instruments constituted the testator's will. The president held that this was not a matter of mere mistake such as could be cured; the codicil expressly and of intention revived the early will, but did not revoke the later one, consequently all three instruments were admitted to probate.

The lesson to be learnt from these decisions is sufficiently obvious. It behooves solicitors instructed to tamper with the testaments of clients to make careful inquiries into the nature of the documents already existing, and to consider carefully upon which of these the testator desires to introduce changes. Testators themselves should also remember that, though the courts do their utmost to give effect to their intentions, a lack of proper full instructions may cause a solicitor, in all good faith, to expose the client's relations and his estate to a series of interminable and costly applications to courts of construction. — Law Times (London).

#### BOYCOTT NOT A LEGAL WEAPON.]

A DECISION of considerable importance was that lately rendered by the Federal Court of Appeals for the ninth district, in the case of a certain firm of employers against a union of coopers in Kansas City. The principle involved was the right of a labor organization not only to strike against the use of new machinery but also to institute a general boycott of the firm as a means of compelling its surrender.

The legality of the boycott is apparently a debatable and open question. Two out of the three judges held that the company boycotted was entitled to an injunction against the coopers and their sympathizers restraining them from injuring its business. They reasoned that if a boycott was proper in the case of one kind of new labor-saving machinery, it might be employed to restrict and suppress the use of machinery of all kinds, including those the industrial world has long since accepted as indispensable and beneficial in the highest degree. This, of course, is meant as a *reductio ad absurdum* of the claim that boycotting was legitimate, although the consideration of the potency and effectiveness of the weapon cannot be overlooked.

Judge Caldwell, in a vigorous dissenting opinion, argues that boycotting, if peaceable and orderly, is as innocent as a strike. There is, he insists, but one just limitation upon the employment of these weapons — namely, the observance of the law. It strikes us that Judge Caldwell is guilty here of assuming the very point at issue. To say that boycotters ought not to be molested so long as they respect the law is clearly an empty and question-begging proposition when the question in dispute is whether boycotting itself is lawful or unlawful. Nor is it relevant to say that labor has no other effective methods of resisting powerful combinations of employers. The fact that there are no other means does not prove that a given mode is proper and permissible.

So far boycotting has been upheld only in dissenting opinions. The few decisions that have been rendered on the question have pronounced this powerful weapon one of aggression and un-

lawful injury. A case now pending in Detroit brings the question before the courts in the most direct form possible and the determination will be watched with great interest. — Chicago Post.

We are aware of the risk always taken in basing discussion of a legal decision upon mere newspaper versions of its substance, without waiting for a copy of the opinion, says the New York Law Journal. Nevertheless, the recent decision of the U. S. Circuit Court of Appeals in the eighth circuit, in *Oxley Stave Co. of Kansas City v. Members of the Coopers' Union and the Trades Assembly of that place*, has attracted wide popular attention, and it seems proper to venture upon some words of comment founded upon the press reports, which have the appearance of being fairly accurate and adequate. The suit seems to have been for an injunction to prevent the defendants from conspiring to carry out a boycott against the plaintiff for the purpose of compelling the latter to withdraw from use a newly invented machine for hooping barrels. Judges Sanborne and Thayer very naturally decide that the action of the defendants was illegal, and that the injunction would lie. The surprising feature of the case is that Judge Caldwell dissents.

We have no knowledge of the particular form of the present boycott, but the general law on the subject is quite well settled. Toleration by the courts of the boycott principle would always be *pro tanto* giving countenance to anarchy. Courts have now with practical unanimity recognized the right of employees to strike, and to take any peaceable concerted measures against their present or former employers, to procure an increase of wages or the redress of any grievance. The gist of a boycott, however, is to draw utterly disinterested outsiders into a controversy, for the sake of compelling a recalcitrant employer to yield, through making life generally miserable, or the transaction of any business impossible. There could, of course, be no limit in principle to the extension of the circumference of the boycott circle. A dispute between an employer and its employees in one small locality might be made to cripple or demoralize business in remote places, and among persons who had no knowledge of what the original difficulty was about, and had never heard of the original parties.

Under such circumstances it is to be regretted that any Federal judge was capable of giving his approval to such an expedient of industrial controversy. So far as can be gathered from the newspaper summary of Judge Caldwell's views, they consist of the conventional diatribe against the evils of trusts and other combinations of capital, with the opinion that it is necessary for conserving the substantial rights of employees to uphold resort to the illogical and publicly oppressive measures in question. It is the duty of the courts to declare the law, and not to lecture on

political economy or commiserate with sentimental grievances. There has been of late far too much stump speaking from the bench. But, overlooking for the moment the mistaken policy of judicial sermons upon popular wrongs, it may not be out of place in a legal periodical, in criticising an *ultra vires* judicial utterance, to indicate the theoretical fallacy as well as the pernicious tendency of the views so expressed. Not only is the method of boycott essentially anarchical, but in the present case it was resorted to, not to increase wages, but to prevent the use of a new machine. There is no doubt that the adoption of new mechanical contrivances furnishes, from time to time, a means of temporarily neutralizing to an extent the power of the trades unions. It is therefore not unnatural that shortsighted and ignorant men, who do not realize that the progress of invention ultimately and in the long run benefits laborers themselves, should assume to direct the machinery of their organizations against the introduction of new scientific devices. Of course such efforts must prove as futile as all other attempts to fight the future. But the fact that a union of laborers essayed such a conflict is significant upon the mental calibre of the leaders. We are loathe to conclude that the majority of any body of workmen really believed that a movement to suppress an actually efficacious labor-saving appliance could finally triumph. The most serious difficulty in dealing with the labor problem is the fact that representative, democratic government does not prevail among trades unions, but that they are despotically ruled by men without sufficient intelligence for leadership, who are often personally selfish, and who attain their positions through the blatant arts of the demagogue. It would seem that the only effect a judicial opinion, approving of the boycott as a means of fighting the advance of science, could have would be to afford some color of official encouragement to the laboring masses—who, beyond question, have real wrongs to be righted—in persisting in blindly following the leadership of the blind.

#### BE PUNCTUAL IN COURT.

THE Melbourne (Australia) Argus relates the story of a principal witness in a larceny case, in the Criminal Court, Frederick Fennell, being late when called for by the crier. Mr. Walsh, the crown prosecutor, then asked Mr. Justice Hodges to estreat the witness's recognizances, and scarcely had the words been uttered when the police said, "Here he is." Fennell appeared to be out of breath, and was hurried into the witness-box. Mr. Justice Hodges cast a relentless look at the witness and said, "Where have you been?" Witness replied, "At dinner," to which the court retorted: "You had plenty of time during the adjournment to get your dinner. I order your

recognizances to be estreated. Your dinner has cost you £100." The witness, who recently arrived in Melbourne from Sydney, was robbed of a gold watch and chain and £8, and has never seen the property since. The man he accused of the robbery was acquitted. The Australian Law Times adds, as a matter of history, that his honor thought fit, on the following day, to rescind the order made by him for estreating the recognizances. The Times goes on in this pleasant vein:

"No one, and especially a mere witness, has a right to keep the court waiting. And as everybody is held to know the law, of course, the witness in the case in question must have remembered every word of the bond which had been hurriedly read over to him after the conclusion of the proceedings in the Police Court. Punctuality is the politeness of kings, and the essence of business, and although it may seem hard and odd that a man should be fined £100 for dawdling over his dinner, while a brutal husband who half kills his wife is only bound over to keep the peace (which he does not), yet the bruised limbs of a poor creature are but as feathers when weighed against the awful dignity of the court. This being so, perhaps, the argument may be logically conducted a step or two further. It is an historical fact that a worthy police magistrate—now retiring from the bench—came into court one day—it was in a remote country district—and seeing by the clock that he was five minutes late, promptly fined himself a guinea, and duly paid the fine. He was quite right. He could not very well fine (or scold) suitors and witnesses for dilatoriness when he had sinned himself, and acting on that great maxim—strangely omitted from Broom's excellent book, "What's sauce for the goose is sauce for the gander"—he set an example which other magistrates might well follow. For instance, it is the custom of most judges to announce that they will sit at half-past ten o'clock. The wisdom of this arrangement is doubtful. To expect a judge who sits till four o'clock, and sometimes till half-past four in the afternoon, to resume again at 10:30 on the following day, savors to our radical nostril, and in this country of Victoria, somewhat of "sweating." It is true the ignorant layman may say the judge is free on Saturday and Sunday, has six weeks' holiday at Christmas, a week at Easter, and a fortnight in July. But the very fact that such vacations exist may be taken as proof that they are necessary. Well, all this being so, what should happen if a judge comes in, say, at five minutes to 11 instead of 10:30 A. M. Why not fine himself a guinea for the first offense, two guineas for a repetition, and so adding a guinea each time on the hardened offender? He keeps shoals of witnesses, lawyers and the smaller fry of legal men waiting; he wastes their time, tries their temper, and—adjournments being oftentimes the result—swells up the bills of costs. But it is no'

punctuality alone that impairs the dignity of courts. We would also advocate a series of fines, easily adjusted to a sliding scale, on outbreaks of temper on the part of the bench. For being offensive to a Q. C., a judge might receive, for a first offense, a simple reprimand, such being fixed by a schedule; subsequent offenses might be punishable by fine, which, of course, should be graduated according to the status of the offended party; as, for instance, so much in the case of an offended barrister, a lesser sum for an amalgam, and so on with solicitors, managing clerks and office boys. It may be objected that such a scale would offend on the score of respecting persons according to an artificial degree, but as a number of judges do not respect persons, no matter what their degree, the argument fails. We throw out these suggestions for the benefit of the Law Reform Commission, when that lively body shall sit again—if it ever shall. It has, we think, become too much the vogue for judges to think they can do no wrong, and that a practitioner can seldom do right. All men are theoretically equal before the law; let us try to approximate to equality in fact.

#### JUDICIAL COSTUME—ORIGIN OF THE "BLACK CAP"—APPELLATION OF "REVEREND."

THE procession of the judges on Monday last in the hall of the Royal Courts of Justice in their quaint robes, headed by the lord chancellor in all his paraphernalia, gives the opportunity of dilating on the peculiar variety of their costume so puzzling to the frequenter of the law courts.

According to the statement of an excellent authority, a former clerk of the lord chief justice of England (Mr. Frayling), the following details are given as to the official list of judges' robes and the special days appointed for their use:

For Hilary Term.—First day in black robe and hood, trimmed with ermine. Wig, full-bottomed.

Conversion of St. Paul, Jan. 25.—Scarlet robes, trimmed with ermine.

Easter Term.—First day in purple robe and hood, trimmed with silk. Wig, full-bottomed.

St. Mark's Day, April 25.—Scarlet robes and hoods, trimmed with silk.

St. Philip and St. James, May 1.—The same.

Trinity Term.—Purple robes and hoods, silk trimming.

Queen's Birthday.—Scarlet robes and hoods, silk trimming.

St. Barnabas' Day, June 11.—The same.

Michaelmas Term.—First day, black robe and hood, ermine trimming.

Lord Mayor's Day.—Scarlet robes and hoods, ermine trimming.

Levées.—Black silk gown, plain bands, three-cornered silk hat, full-bottomed wig, breeches, shoes and buckles.

House of Lords.—Robes with scarf and tippet. On the occasion of visit of the sovereign, full robes of state.

Old Bailey Sessions.—Black robes, trimmed with ermine, silk scarf and tippet.

Red-letter Days according to the Calendar.—Scarlet robes, trimmed with ermine for winter months. After Easter and Trinity terms, silk trimmings.

St. Paul's Cathedral.—First Sunday in Easter and Trinity terms, full robes, etc.

Circuit Robes.—Scarlet robes, with beaver hat and full-bottomed wig—to open commission and swear in grand jury.

The late Lord Coleridge is credited with making an alteration in costume by introducing a scarlet sash, to be worn over the right shoulder, while puisne judges were authorized to wear it over the left shoulder, attached to the hood at the back.

#### THE "BLACK CAP."

The "black cap" is the part of the costume which has always appealed to the sentiment of the outsider, on account of sympathy for the occasion of its use. Perhaps few questions have caused so much doubt as to its origin and as to the obscurity in which it was so long involved. The date of introducing the custom of using the "black cap" has never yet been traced. The cap was called the "judgment cap," and is only used when sentence of death is passed. The covering of the head by the judge is a sign of mourning. The judge is supposed to be assuming the highest function of power, that is to say, taking away life, and therefore the head is covered in token of putting on the full dignity of the crown, at the same time giving additional solemnity to the awful occasion.

#### THE APPELLATION OF "REVEREND."

It would be interesting to learn when the title of "reverend," as applied to judges, originated, and also when the custom, if ever, was dropped. In the archives of the seventeenth century mention is made of a publication of law reports headed, "By the approbation of the reverend judges." Shakespeare appears to have the expression in view when Othello declaimed, "Most potent, grave and reverend signors."—Law Times (London).

#### THE EVIDENCE OF PRISONERS.

Two points of evidence arose in a recent trial in Victoria which are of interest with reference to the much-discussed proposal to alter the English law as to the evidence of persons accused of crime. The law of the colony (Act of 1891, No. 1,231, s. 34) permits a prisoner or his wife or her husband to be called and sworn as a witness, with the prisoner's consent, at any stage of the proceedings. In *Regina v. Buck and Burns* (1896), 22 Vict. L. R. 66, two persons were jointly indicted for forgery. The wife of Burns was admitted as a witness

for the Crown with her husband's assent, but with the objection of counsel for Buck, who was then called as a witness in his own defense, with the objection of counsel for Burns. The full court, on a case reserved, held that the evidence of Buck was admissible against Burns, adopting as an authority *Regina v. Martin*, 17 Cox Cr. Cas. 36. The result of the colonial case is to empower one of two persons, jointly indicted, to give evidence incriminating the other without the necessity of resorting to the old procedure of either taking a plea of guilty or pardoning the prisoner to be called. One of the judges, be it said, severely criticised the proviso against asking questions not relevant to the particular offense, except where the prisoner electing to testify gives evidence of good character, pointing out that it enabled a guilty prisoner to testify against an innocent, and precluded counsel from asking him as to previous convictions, even of perjury. — Law Journal (London).

### Legal Notes of Pertinence.

The Supreme Court of Missouri has decided that smoke is not a nuisance, *per se*.

Speaker Reed again denies the report that he intends to retire from Congress at the close of his present term and practice law in New York City.

At Cayuga, Ont., Mrs. Olive Adele Sternaman was on the 19th found guilty of the murder of her husband and sentenced to be hanged in the courtyard of the jail on Thursday, January 20.

A juror in a murder case at Syracuse blew out the gas, and he and three other jurors narrowly escaped death. Meanwhile the prisoner is feeling comfortable and confident. — Boston Herald.

Superintendent Austin Lathrop of the state prisons will recommend to the next legislature of New York that an appropriation be made for the erection of a prison in the central part of the State at which all electrocutions shall take place.

According to a newspaper statement, the oldest peace magistrate, and the longest in continuous service, in the State of Indiana, is Noah R. Freeman, of Winamac. He is said to have reached the age of 100 years, and has been a peace justice since 1839. During his 58 years of service, he has administered the marriage service 2,896 times. His dockets record the trial of 8,979 cases, in none of which has his decision been overruled. He is the lineal ancestor of 138 descendants, and proposes to resign his office when the number has reached 150.

If Luetgert should be convicted, his sentence be commuted, he be pardoned and then married again, all within seven years, what would be the positions, respectively, of the accused and the State of Illinois, if the supposed murdered wife should turn up, and, woman-like, desire to make his new conjugal relations unpleasant through pro-

ceedings for bigamy? Luetgert would not deny the actual and animate existence of wife number one, but would not the state be bound by the record and forced into the ridiculous position of contending that, though "technically" alive she must be dead. — Minnesota Law Journal.

Hon. John M. Langston, described by the Washington Law Reporter as the most prominent of the colored members of the District of Columbia bar, died at his residence in Washington on the 15th, inst. Although born a slave, he was given his freedom at a very early age. He received a liberal education, and was admitted to the bar in Ohio prior to the war, being the first colored man to be admitted to the ranks of the profession in the west. He won distinction as a legislator and diplomat, having been a member of Congress from Virginia, and minister and consul-general to Hayti. As an educator also he did much for the elevation of his race. Mr. Langston was an able lawyer and an unusually gifted orator. For a number of years he was a member of the faculty of the law school of Howard University.

A few years ago it was a rare thing to see anything in the public prints from the pens of South Carolina writers. This was not because our people lacked ability, but somehow it was not the fashion. Now quite a number of South Carolinians contribute to the magazines and hold their own with the best writers of the country. We have literary men in our own State and even in the city of Abbeville. Walter L. Miller spends what leisure he has from his official duties writing for the press, and his articles have attracted attention. In the ALBANY LAW JOURNAL for October 16th he has an article on "What Should Lawyers Read?" He gives a lot of advice and suggests a course of reading. In the same publication for October 30th he has an article on "Lawyers and Politics." It is brief, but in it he manages to crowd in a lot of advice about how lawyers must do in certain political contingencies. Both articles are readable and reflect credit upon Mr. Miller, but we do not agree with all his conclusions. — Abbeville (S. C.) Medium.

### English Notes.

The appointment of Mr. John Charles Bigham, Q. C., to the vacancy on the common law bench is announced.

Mr. Justice Wright, by appointment of the lord chancellor, has succeeded Lord Justice Collins as *ex officio* railway commissioner for England.

It is stated that the lord chief justice is gradually recovering from the injury to his knee. He has been able to walk a little and to take carriage exercise.

The three lords justices now sitting in the First Court of Appeal — Lords Justices Smith,



Rigby and Collins—are all distinguished Cambridge men says the Law Journal. Nor is this the only thing they have in common. All three are anglers, and find the chief pleasure of their vacations in the catching of salmon.

The appointment of Mr. Arthur Moseley Channel, Q. C., to a judgeship in the Queen's Bench Division is a recognition of qualifications of a thoroughly sound and practical character. The new judge will as nearly as possible fill the void made by the retirement of Mr. Justice Charles. Much of the time of the courts in these days is occupied with the construction of ill-drawn and obscure statutes. In this work Mr. Justice Channel has had a unique experience. — Law Times.

For the recent examination preliminary to "call to the bar," 114 students presented themselves, of whom but 52 were successful in satisfying the examiners. Less difficulty seems to attend the attempt to pass in the Roman Law and Constitutional Law subjects than in those relating to English Law. It is worthy of note that 6 students in the general pass list come from the Middle Temple, 7 from Gray's Inn, 14 from Lincoln's Inn, and 23 from the Inner Temple.

Mr. Justice Vaughan-Williams, who has been appointed to the seat in the Court of Appeal vacated by Lord Justice Ludlow's retirement, was born in 1838. He was a graduate of Christchurch, Oxford, taking his B. A. degree in 1860. In the Inn, choosing the south-eastern (then the home) following year he was called to the bar at Lincoln's circuit, also practicing as a special pleader, and at the Surrey Sessions. He received the honor of silk in 1889, and became a judge in succession to Mr. Justice Manisty in 1890. In 1865 he married Laura, youngest daughter of the late Mr. Edmund Lomax, of Netley, Surrey.

The Westminster Gazette says that Lord Justice Williams is distinguished for his unconventionality. His departure from the traditional habit of judges to travel in first-class compartments on their railway journeys from one circuit town to another once occasioned an amusing mistake at an assize town on the Western Circuit. The high sheriff was waiting with his retinue to receive him. As the train drew up at the platform a distinguished-looking man stepped out of a first-class carriage. "This must be the judge," concluded the high sheriff, who hastened to greet him with the reverence to which judges are accustomed on circuit. Meanwhile Mr. Justice Vaughan-Williams was getting out of a third-class compartment in the rear of the train and devoting his attention to his luggage. The distinguished-looking man, whom, to his utter embarrassment, the high sheriff had mistaken for the judge, was the late Mr. Bovill, the clerk of the circuit.

### Legal Laughs.

Luke Tulliver was an inventive genius; he was also a court baliff, a carpenter, a hay rancher and the postmaster in Teton City. When the judge who swung around the district which took in Uintah county came up to Teton to hold court Tulliver did the "Oh yes-ing" and kept things running smoothly. One term they had a little one-horse murder case which, to all the world, with the exception of the jury, was as clear as distilled water. But the jury, strangely enough, realizing its own importance, became strongly set in conflicting opinion, and in two days was tied in a hard, complex knot.

The townspeople were impatient, and the judge was vastly annoyed, for he had been invited to speak at a banquet down at Rawlins, and he wanted to get away. He called the jury before him three times and lectured it as to its duty. He pleaded with the members of it to get together. He offered to explain any tangle. But the twelve men were sullen and immovable.

"Look here, your honor," said Luke Tulliver, returning after conducting the disputatious twelve to their room. "I can get a verdict out of that outfit. Do you really want one?"

The judge warmly declared that he did, and confided his canvasback and wine hopes to Luke.

"I might discharge them," he said, "but the cost of another trial would be ruinous."

"Don't you bother," said Luke Tulliver.

Twelve minutes later the jury returned a verdict.

"How on earth did you manage it?" asked the court after the jurors had fled in excited haste, without waiting to inquire as to fees.

"I cussed the gov'ment," said Luke.

"Did what? I don't understand."

"Stood outside the jury room door an' cussed the gov'ment till further orders an' regardless. Cussed it up an' down, black an' blue, this way an' that."

"And do you mean to say you roused the patriotism of these men? that —"

"Judge, you're new. Them fellers don't know they is such a thing as the Declaration of Independence. The only Bunker Hill they know is Bunker Hill, Goss county, Idaho. But, sir, them men knows the minin' laws by heart."

"Yes?"

"Yes. An' when I got up on my feet at the door of that jury room an' cussed the President, the Supreme Court an' the two houses of Congress for enactin' a law that made it necessary for a court bailiff to stick to a fool jury, while everybody else in town was chasin' up to Burgo creek to file claims along the bottom where Tony Clare discovered gold, pounds to the ton, last night — when I made my few remarks just to no one in particular, the door of the jury room opened an' Pete Brewer looked out.

" 'Did you say gold had been struck on Burgo?' says he.

" 'I am not allowed to communicate any conversation to the jury,' says I.

" 'Hm-m-m,' says he, an' Roy Blake looked out.

" 'What's that?' says he, 'gold in Burgo?'

" 'I can't talk to you,' says I. 'Nevertheless, cuss an' eternally, essentially an' particklerly cuss the gov'ment that obliges me to stay here while Ike Smart an' Lefty Gavin is diggin' out nuggets like pertaters.'

" 'Pertaters,' said Red Horton, lookin' out. 'Gents—pertaters you say?—I move we have one more vote, an' I for one say the feller ought to be hung.'

" 'Well, sir, your honor, they took a vote in less'n nineteen seconds, an' them black streaks cuttin' across the horizon is the twelve good men an' true breakin' for Burgo. They'll look right considerable afore they'll find a strike in that cactus country, but we've got our verdict, you've got your dinner, an' the boys have got a hangin' just the same. Oh, you can accomplish most anythin' by proper cussin' of the gov'ment.'

The judge told the story down at Rawlins, but it was disbelieved. — Chicago Record.

#### WHEN DOES "ISSUE" MEAN "CHILDREN."

Perhaps there has been no more fruitful source of litigation than the use in wills and other documents of the word "issue." It is an ambiguous word. In ordinary language it means children, and only children; as when one talks of what issue a man has, or what issue there has been of a marriage. But in the language of lawyers it includes descendants of every degree, and even the addition of such words as "begotten of John Smith" will not necessarily restrict "issue" to the sense of "children" of John Smith. But there is a case which often arises in which it is settled that the generality of the word "issue" will be restricted; for where the "parent" of "issue" is spoken of, the word issue is *prima facie* restricted to children of the parent. This rule is commonly known as the rule in *Sibley v. Perry*, and its importance may be easily recognized if one considers the enormously large class of wills which contain devises or bequests to children of a named person with a direction that the issue of any child dying before the period of distribution shall take their parent's share. Lord Eldon does not, however, appear to have intended to lay down in that case any general rule or canon of construction; he only dealt with the peculiar language of the will which he had before him. Subsequent decisions have built up the rule, which has not always been spoken of respectfully. "Suppose," said Lord Justice James, "a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead,

equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families. The grandchildren might go to the workhouse and the family property go to a stranger under the residuary gift. That seems a possible result of that rule." In the same case Lord Esher is reported to have said that he should have no objection to be present at the funeral or *Sibley v. Perry*. But the rule is very often one of convenience; it may prevent property which a testator really intended to go to his children or grandchildren *per stirpes* from being divided among children, grandchildren and great-grandchildren as tenants in common *per capita*. — Law Journal (London).

#### PRICES PAID TO MODERN AUTHORS.

Rudyard Kipling commands the highest price of any living author, according to the *Pall Mall Gazette*, which says that it paid \$750 for each of his "Barrack Room Ballads," and that "The Seven Seas" brought him \$11,000. He has received 50 cents a word for a 10,000 word story. Anthony Hope charges \$450 for a magazine story, reserving the copyright. Mr. Gladstone's price for a review is \$1,000. Conan Doyle received \$35,000 for "Rodney Stone," Mrs. Humphrey Ward \$40,000 for "Robert Elsmere," \$80,000 each for "David Grieve" and "Marcella," \$75,000 for "Sir George Tressady," and \$15,000 for "Bessie Costrel." Ian Maclaren has made \$35,000 out of "The Bonnie Briar Bush" and "Auld Lang Syne." Rider Haggard still asks from \$75 to \$100 a column of 1,500 words, and will not write for less than \$10,000. The highest price ever paid for a novel is \$200,000, which, the *Pall Mall Gazette* says, was handed over to Alphonse Daudet for his "Sappho." Zola's first 14 books netted him \$220,000, and in 20 years he has made at least \$375,000. Ruskin's 64 books bring him in at least \$20,000 a year. Swinburne, who writes very little, makes \$5,000 a year by his poems. Browning, in his later years, drew \$10,000 a year from the sale of his works, and Tennyson is said to have received \$60,000 a year from the Macmillans during the last years of his life. Mr. Moody is believed to have beaten all others, as more than \$1,250,000 has been paid in royalties for his hymns.

#### Notes of Recent American Decisions.

Accident Insurance — Classification. — One insured as a bookkeeper against accident by a policy classifying as more hazardous the occupation of "hunter or hunting," and providing that if injury occurs "while performing an act pertaining to an occupation classed as more hazardous" than the one under which the policy is issue, "or while en-

gaged in a more hazardous occupation," insured shall be entitled only to such indemnity as the premiums paid would purchase in the class in which such occupation is classed, is not prevented from recovering the indemnity provided for a bookkeeper, though shot by discharge of a gun he was carrying while hunting for recreation. (*Holiday v. American Mut. Acc. Assn. of Oshkosh, Wis.* [Iowa], 72 N. W. Rep. 448.)

**Assignments *Pendente Lite* — Effect.** — The assignment *pendente lite* of a chose in action which is the subject of the suit does not form ground for abatement, where the assignor has agreed to continue the suit for the benefit of the assignee. (*Drouilhet v. Pinckard* [Tex.], 42 S. W. Rep. 135.)

**Banks and Banking — Fraud by Agent — Knowledge.** — A bank is presumed to know what its president knows only while he acts within the scope of his agency, and hence it is not imputable with knowledge of his fraudulent intent in drawing a fund from the bank in his private capacity as trustee of the fund, with intent to misappropriate it. (*Knobeloch v. Germania Sav. Bank* [S. Car.], 27 S. E. Rep. 962.)

**Bills and Notes — Fraud.** — The maker of notes given in payment of his subscription to a syndicate organized to purchase the assets of a corporation, and used by the syndicate in making the purchase, cannot avoid them for fraudulent representations as to the value of, and the incumbrances on, such assets, where the representations were made by his associates in the syndicate, and the promoters thereof, and not by the vendor. (*Tradesmen's Nat. Bk. v. Looney* [Tenn.], 42 S. W. Rep. 149.)

**Contract — Employment — Breach — Discharge.** — Failure of the servant to perform his work in an absolutely skillful and satisfactory manner does not, in the absence of a special contract, authorize his discharge, but only failure to perform it in a reasonably skillful manner. (*Crescent Horseshoe & Iron Co. v. Eynon* [Va.], 27 S. E. Rep. 935.)

**Contempt — Interference with Property in Custody of Court.** — Where a marshal, who had taken goods on a writ of replevin directing him to deliver them to the plaintiff, permitted plaintiff's agents to pack the goods, load them into a car, and procure a shipping receipt and bill of lading therefor, such acts constituted a delivery to the plaintiff, and the goods thereby passed out of the custody of the court, and a sheriff who thereafter levied on them under a writ of attachment issued by a State court was not guilty of contempt of the Federal court. (*Animarium Co. v. Bright* [U. S. C. C., D., N. J.], 82 Fed. Rep. 197.)

**Deed — Conveyance to Wife — Fraud.** — The defendant, being indebted to his wife for various loans made to him, evidenced by his two notes, transferred to her the note of a third party for a similar amount, in consideration of the cancella-

tion of his notes: Held to be a valuable consideration, and not in fraud of creditors. (*Muir v. Miller* [Iowa], 72 N. W. Rep. 409.)

**Frauds, Statute of — Part Performance.** — In order that the making of improvements may be a sufficient part performance to take a contract for an interest in lands out of the statute of frauds, they must be such as would not have been made except in reliance upon the contract; they must be substantial and permanent in character, and the loss thereof a sacrifice to the purchaser. (*Cooley v. Lobdell* [N. Y.], 47 N. E. Rep. 783.)

**Federal Courts — Following State Decisions — Powers of State Corporations.** — When the highest court of the State has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases involving no question of general or commercial law, and no question of right under the Federal Constitution. (*Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America* [U. S. C. C. of App., Eighth Circuit], 82 Fed. Rep. 124.)

**Insanity — Lunatic — Contract.** — Where a person contracts with a lunatic with knowledge of his disability, and the contract is set aside on that ground, the lunatic can be charged only with such benefits as he actually received. (*Creekmore v. Baxter* [N. Car.], 27 S. E. Rep. 994.)

**Master and Servant — Assumption of Risk — Telephone Lineman.** — In *McGorty v. Southern New England Tel. Co.*, 38 Atl. Rep. 359, it was held that a lineman in the employ of a telephone company cannot recover for an injury caused by the fall of a pole on which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety.

### Books Received.

**Proceedings of the Fourteenth Annual Meeting of the Bar Association of the State of Kansas.**

For the thirteenth time the famous little Columbia Pad Calendar makes its annual and welcome appearance. The 1898 issue is not only brightly illustrated, but filled with choice thoughts and verses from the army of Columbia riders in all parts of the world. Hardly a more desirable memorandum pad can be imagined than the Columbia calendar. It may rest on the desk at any angle and is always ready for reference. It will be mailed to any address by sending five 2-cent stamps to the calendar department of the Pope Manufacturing Co., Hartford, Conn.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, DECEMBER 4, 1897.

### Current Topics.

THE ALBANY LAW JOURNAL is indebted to Judge Amos M. Thayer, of the United States Circuit Court of Appeals, for a copy of the opinion recently handed down by that court, in the now somewhat celebrated case of Hopkins et al. v. The Oxley Stave Company. This opinion, to which reference was made in last week's issue, is now given in full in this number, in advance, it is believed, of any other publication, and is of the highest interest and importance to the profession. It is clear, well-reasoned and, we think, entirely sound. The dissenting opinion of Judge Caldwell, in which he holds, substantially, that the boycott is a legal weapon, if used "in a peaceable and orderly manner," is very lengthy, comprising twenty large printed pages. A careful perusal of it does not, in any way, alter our previous conviction, formed after reading the synopsis which was published in the newspapers immediately after the decision was announced, that the dissenting opinion is unsound, enunciating a doctrine not only dangerous in the highest degree to the rights and liberties of the people, but one to which the highest courts of the land would never give their assent.

The latest report from Washington is to the effect that the President has offered the appointment to the Supreme Bench, to fill the vacancy caused by the resignation of Justice Field, to Attorney-General McKenna, who has accepted. Justice Field's resigna-

VOL. 56 — No. 23.

tion took effect on the 1st inst. The attorney-general is understood to be closing up his work in the department of justice, preparatory to taking his seat on the Supreme Bench, while the President is forced to make choice of a successor of the distinguished Californian. It is the gossip at Washington that Judge Wayne, of California, will be the man. The President and Mr. McKenna are old and intimate friends, having served together on the Ways and Means Committee of the House of Representatives, and when the chief executive took Mr. McKenna from his life position on the Circuit Bench, to be attorney-general, it was with the understanding, so it is said, that when Judge Field retired Mr. McKenna should succeed him. There can be little doubt of confirmation by the Senate, although some opposition is expected on the part of a small but active faction who insist — doubtless without any reason except their own imagination — that Judge McKenna is a "corporation judge." By nearly every one else he is conceded to be able, honest, independent and impartial, looking at every question which comes before him in a cold, judicial way. His accession to the Supreme Court of the United States will be a notable event, and it will certainly add strength to a tribunal already conceded to be one of the ablest in the civilized world. The appointee is thus pleasantly described by a newspaper correspondent:

"McKenna is short and slight, with the pale face and expression of a scholar, but vigorous and active and very good looking. His silky auburn hair and short beard are turning gray, but his blue eyes are as bright as ever, and he walks and talks like a much younger man. He is quiet, modest and courageous; a good speaker, and a good writer, in the judicial style. He is very popular with public men and has many warm friends, among whom are most of the Supreme Court justices. He has a pleasant home on California avenue here, where he lives in great happiness with his interesting family."

Mr. McKenna furnished the following autobiography to the last edition of the Congressional Directory:

Joseph McKenna of San Francisco, Cal., attorney-general, was born in Philadelphia, Pa., Aug. 10, 1843; attended St. Joseph's College of his native city until 1855, when he removed with his parents to Benicia, Cal., where he continued his education at the public schools and the Collegiate Institute, at which he studied law; was admitted to the bar in 1865; was twice elected district attorney for Solano county, beginning in March, 1866; served in the lower house of the legislature in the sessions of 1875 and 1876; was elected to the 49th, 50th, 51st and 52d Congresses; resigned from the last-named Congress to accept the position of United States circuit judge, to which he was appointed by President Harrison in 1893; resigned that office to accept the place of attorney-general of the United States in the cabinet of President McKinley. His appointment was confirmed by the Senate March 5, 1897.

The recent detention of six Turks, by New York immigration officials, on the ground that the law excludes them as polygamists, raises a nice question under our immigration laws. The subjects of the Sultan, referred to, wish to become farm laborers, their objective point being Michigan. When asked by the inspector if they believed in the Koran, their reply was, of course, in the affirmative, for all good Turks do. Being asked further whether they believed in the Surah of the law where the prophet tells the faithful that they may marry by twos, by threes, or by fours, of course they replied again in the affirmative. The Turks were then told that they could not enter the United States, the law distinctly declaring that a polygamist cannot become a citizen of the United States by adoption. It is argued by the immigration officials that a believer in the Koran is necessarily a polygamist. On the other hand, it is claimed by the Turkish Consul that the United States do not intend to discriminate in their immigration laws against religions; that they do not forbid Mormons to believe in polygamy — what they do is to forbid them to practice it, and they punish them if they do. It is therefore claimed that, no matter what they believe, if

they have no intention to violate the laws of the United States they are entitled to enter the country. Whether these detained Turks are polygamists within the meaning of the law is not certain, and the question will have to be decided by the courts. It will hardly be claimed that in passing the laws referred to Congress intended to exclude those believers in the Koran who do not practice or intend to practice what they profess to believe; and the intent of Congress will be, of course, the controlling consideration with the courts. If these six Orientals make declaration in proper form, that they will not practice polygamy, it seems right that they should be given entrance. In other words, the courts, it seems to us, are likely to make a distinction between theoretical and practical polygamy.

A somewhat remarkable case, and one which well illustrates the diversity and difficulty of the questions brought before that tribunal for adjudication was argued in the New York Court of Appeals last week. It involves the question whether the adjudication by a court of the Roman Catholic church of a controversy is a bar to a civil action in the regularly constituted courts of the State of New York. In the case to be considered, for the facts of which we are indebted to the Albany Argus, both of the lower tribunals, the Supreme Court, Special Term, and the Supreme Court, Appellate Division, decided that such a religious court is, in its nature, ecclesiastical only, and has no jurisdiction to determine the civil rights of parties, and is no bar to action even by priests of that church in a civil court.

The question comes up on the appeal of the Rev. John S. Baxter, a priest in the diocese of Brooklyn, from a decision of the Metropolitan Court of the Arch Diocese of New York, presided over by the vicar-general of the Roman Catholic church, rejecting his application for reinstatement to his parish and for an award of \$6,665 salary alleged to be due him, and also from the judgment of the apostolic delegate at Washington, affirming that decision.

Rev. Father Baxter, a priest in the diocese

of Brooklyn, was assigned by Bishop Laughlin to duty in the mission church at Babylon, on the 10th of September, 1885, at the usual salary of \$1,000 per year. All the funds of the church were turned over to the bishop, who, it is alleged, guaranteed the payment of the salary. In 1892, Father Baxter, because of physical disability, following a severe attack of grip, was relieved from duty, and at this time there was a balance due him of \$5,598. In December of the same year, recovering somewhat, he was assigned to duty at St. Mary's hospital, Brooklyn, with a promise, as he alleges, that he should retain his pastor's salary and be sent back to his old charge. In 1896, after having received only \$300 per year for service in the hospital, and the Rt. Rev. Charles E. McDonnell having succeeded Bishop Laughlin, he brought his case to the attention of the Metropolitan Court of the Arch Diocese of New York. The complaint asserts that while the case was in this ecclesiastical court, and while he was still suffering in health, he was induced by the vicar-general, who presided, to sign a release for \$1,500 of his entire claim of nearly \$7,000. Upon his signing he was given the money, but was not restored to his parish. He appealed to the apostolic delegate at Washington, but the appeal was dismissed.

He then took the case into the State courts, and the defense interposed by the Roman Catholic prelates was that the plaintiff had admitted that such Metropolitan court had jurisdiction over him, and that, being a member of the Holy Roman Catholic church and subject to the rules, laws and disciplines of that church, he was subject to the jurisdiction and adjudication of that church.

The Supreme Court, Special Term, held differently, and Judge Bradley, writing the decision for the Appellate division on the same lines, said: "Beyond the question of doctrine, discipline or church government, there can be no recognition in this State of the jurisdiction and judicial power of any ecclesiastical court. The question of civil rights of persons relating to themselves personally or to property, whatever may be the

relation to church organizations, are subjects of adjudication in the civil tribunals exclusively. \* \* \* Judicial notice will be taken of the fact that it was not a court created or organized pursuant to any law of the State of New York, but was one that could not by virtue of any law be created within the State. It appearing that the alleged tribunal in its nature is ecclesiastical only, it cannot be assumed, that it, as such, had jurisdiction to determine the civil rights of the parties; but judicial notice must be taken to the contrary."

Upon this decision Father Baxter was allowed to bring action in the civil court and from this Bishop McDonnell appeals to the Court of Appeals.

A very interesting case involving the liability of an inn-keeper for the loss of a bicycle, the property of one of his guests, which had been left in the charge of one of the landlord's employes, was decided recently at the Luton (Eng.) county court, His Honor, Sir Alfred G. Marten, delivering the judgment of the court. The plaintiff, H. W. Mathias, had journeyed from St. Albans to Luton on his bicycle and put up at the George hotel, kept by the defendant. Arriving there shortly after noon, he placed the wheel in charge of an attendant of the hotel, and the latter put the machine, with many others, in a shed in the yard attached to the hotel. After partaking of luncheon, and paying the bill therefor, the plaintiff returned to the shed, intending to resume his journey, when he discovered that his bicycle was missing. The court found that there was no negligence on the plaintiff's part conducing to the loss. It was contended for the defendant that he did not receive the bicycle into his care, and that assuming him to have so received it, he received it as a bailment for which he was not liable unless shown to be negligent; and that no such negligence was proven. The court thought it plain that the only relation which existed between the parties was that of landlord and guest, and that the bicycle was received by the defendant accordingly, as goods brought by the plaintiff to the inn. That being so it was not neces-

sary to show the negligence of the defendant, for an inn-keeper is *prima facie* liable for the loss of goods of his guests. The court cited Calye's case, 8 Reports, 32; s. c., 1 Smith's Leading Cases, 10th edit. 115; Morgan v. Ravey, 6 Huls. & Norm. 265; Medawar v. Grand Hotel Company, 64 L. T. Rep. 851; (1891) 2 Q. B. 11; Robins v. Gray, 73 L. T. Rep. 252; (1895) 2 Q. B. 501, affirming Ibid. 78. The question was raised whether a bicycle is within the law of liability of inn-keepers, inasmuch as it does not, like the horse, consume provender, and so bring profit to the inn-keeper; and that it is a modern invention. The court was unable to see any distinction between a bicycle and any other goods which a guest may bring with him. A similar question was raised with respect to carriages in Turrill v. Crawley (13 Q. B. 197), where Mr. Justice Coleridge, in giving judgment, said: "New usages have grown up, and as carriages are commonly used in traveling, the inn-keeper's duties and privileges are extended to them. It would be absurd to say that an inn-keeper might receive a guest and refuse to receive his carriage." Moreover, in Taylor v. Goodwin, 40 L. T. Rep. 458; 4 Q. B. Div. 228, it was held that a bicycle was a carriage within the meaning of the act, 5 and 6 Will. 4, c. 50, s. 78, as to furious driving of any sort of carriage. The court, therefore, found the defendant liable for the plaintiff's loss of his wheel, and assessed the damages at £21.

#### BOYCOTT NOT A LEGAL WEAPON.

UNITED STATES CIRCUIT COURT OF APPEALS —  
EIGHTH CIRCUIT.

No. 789. — May Term, A. D. 1897.

Opinion Filed Nov. 8, 1897.

H. C. HOPKINS, J. C. COLLINS, THOMAS YATEBY, JAMES BROWN, J. R. ALLEN, JACOB HEISEY, J. L. COLLINS, C. W. MARSH, CHARLES PRINCE, WILLIAM STANTON, C. W. OTTS, D. MULKERN and W. LINKER, Appellants, v. THE OXLEY STAVE COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. James F. Getty (Mr. F. D. Hutchings was with him on the brief) for the Appellants.

Mr. David Overmyer (Mr. David W. Mulvane was with him on the brief) for the Appellee.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

THAYER, C. J., delivered the opinion of the court.

This case comes on appeal from an order, made by the Circuit Court of the United States for the District of Kansas, granting an interlocutory injunction. The motion for the injunction was heard on the bill and supporting affidavits, and on certain opposing affidavits. There is no substantial controversy with reference to the material facts disclosed by the bill and accompanying affidavits, which may be summarized as follows: The appellants, H. C. Hopkins and others, who were the defendants below, are members of two voluntary unincorporated associations termed respectively the Coopers' International Union of North America, Lodge No. 18, of Kansas City, Kansas, and the Trades Assembly of Kansas City, Kansas. The first of these associations is a labor organization composed of coopers, which has local lodges in all the important trade centers throughout the United States and Canada. The other association, the Trades Assembly of Kansas City, Kansas, is a body composed of representatives of many different labor organizations of Kansas City, Kansas, and is a branch of a general organization of the same name which exists and operates by means of local assemblies in all the principal commercial centers of the United States and Europe. The Oxley Stave Company, the plaintiff below and appellee here, is a Missouri corporation which is engaged at Kansas City, Kansas, where it has a large cooperage plant, in the manufacture of barrels and casks for packing meats, flour and other commodities. It sells many barrels and casks annually to several large packing associations located at Kansas City, Missouri, and Kansas City, Kansas, and also has customers for its product in sixteen other States of the Union and in Europe. Its annual output for the year 1895 was of the value of \$164,173. For some time prior to November 16, 1895, the plaintiff company had used successfully in its cooperage plant at Kansas City, Kansas, certain machines for hooping barrels, which materially lessened the cost of making the same. It did not confine itself exclusively to the manufacture of machine-hooped barrels, but manufactured besides many hand-hooped barrels, and employed a large number of coopers for that purpose. The wages paid to the coopers in its employ were satisfactory, and no controversy had arisen between the plaintiff and its employes on that score. On or about November 16, 1895, the plaintiff company was informed by a committee of persons representing the local lodge of the Coopers' Union No. 18, at Kansas City, Kansas, that it must discontinue the use of hooping machines in its plant. Said committee further informed the plaintiff that they had already notified one of its largest cus-

tomers, Swift & Company, that in making contracts with the plaintiff for barrels, the Coopers' Union would require such customer in future to specify that all barrels supplied to it by the plaintiff must be hand hooped. None of the members of this committee were employes of the plaintiff company, and, with one exception, none of the present appellants were, or are, in its employ. At a later date the Coopers' Union No. 18 called to its assistance the Trades Assembly of Kansas City, Kansas, for the purpose of enforcing its aforesaid demand, and on or about January 14, 1896, a committee of persons representing both of said organizations waited upon the manager of the plaintiff company, and notified him, in substance, that said organizations had each determined to boycott the product of the plaintiff company, unless it discontinued the use of hooping machines in its plant, and that the boycott would be made effective on January 15, 1896. The formal action taken by the Trades Assembly was evidenced by the following resolution:

*"To the Officers and Members of the Trades Assembly:*

"Greeting: Whereas the cooperage firms of J. R. Kelley and the Oxley Cooperage Company have placed in their plants hooping machines operated by child labor, and whereas said hooping machines is the direct cause of at least one hundred coopers being out of employment, of which a great many are unable to do anything else on account of age, and at a meeting held by Coopers' Union No. 18 on the 31st of December, 1895, a committee was appointed to notify the above firms that unless they discontinued the use of said machines on and after the 15th of January, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines the 15th of January, 1896; and at a meeting held by Coopers' Union No. 18 on the 4th of January, 1896, delegates were authorized to bring the matter before the Trades Assembly in proper form and petition the Assembly to indorse our action and to place the matter in the hands of their Grievance Committee to act in conjunction with the committee appointed by Coopers' Union No. 18, to notify the packers before letting their contracts for their cooperage;

Therefore be it resolved: That this Trade Assembly indorse the action of Coopers' Union No. 18, and the matter be left in the hands of the Grievance Committee for immediate action.

Yours respectfully,

J. L. COLLINS, Sec'y.

Coopers' International Union of North America, Lodge 18."

It was also charged, and the charge was not denied, that the members of the voluntary organiza-

tions to which the defendants belonged had conspired and agreed to force the plaintiff, against its will, to abandon the use of hooping machines in its plant, and that this object was to be accomplished by dissuading the plaintiff's customers from buying machine-hooped barrels and casks, such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country would be induced not to purchase any commodity which might be packed in such machine-hooped barrels or casks. The bill charged by proper averments, and no attempt was made to prove the contrary, that the defendants were persons of small means, and that the plaintiff would suffer a great and irreparable loss, exceeding \$100,000, if the defendants were allowed to carry the threatened boycott into effect in the manner and form proposed.

The injunction which the court awarded against the defendants was, in substance, one which prohibited them until the final hearing of the case, from making effective the threatened boycott, and from in any way menacing, hindering or obstructing the plaintiff company, by interfering with its business or customers, from the full enjoyment of such patronage and business as it might enjoy or possess, independent of such interference.

The first proposition contended for by the appellants is that the trial court acted without jurisdiction in awarding an injunction. The ground for this contention consists in the fact that in the bill as originally filed two persons were named as defendants who were citizens and residents of the State of Missouri, under whose laws the Oxley Stave Company was incorporated. But as the case was dismissed as to these defendants, and as to the two voluntary unincorporated associations, and as to all the members thereof who were not specifically named as defendants in the bill of complaint, before an injunction was awarded, and as the bill was retained only as against persons concerned in the alleged conspiracy who were citizens and residents of the State of Kansas, the objection to the jurisdiction of the trial court is, in our opinion, without merit. *Oxley Stave Company v. Coopers' International Union of North America*, 72 Fed. Rep. 695. It is further urged that the trial court had no right to proceed with the hearing of the case in the absence of any of the persons who were members of the two voluntary organizations, to wit, The Coopers' Union No. 18 and the Trades Assembly of Kansas City, Kansas, because all the members of those organizations were parties to the alleged conspiracy. This contention seems to be based on the assumption that every member of the two organizations had the right to call upon every other member for aid and assistance in carrying out the alleged conspiracy, and that an injunction restraining a part



of the members from rendering such aid and assistance would necessarily operate to the prejudice of those members who had not been made parties to the suit. In other words, the argument is that certain indispensable parties to the suit have not been made parties, and that full relief consistent with equity cannot be administered without their presence upon the record. We do not dispute the existence of the rule which the defendants invoke, but it is apparent, we think, that it has no application to the case in hand. The present suit proceeds upon the theory, without which no relief can be afforded, that the agreement entered into between the members of the two voluntary associations aforesaid, is an unlawful conspiracy to oppress and injure the plaintiff company; that no right whatsoever can be predicated upon, or have its origin in such an agreement, and that the members of the two organizations are jointly and severally liable for whatever injury would be done to the plaintiff company by carrying out the object of the alleged agreement. The rule is as well settled in equity as it is at law, that where the right of action arises *ex delicto*, the tort may be treated as joint or several, at the election of the injured party, and that he may, at his option, sue either one or more of the joint wrong doers. *Cunningham v. Pell*, 5 Paige, 607; *Wall v. Thomas*, 41 Fed. Rep. 620, and cases there cited. We perceive no reason, therefore, why the case was not properly proceeded with against the appellants, although numerous other persons were concerned in the alleged combination or conspiracy.

We turn, therefore, to the merits of the controversy. The substantial question is whether the agreement entered into by the members of the two unincorporated associations to boycott the contents of all barrels, casks and packages made by the Oxley Stave Company which were hooped by machinery, was an agreement against which a court of equity can afford relief, preventive or otherwise? The contention of the appellants is that it was a lawful agreement, such as they had the right to make and carry out for the purpose of maintaining the rate of wages then paid to journeymen coopers, and that being lawful, the injury occasioned by the plaintiff company, no matter how great, was an injury against which neither a court of law nor equity can afford any redress. According to our view of the case, the claim made by the defendants below that one object of the threatened boycott was to prevent the employment of child labor, is in no way material, but in passing it will not be out of place to say that this claim seems to have been a mere pretense, since it was shown that the machinery used to hoop barrels cannot be managed by children, but must of necessity be operated by persons who have the requisite strength to handle barrels and casks weighing from seventy-five to eighty pounds

with great rapidity. It is manifest that this is a species of labor which could not, in any event, be performed by children. Neither do we deem it necessary on the present occasion to define the term "boycott," for whatever may be the meaning of that word, no controversy exists in the present case concerning the means that were to be employed by the members of the two labor organization for the purpose of compelling the plaintiff company to abandon the use of hooping machines. It is conceded that their purpose was to warn all of the plaintiff's immediate customers not to purchase machine-hooped barrels or casks, and to warn wholesale and retail dealers everywhere not to handle provisions or other commodities which were packed in such barrels or casks. This warning was to be made effectual by notifying the members of all associated labor organizations throughout the United States, Canada and Europe not to purchase provisions or other commodities, and, as far as possible, to dissuade others from purchasing provisions or other commodities, which were packed in machine-hooped barrels or casks. The object of the conspiracy, it will be seen, was to interfere with the complainant's business and to deprive the complainant company, and numerous other persons, of the right to conduct their business as they thought proper. To this end those who were engaged in the conspiracy intended to excite the fears of all persons who were engaged in making barrels, or who handled commodities packed in barrels, that if they did not obey the orders of the associated labor organizations, they would incur the active hostility of all the members of those associations, suffer a great financial loss, and possibly run the risk of sustaining some personal injury. It may be conceded that when the defendants entered into the combination in question, they had no present intention of resorting to actual violence for the purpose of enforcing their demands, but it is manifest that by concerted action, force of numbers, and by exciting the fears of the timid, they did intend to compel many persons to surrender their freedom of action, and submit to the dictation of others in the management of their private business affairs. Another object of the conspiracy, which was no less harmful, was to deprive the public at large of the advantages to be derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands.

While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (*Arthur v. Oakes*, 63 Fed. Rep.

310), yet they have very generally condemned those combinations usually termed boycotts, which are formed for the purpose of interfering otherwise than by lawful competition with the business affairs of others and depriving them by means of threats and intimidation of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights, and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service either singly or in a body if the wages paid, or the conditions of employment are not satisfactory, but they have no right to dictate to an employer what kind of implements he shall use or whom he shall employ.

Many courts of the highest character and ability have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy at common law, and that an action will lie to recover the damages which one has sustained as the direct result of such a conspiracy; also that a suit in equity may be maintained to prevent the persons concerned in such a combination from carrying the same into effect, when the damages would be irreparable, or when such a proceeding is necessary to prevent a multiplicity of suits. The test of the right to sue in equity is whether the combination complained of is so far unlawful that an action at law will lie to recover the damages inflicted, and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for any reason inadequate, resort may be had, as in other cases, to a court of equity.

In the case of *Springhead Spinning Company v. Riley*, 6 Equity Cases, 551, 558, Vice-Chancellor Malins held that an injunction was a proper remedy to prevent the officers of a trades union from using placards and advertisements to dissuade laborers from hiring themselves to the Spinning Company, pending a dispute between the latter company and the trades union as to wages. The court said: "That every man is at liberty to induce others, in the words of the act of Parliament, 'by persuasion or otherwise' to enter into a combination to keep up the price of wages or the like; but directly he enters into a combination

which has as its object intimidation or violence, or *interfering with the perfect freedom of action of another man*, it then becomes an offense, not only at common law, but also an offense punishable by the express enactment of the act, 6 Geo. 4, ch. 129. It is clear, therefore, that the printing and publishing of these placards and advertisements by the defendants, admittedly for the purpose of intimidating workmen from entering into the service of the plaintiffs, are unlawful acts, punishable by imprisonment under the 6 Geo. 4, ch. 129, and a crime at common law." In *Temperton v. Russell*, 1 Queen's Bench L. R. 715, the facts appear to have been that a committee representing certain trades unions, for the purpose of enforcing obedience to certain rules that had been adopted by the unions, notified the plaintiff not to supply building materials to a certain firm. He having declined to comply with such request, the committee thereupon induced certain third parties not to enter into further contracts with the plaintiff, such third parties being so induced by threats or representations that the unions would cause their laborers to be withdrawn from their employ in case such further contracts were made. It was held that the plaintiff had a right of action against the members of the committee for maliciously conspiring to injure him by preventing persons from having dealings with him. In delivering the judgment of the court the master of the rolls, Lord Esher, quoted with approval a statement of the law which is found in *Bowen v. Hall*, 6 Queen's Bench Division, 333, to the effect that where it appears that a defendant has, by persuasion, induced a third party to break his contract with the plaintiff, either for the purpose of injuring the plaintiff, or for the purpose of reaping a personal advantage at the expense of the plaintiff, the act is wrongful and malicious, and therefore actionable. In the case of *State v. Stewart*, 59 Vt. 273, it was held that a combination entered into for the purpose of preventing or deterring a corporation from taking into its service certain persons whom it desired to employ, was an unlawful combination or conspiracy at common law. The court said: "The principle upon which the cases, English and American, proceed is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workmen, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men appointed for the purpose of controlling the industry of others by a species of

intimidation that work upon the mind rather than the body, are quite as dangerous, and generally altogether more effective than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay the basis for an indictment on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings." In *Barr v. Essex Trades Council*, 30 Atlantic Reporter (N. J.), 881, it appeared that a publisher of a newspaper had determined to use plate matter in making up his paper, whereupon the members of a local typographical union, conceiving their interests to be prejudiced by such action, entered into a combination to compel him to desist from the use of such plate matter. The object of the combination was to be accomplished by the typographical union by a formal call upon all labor organizations with which it was affiliated, and upon all other persons who were in sympathy with it, to boycott the paper by refusing to buy it or advertise in the same. It was held, in substance, that a person's business is property, which is entitled under the law to protection from unlawful interference, and that the combination in question was illegal, because it contemplated a wrongful interference with the plaintiff's freedom of action in the management of his own affairs. Decisions embodying substantially the same views have been made by many other courts. *Hilton v. Eckersley*, 6 E. & B. 47, 74; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135; *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. Rep. 803, 818; *Arthur v. Oakes*, 63 Fed. Rep. 310, 321, 322. See also *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *State v. Glidden*, 55 Conn. 46; *Vegetahn v. Gunter*, 44 N. E. (Mass.) 1077. The cases which seem to be chiefly relied upon as supporting the contention that the combination complained of in the case at bar was lawful, and that the action proposed to be taken in pursuance thereof ought not to be enjoined, are the following: *Mogul Steamship Co., Limited, v. McGregor, Gow & Co.*, 23 Queen's Bench Div. 598; *Id.*, 1 Appeal Cases, 25; *Continental Insurance Co. v. Board of Fire Underwriters of the Pacific*, 67 Fed. Rep. 310, and *Bohn Manufacturing Co. v. Hollis*, 54 Minn. 223. In the first of these cases the facts were that the owners of certain steamships, for the purpose of securing all the freight which was shipped at certain ports, and doing a profitable business had formed an association and issued a circular to shippers at said ports agreeing to allow them a certain rebate on freight bills, provided they gave

their patronage exclusively to ships belonging to members of the association. The association also prohibited its soliciting agents from acting as agents for other competing lines. A suit having been brought against the members of the association by a competing ship owner to recover damages which had been sustained in consequence of the formation and action of the association, it was held that the acts complained of were lawful, the same having been done simply for the purpose of enabling the members of the association to hold and extend their trade, in other words that the acts complained of amounted to no more than lawful competition in trade. *Continental Insurance Company v. Board of Fire Underwriters of the Pacific*, was a case of the same character as the one last considered, and involved an application of the same doctrine. It was held, in substance, that an association of fire underwriters which had been formed under an agreement that provided, among other things, for the regulation of premium rates, the prevention of rebates, compensation of agents and non-intercourse with companies that were not members of the association, was not an illegal conspiracy, and that the accomplishment of its purpose by lawful means would not be enjoined at the suit of a competing insurance company which was not a member of the association. In the case of *Bohn Manufacturing Company v. Hollis*, it appeared that a large number of retail lumber dealers had formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a wholesale lumber business, and had provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all members of the fact. The plaintiff having made such a sale, and the secretary being on the point of sending a notice of the fact to members of the association, as provided by the by-laws, it was held that the sending of such a notice was not actionable, and that an injunction to restrain the sending of such notice ought not to issue. The decision to this effect was based on the ground that the members of the association might lawfully agree with each other to withdraw their patronage, collectively, for the reasons specified in the agreement, because the members individually had the right to determine from whom they would make purchases, and to withdraw their patronage at any time and for any reason which they deemed adequate. It is not always the case, however, that what one person may do without rendering himself liable to an action, many persons may enter into a combination to do. There is a power in numbers, when acting in concert to inflict injury, which does not re-

side in a single individual, and for that reason the law will sometimes take cognizance of acts done by a combination when it will not do so if committed by a single individual. *Mogul Steamship Company, Limited, v. McGregor, Gow & Company*, 1 App. Cases, 25, 45; *Id.*, 23 Queen's Bench Div. 598, 616; *Arthur v. Oakes*, 63 Fed. Rep. 310, 321; *State v. Glidden*, 55 Conn. 46. But conceding that the reasoning employed was sound, as applied to the facts of that case, it by no means follows, and that fact was recognized in the decision, that the members of the association would have had the right to combine for the purpose of compelling other persons, not members of the association, to withhold their patronage from a wholesale dealer who failed to conduct his business in the mode prescribed by the association.

We think it is entirely clear, upon the authorities, that the conduct of which the defendants below were accused cannot be justified on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers. No decrease in the rate of wages had been threatened by the *Oxley Stave Company*, and with one exception the members of the combination were not in the employ of the plaintiff company. The members of the combination undertook to prescribe the manner in which the plaintiff company should manufacture barrels and casks, and to enforce obedience to its orders by a species of intimidation which is no less harmful than actual violence, and which usually ends in violence. The combination amounted, therefore, to a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. Aside from the foregoing considerations, the fact cannot be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seems to have been one of great utility. If a combination to that end is pronounced lawful, it follows of course, that combinations may be organized for the purpose of preventing the use of harvesters, threshers, steam looms and printing presses, type-setting machines, sewing machines, and a thousand other inventions which have added immeasurably to the productive power of human labor, and the comfort and welfare of mankind. It results from these views that the injunction was properly awarded, and the order appealed from is accordingly affirmed.

#### ▲ PORTRAIT WITH AN INTERESTING HISTORY.

**A**MONG the portraits of the eminent judges and lawyers to be seen in the rooms of the New York State Bar Association, in the Capitol at

Albany, is that of Joshua A. Spencer, who was one of the ablest and most eminent members of the Central New York bar, distinguished for a long and brilliant career as a lawyer, and especially distinguished as the counsel for Alexander McLeod, indicted for complicity in the burning of the steamer *Caroline* in the Canadian war. The trial of McLeod is famous in legal history as involving singularly important questions of international law. There is an interesting and melancholy incident connected with this portrait and the manner in which it came into the possession of the State Bar Association. In the spring of 1887, not long before the Hon. Aaron J. Vanderpoel sailed for Europe to spend several months, principally in Paris, he called at the rooms of the association, being then one of the vice-presidents of the organization, accompanied by a man having a portrait in charge.

Mr. Vanderpoel said to Mr. Proctor, the secretary of the association: "I have here a valuable portrait of Joshua A. Spencer, to me especially valuable. I am going to spend some time in Europe, and I desire to leave the portrait in these rooms during my absence. It is the proper place for it, for his career as a lawyer and scholar, his character as a man and a high-minded gentleman reflects lasting honor on the bar of the State of New York, and his portrait will be an embellishment to the State Bar Association, which is also an honor to the legal profession. Take and place it on the wall of this room. It may be that I shall never return to my home and my country; if I do not then this portrait will become the property of the association, and I wish you to present it to the organization in my name."

"Judge Vanderpoel," said Mr. Proctor, "the portrait of a jurist, illustrious as is the memory of the original of this painting, would be of inestimable value to the State Bar Association. To receive it under the bereaving circumstances under which it must become the property of the association would invest it with a mournful and sacred interest. It shall be placed on the walls of our rooms, as you direct, and it will be a joyful moment when I can take it from thence and return it to you, to be received by you personally, and this joy will be shared by the members of the association and the profession. If you do not return to your friends and your country this portrait will remain permanently in these rooms, blended with the memory of the donor who was the bosom friend and peer at the bar of the great original Joshua A. Spencer, with fadeless remembrance of its distinguished donor."

Not long afterwards Judge Vanderpoel embarked for Europe, spending much of his time in Paris. He had been absent two months, when, one evening, Mr. Proctor received a cablegram from the French capital announcing his sudden

death, which took place early in the morning of the day the mournful message was received. In due time the portrait was formally presented to the association, and thus came into possession of one of the most valuable works of art that adorns the rooms of the State Bar Association.

### NO POLL TAX FOR VOTERS.

#### PROVISION IN THE CHARTER OF SAUGERTIES MAKING ITS PAYMENT A PREREQUISITE TO VOTING, UNCONSTITUTIONAL.

I AM asked my opinion as to the validity of that portion of the charter of the village of Saugerties which prevents the electors of that village from voting for village officers unless they have previously paid a poll tax.

The provision in question was enacted in 1894 and is as follows:

"Section 37. The board of directors (trustees) shall have power to assess and collect a poll tax of one dollar on each male resident in the village above the age of twenty-one years, excepting all honorably discharged soldiers and sailors who lost an arm or a leg in the service of the United States during the late war, or who are unable to perform manual labor by reason of injuries received or disabilities incurred in such service; persons seventy years of age, clergymen and priests of every denomination, paupers, idiots and lunatics. \* \* \* Every person assessed for the poll tax of one dollar, who shall neglect to pay the same shall not be permitted to vote at village elections until he shall have paid such tax. The clerk of said village shall prepare a list of all persons assessed for the poll tax who shall have neglected to pay the same, and who shall deliver or cause to be delivered a copy of said list to the officers conducting village elections, at least five days prior to the first election after said tax becomes due and payable under the warrant for its collection, and it shall be the duty of the officers conducting village elections to refuse to receive the vote of any person whose name appears on said list, unless he shall produce a receipt from the treasurer of the village, showing he has paid said tax." (Amendment, chapter 546 of Laws of 1894, pages 1146, 1147.)

There is no question as to the power of the legislature to authorize the village trustees to impose a poll tax, but the point presented is whether the legislature can provide for the disfranchisement of a citizen in case such tax shall not be paid.

That must depend upon the question whether the Constitution itself fixes the qualifications of voters in this State, or such qualifications are left to be determined by the legislature according to its own discretion.

Aside from the plain reading of the Constitution, the authorities in this State seem to settle the question.

O'Brien, J., in delivering the opinion in the case of *People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. R. 401, assumes that the legislature cannot regulate the qualifications of voters, and speaks of "The right to vote secured to the citizens by the Constitution," as though it was a conceded matter.

It was virtually held in *Matter of Gage*, 141 N. Y. R. 116, per Finch, J., that "The Constitution, in article 2, section 1, prescribes the qualifications of voters," which cannot be altered, abridged nor extended by legislation.

In *People v. Pease*, 27 N. Y. R. 45, 52, 53 (decided in 1863), Davies, J., in delivering the opinion of the Court of Appeals, says: "The Constitution of this State declares who may exercise the elective franchise. Those entitled to vote at any election are, every male citizen of the age of twenty-one years who shall have been a citizen for ten days (now ninety days), and an inhabitant of this State for one year next preceding any election, and for the last four months a resident of the county where he may offer his vote. (Sect. 1, Art. 2)."

Article 2 of the Constitution provides as follows:

"Section 1. Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people."

This provision, explicitly declaring who are entitled to vote, must be deemed to absolutely fix the qualifications of electors. Not only does it exclude from the elective franchise those not specially described therein (*People v. Barber*, 48 Hun, 201), but it confers an absolute and unconditional right to vote upon those answering the description. The article is appropriately indexed in the Constitution as follows: "Qualification of Voters," and must be regarded as fixing all the constitutional requirements from voters necessary to entitle them to participate in our elections. It follows that no requirement which is specifically mentioned can be dispensed with, and, also, that nothing further can be exacted or added.

In Vol. 6 of "American and English Encyclopedia of Law," page 263, it is said: "In all but one or two of the States, the qualifications of the electors are fixed by the Constitution; and where this is so, the legislature has no power to require any other or different qualifications from those

embraced in the Constitution." This is elementary law, so plain as to admit of no discussion.

It has been so decided in Pennsylvania. (*McCaffrey v. Guyer*, 59 Penn. St. Rep. 109.)

Also in Massachusetts. (*Kinnen v. Wells*, 144 Mass. R. 497.)

Likewise in Indiana. (*Quinn v. State*, 35 Ind. R. 485), and in Wisconsin (*State v. Tuttle*, 53 Wis. R. 45).

This provision (art. 2, sec. 1) must be deemed to be complete within itself, unless there is some other provision in the Constitution with which it must be construed, either expressly or impliedly modifying its terms; and there does not seem to be any such affecting the precise question here involved.

If, as seems very clear, the Constitution intended to prescribe the qualifications of voters in this State and not leave such qualifications to be determined at the will, caprice or discretion of the legislature, the conclusion becomes irresistible that the amendment to the Saugerties charter prescribing the payment of a poll tax as an essential requisite for the privilege of voting imposes an additional condition, requirement, or qualification not authorized by the Constitution, and renders such amendment invalid. It has always been understood that manhood suffrage was guaranteed in our Constitution, not by a positive and affirmative declaration to that effect, but by the omission to provide for any property qualification on the part of electors; but if article 2, section 1, is not sufficient to prevent the adoption of the test of the payment of a poll tax as a condition of the right to vote, it is difficult to see what prevents the legislature from insisting upon a property qualification, because there is really no difference in principle between the two cases. If the ownership of property or the payment of taxes constitutes the basis for the exercise of the elective franchise, instead of manhood alone, the theory upon which our Constitution was framed has heretofore been greatly misapprehended.

It is safe to say that all qualifications for voters, which are based upon property, education, religion, color or nationality are obnoxious to the true spirit of our free institutions and were intended to be abolished in our present Constitution, leaving the sacred right of suffrage to depend wholly upon the sex, age and citizenship of the voter, and his place of residence during a specified period of time. All else was discarded; all else was regarded as unnecessary and offensive; all else was rejected as unfairly discriminating between equal citizens.

If a poll tax can legally be exacted as a condition of voting, then a tax upon lands or personal property can also be made the means of disfranchisement; and, as in such case, the imposition of taxes and the amount or extent thereof are both within the discretion of the legislature, it is clear

that by an abuse of such power the suffrage can thereby be largely restricted, the great mass of the citizens can be excluded therefrom, and a State government by plutocracy can readily be instituted. The barriers against the accomplishment of such results are to be found in Article two of the Constitution or not at all, and they consist in the guaranty of manhood suffrage, without any other qualification, condition or limitation, except sex, age, citizenship and residence.

It should be observed that the general election law of 1896 defines the "qualifications of an elector" for the purposes of registration exactly in accordance with the constitutional provision. (Chapter 909, Laws of 1896, section 34.)

It seems that the amendment in question to the Saugerties charter is exceptional in its character, as my attention has not been called to a similar provision in any other village charter. The general village law of 1897, while it authorizes the collection of a poll tax, yet contains no such disfranchising provision applicable to elections for village officers. (Chapter 414, Laws of 1897.)

It may also be stated that in the States, such as Massachusetts and Pennsylvania, where the payment of taxes is made a condition precedent to voting, the authority therefor is embraced in the Constitutions of such States. (See Constitutions.)

It cannot be answered that this article two of the Constitution applies only to State elections and not to municipal or village elections. The provision is broad and comprehensive. It makes no exceptions. It refers to every election. It includes elections "for all officers that now are or hereafter may be elective by the people." Section two of Article ten of the Constitution should be read in connection with this comprehensive provision. It says, "All city, town and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns or villages or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose."

Village officers are not otherwise expressly provided for in the Constitution, and hence they are covered by article ten, and may be either elected or appointed as the legislature may determine. If the legislature determines that they shall be elected, then such village officers become "elective" officers within the meaning of Article two, and "every male citizen" of the State, possessing the further necessary qualifications of age and residence "shall be entitled to vote" therefor, whether or not he owns any property or pays any taxes, or whatever may be his condition, creed, color or nationality.

Village officers need not be elected at all unless the legislature shall so determine, but they may be appointed by such other local authorities as

the legislature shall designate for that purpose, but the legislature having decided that they shall be elected and not appointed, they become elective officers within the true intent and meaning of Article 2 of the Constitution, and their election must be governed by those constitutional provisions which have been provided for elections generally (Matter of Gage, 141 N. Y. R. 116-117), and every elector entitled to vote at such elections must be permitted to vote at a village election without any additional qualifications, restrictions or conditions being insisted upon. In other words, the Constitution and not the legislature determines the qualifications of all voters at all elections whether State, city, town or village.

This construction makes the provisions of the Constitution harmonious and reasonable, as well as prevents unjust and improper class discriminations among citizens. An elector in one part of the State is an elector in every other part. It is evident that the Constitution does not contemplate the existence of "tax paying" electors in Sauger-ties, and non-tax paying electors everywhere else. Equal rights, equal privileges and equal prerogatives were intended to be vested in all citizens alike, regardless of monetary, tax paying or other similar discriminations. It follows that any legislative enactment which seeks to disfranchise citizens based upon such unauthorized discriminations is necessarily null and void.

I, therefore, conclude by saying that, in my opinion, the provisions of the charter of Sauger-ties which assume to prevent electors from voting for village officers, unless they have previously paid a poll tax, are in violation of the Constitution, and that every elector of said village, otherwise qualified, is entitled to vote for all elective village officers whether he has paid such tax or not, and his vote must be received and counted.

DAVID B. HILL.

ALBANY, Nov. 20th, 1897.

#### DEFECTS IN THE LAW OF MURDER.

THE reprieve of the man Stormouth, who was found guilty and sentenced to death for aiding and abetting in the suicide of a woman, will direct attention to an admitted defect in our criminal law.

"One point," writes Sir Fitzjames Stephen so far back as 1863, "in which the law of murder requires relaxation is the case of suicide. Suicide is by law murder, and a person who is present aiding and abetting in the act is a principal in murder and might be convicted and executed for the offense. Thus in the not very uncommon case of a joint attempt at suicide, if one person escapes and the other dies, the survivor is guilty of murder. That this is a hard case is apparent from the fact that in practice no one would be executed for such an offense. Suicide may be wicked, and is

certainly injurious to society, but is so in much less degree than murder. The injury to the person killed can neither be estimated nor taken into account. The injury to survivors is generally small. It is a crime which produces no alarm and which cannot be repeated. It would therefore be better to cease altogether to regard it as a crime, and to provide that any one who attempted to kill himself or who assisted any other person to do so should be liable to secondary punishment. Juries would be delivered from a conflict between duty and pity." (General View of the Criminal Law of England, pp. 121-2.)

The Draft Penal Code of 1879, which was proposed by a royal commission, consisting of Lord Blackburn, Lord Justice Barry, Lord Justice Lush and Sir James Stephen, who sat "daily" from November, 1878, till May, 1879, and "discussed every line and nearly every word of every section," proposed to make the abetment of suicide a special offense, subject to penal servitude for life as a maximum punishment. The attempt to commit suicide was to be punishable by two years' imprisonment at hard labor, while the definition of homicide, "the killing of a human being by another," excluded suicide.

It is of very considerable interest to observe that the conclusions to which the most eminent jurists of their time arrived in thus distinguishing suicide and the abetting of suicide from murder and the crime of being accessory before the fact to murder, had been formed by a similar course of reasoning a generation previously by one of the greatest thinkers of the present century, who, although a prelate of the Established Church, was an active reformer of the penal system, and the principal agent in the substitution of penal servitude for transportation.

"It is assumed," writes Archbishop Whately, "that suicide is a species of murder because it is self-murder. Suicide, if any one considers the nature and not the name of it, evidently wants the most essential characteristic of murder, viz., the hurt and injury done to one's neighbor, as well as to others, by the insecurity they are in consequence liable to feel. And since no man can, strictly speaking, do injustice to himself, he cannot in the literal and primary acceptation of the words be said either to rob or to murder himself. Suicide implies no inhumanity. It is much more closely allied to the sin of wasting life in indolence or in trifling pursuits—that life which is bestowed as a seed-time for the harvest of immortality. What is called in familiar phrase 'killing time' is in truth an approach so far as it goes to the destruction of one's own life, for time is the stuff life is made of.

"Time destroyed

Is suicide where more than blood is spilt."

— (Whately's Logic, pp. 110-111.)

Nor is this the only defect in the law of murder

which is still unremoved. What Sir Fitzjames Stephen well calls the "astonishing doctrine," that if a person seeking to commit a felony should, in the prosecution of that purpose cause — although it might be unintentionally — the death of another, that by the law of England is murder. Lord Chief Justice Cockburn, in *Barrett's case*, thus referred to this doctrine: "There were persons who thought and maintained that when death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the court and jury were sitting there to administer the law, not to make or mould it, and the law was what he told them." (*Times*, 28th April, 1868.) Sir Fitzjames Stephen says that this doctrine has been repeated so often that he, amongst others, had not only accepted it, though with regret, but had acted on it in a case which set its possible cruelty in a specially strong light: "At Lincoln, in the winter assize of 1880, two men and a woman were tried for murder before me. They had conspired together to rob a man. The girl brought him to the appointed place, the men threw him down and robbed him. He had a weak heart and died. The three prisoners were convicted of murder and sentenced to death, but not executed." (*History of the Criminal Law of England*, vol. 3, p. 57, note.)

To take an extreme illustration of this doctrine: A. shoots at a domestic fowl, intending to steal it, and accidentally kills B. A. commits murder. That these defects in the law of murder, which have been acknowledged by the highest judicial authorities and are abhorrent to public opinion, have not been remedied by legislation, but are mended in an indirect and clumsy fashion by the intervention of the crown in the exercise of its prerogative on the advice of the home secretary, is an anomaly in our jurisprudence for which there is no justification or excuse. — *Law Times* (London).

#### THE LIABILITY OF BANKERS FOR BREACHES OF TRUST BY CUSTOMERS WHO ARE TRUSTEES.

THE recent decision of Mr. Justice Byrne in *Colman v. The Bucks and Oxon Union Bank* (66 *Law J. Rep. Chanc.* 564) is one of considerable importance as to the liability of bankers for breaches of trust committed by customers who are trustees. An agent is as a rule accountable to his principal only, and not liable for a misapplication of trust funds which his principal directs. In *Gray v. Johnston* (L. R. 3 H. L. 1), which came before the house of lords in 1868, Lord Cairns laid down the rule that to justify a banker in refusing to honor the check of a customer known to be an executor or trustee, there must be a misapplication or breach of trust actually intended to which the banker is privy. Lord Westbury seems to have thought that if the trustee did not himself admit

the intended breach of trust, the banker could not refuse payment because he had evidence *aliunde* of the intention; but that if the trustee applied part of the trust estate in the banker's hands in payment of a debt due from himself to the bank, this would render the banker liable to refund. Some remarks of Lord Justice Fry in *Foxton v. The Manchester and Liverpool Banking Company* (44 *Law Times*, 408) have been considered to establish that whenever there is an account which, upon the face of it, is a trust account, and the customer draws a check upon that account, which he pays in to the credit of his own private account, the bankers are put upon inquiry whether the customer is really entitled to treat the money as his own. That this is not the right interpretation of what Lord Justice Fry said appears from the case before Mr. Justice Byrne, in which the bankers themselves placed to the credit of a trustee's private account money which they knew to be trust money, but in respect of which they had received no instructions to open a separate account. The trustee being well aware of this, took no steps to open a trust account, but continued to draw on his own account as usual, and after several years became bankrupt; but until the bankruptcy he was always in good credit, and the bankers had no intention of benefiting themselves, and no suspicion that a breach of trust was in fact being committed. Under these circumstances they were held not liable. — *Law Journal* (London).

#### Notes of Cases.

In *Jenkins v. State*, decided by the Supreme Court of Tennessee in October, 1897 (42 S. W. R. 363), it was held that a statute of that State, disqualifying from jury service all persons shown to be engaged in a general conspiracy against law and order, does not contravene any constitutional provision.

The court said in part:

"The record shows that, after the panel had been elected, but before they were sworn, the attention of the court was called to the fact that one of the jurors, J. L. Romines, belonged to an unlawful organization known as 'Whitcaps,' and was, therefore, incompetent as a juror. The court thereupon proceeded to investigate said charge, and from the testimony of witnesses, based on general rumor, became satisfied that said juror was a member of said order, and thereupon discharged the juror from said panel. Another juror was then selected, and the panel was sworn. It appears that when the jury was thus completed defendant had not exhausted his peremptory challenges. It is said that his honor, in excluding the juror Romines, acted under authority conferred by sec. 3, c. 52, Acts 1897, entitled 'An act to prevent and punish the formation or continuance of conspiracies and combinations for certain unlawful pur-



poses,' etc., commonly known as the 'Law against Whitecaps.' Said section is as follows: 'That no person who has been guilty of any offense declared in the two preceding sections of this act shall be competent to sit or serve on any grand or traverse jury, and it shall be the duty of the court to carefully exclude all such persons from the juries, both grand and petit; and when he shall be informed or shall have reason to suspect any person presented as a juror guilty of any of said offenses he shall call witnesses, if necessary, and examine fully into the truth of the charge. He shall dismiss from the grand jury any person who has been selected and afterwards shown to be implicated in any of said offenses.' It is insisted that this act is unconstitutional, but the provision of the organic law supposed to be violated is not pointed out. We think the act simply adds another disqualification to jury service, and is in all respects valid. 'In Tennessee, to be competent as a juror: (1) The person must be a man. (2) He must be a citizen. (3) He must be 21 years of age. (4) He must be a freeholder or householder. (5) He must be of sound mind. (6) He must be in full possession of the senses of hearing and seeing. The foregoing may be considered as the positive qualifications of a juror. The want of any one of them is cause for challenge. But, although these qualifications exist, he is yet incompetent, or subject to challenge for cause, if any of the following disqualifications exist: (1) If he is interested in the case in which he is presented as a juror. (2) If he has an adverse interest in a similar suit involving like questions of fact or with the same parties. (3) If he is under conviction of a crime rendering him infamous. (4) If he has served as a juror within the two preceding years. (5) If he has a suit pending in the same court. (6) If he is drunk when presented, or has been drunk during the term, or is an habitual drunkard. (7) If he is connected with either of the parties by affinity or consanguinity within the sixth degree, computing by the civil law. (8) Any person who has applied to the sheriff to be one of the guard to take prisoner to penitentiary in event of conviction. There are other causes of challenge; as that the juror has prejudged the case, or that he entertains such views about the case or the party as will prevent him from looking alone to the evidence for his verdict.' (Caruther, Hist. Lawsuit, sec. 202.) We think it was within the competency of the legislature to further add to these statutory disqualifications, and exclude from jury service all persons shown to be engaged in a general conspiracy against law and order. This question was somewhat considered by the Supreme Court of the United States in *Clawson v. U. S.* (114 U. S. 477, 5 Sup. Ct. 949.) Congress had enacted a law which provided 'that in any prosecution for bigamy, polygamy, or any unlawful cohabitation under any statute of the United States, it shall be sufficient

cause of challenge to any person drawn or summoned as a juror or talesman that he believes it right for a man to have more than one living or undivorced wife at the same time.' This act was held valid, and certain persons who were violators of the act were excluded from the grand jury."

In *Toledo & O. C. R'y Co. v. Dages*, decided by the Supreme Court of Ohio in October, 1897 (47 N. E. R. 1039), it was held that although a common carrier of passengers is under no obligation to carry articles of merchandise as baggage, and although it is not liable for the loss of such merchandise if it is tendered to and received by it as baggage without actual knowledge of its true character, yet, if it receives and checks merchandise as baggage with actual knowledge on the part of its agents that it is merchandise, it thereby waives its right to immunity from liability because of the character of such articles.

The court said in part: "The general rule upon the subject of waiver as affecting the liability of the carriers was stated by Mr. Justice Field in *Railroad Co. v. Swift* (12 Wall. 262), as follows: 'If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If, not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed.' In 3 Wood, R. R., p. 1806, it is said: 'While a carrier is not obliged to accept anything but ordinary baggage as baggage, yet if, without extra compensation, and knowing that it is not personal baggage, he permits it to be treated and carried as such, he is liable for its loss.' The same doctrine was declared and applied in *Jacobs v. Tutt* (33 Fed. 412) and in numerous cases cited in the briefs. Nothing opposed to this view is held in *Humphreys v. Perry* (148 U. S. 627, 13 Sup. Ct. 711), relied on by counsel for the company; for not only does the court, by distinguishing *Jacobs v. Tutt*, recognize that case as correctly decided, but in the opinion it is stated as a reason for the conclusion that the carrier was not liable for the value of merchandise received to be carried as baggage that the witness 'testified to no fact from which the inference could be drawn that the agent had actual knowledge that the trunk contained a stock of jewelry.' Nor is the view stated in conflict with the cases in which it is held that the carrier does not become liable for merchandise received as baggage merely because it had frequently so received it, nor merely because of the peculiar appearance of the trunks or cases in which it was contained. for fraud cannot be practiced upon a carrier so frequently as to create a cause of action against it: nor is proof of a circumstance which tends to show knowledge, or which might excite a suspicion.

necessarily equivalent to proof of actual knowledge. Concerning the effect of such circumstances, it was said by this court in *Johnson v. Way* (27 Ohio St. 374), as a reason for rejecting the ancient rule that there could be no recovery upon a negotiable instrument void between the original parties if the holder had acquired it under circumstances calculated to excite suspicion: 'Circumstances which might excite the suspicion of one man might not attract the attention of another. It is a rule which business men cannot act upon in the ordinary affairs of life with any certainty that they are safe.' It was nevertheless held that good faith required the holder to act upon his knowledge. It is true that in cases not distinguishable from those before us the Supreme Court of Massachusetts has exempted the carrier from liability for the merchandise holding that, notwithstanding its knowledge of the character of the articles to be carried, it is liable only according to the terms of its contract, and that the articles of merchandise were carried at the risk of the passenger. If we were inclined to adopt this view instead of that which obtains generally, we should find difficulty in distinguishing *Express Co. v. Backman* (28 Ohio St. 144), where a common carrier of freight was charged with the consequences of its knowledge that the value of the freight exceeded that which was stated in the bill of lading. It would not seem practicable, in this respect, to distinguish between the carriage of freight and the carriage of baggage, nor between knowledge of the value of the articles carried and knowledge of their character. In one case as clearly as in the other considerations of public policy justify the conclusion that, if the carrier, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives its right to refuse merchandise which it is requested to carry as baggage, or to make an additional charge commensurate with the increased risk, it cannot, after a loss has occurred, assert an immunity from liability because of such right."

### Legal Notes of Pertinence.

In a recent decision the New York Court of Appeals has condemned the practice, in the lower appellate courts, of dismissing the complaint absolutely where they reverse a judgment in a case which has been tried before a jury. No matter how hopeless the plaintiff's cause of action may seem on the record contained in the printed appeal book, there is almost always a possibility that it may be improved if he is allowed to try the case over again. "We are not satisfied with the action of the General Term," say the Court of Appeals in the decision to which we refer, "in ordering final judgment on the merits, even if the evidence was not sufficient to justify the submission of the case to the jury—a question which we do not now decide. We are unable to say that

other evidence may not be in existence which may materially change the facts with reference to these transactions. We, therefore, think that a new trial should have been ordered." The suit was an action for negligence, in which the plaintiff was a child who had been crippled by falling into a cellar-way. — *New York Sun*.

Chief Judge-elect Alton B. Parker, of the Court of Appeals, rendered the original decision in the *Kingston Railway* case, which has recently attracted so much attention, says the *Albany Argus*: Mr. Justice Parker held that a consent to construct and operate a street surface railroad obtained by one corporation was available to another railway company which had entered into a traffic arrangement with the first. This view accorded with that generally entertained by lawyers who had considered the subject, but it was rejected both by the Appellate Division of the Third Judicial Department and by the Court of Appeals. The counsel who represented the successful appellants was A. T. Clearwater, of Kingston, county judge of Ulster county, who, curiously enough, is the most prominent candidate for appointment as the successor of Judge Parker on the Supreme Court bench in the third district.

The request of the Shelburne Falls murderer, made to Judge Fessenden, to fix an earlier day than January 7 next for his execution, in order to save worry on the part of the condemned man's family, furnishes an interesting commentary on the efforts of his counsel to interpose obstacles to the execution of the death sentence. The obligations of lawyers to use every effort to protect their clients, ought not to be overlooked, but it may reasonably be doubted whether it is in the interest of justice or any kindness to a condemned man whose guilt cannot reasonably be questioned, to resort to legal technicalities to stave off the execution of the death sentence, as is now being done by counsel for more than one convicted murderer. There are cases where it is better, as well as more merciful, to promptly accept the inevitable and shorten the anguish.—*Boston Herald*.

The announcement comes from St. Louis that a convicted murderer there, who is to be executed this week, has been negotiating with a local medical college, with reference to the sale of his body to the institution. In this State the Penal Code expressly declares that a person has a right to direct the manner in which his body shall be disposed of after his death. Whether this applies to one convicted of murder, however, may be somewhat doubtful, in view of the provisions of law relating to the body of a criminal upon whom the death penalty has been inflicted. Such body, unless claimed by some relative or relatives of the person so executed, is required by the Code of Criminal Procedure to be interred in the graveyard or cemetery attached to the prison, with a

sufficient quantity of quicklime to rapidly consume the remains.

The amendment to the Constitution of New York, removing the limit as to the amount of money that can be recovered from a corporation on account of a death caused by it, has now been followed by a verdict of \$30,000 damages against the New York, New Haven & Hartford company for the death of one of its passengers. Until this feature was established in the organic law it was impossible to obtain a verdict for damages causing death inflicted by a railway corporation, or any other corporation or any individual, at more than \$5,000. The value of a human life was thus fixed at \$5,000 until the change in the law, whereas the value of a limb might be any figure upon which a jury would agree.

William H. Shankland has been appointed clerk of the Court of Appeals at a yearly salary of \$5,000. Mr. Shankland fills the vacancy caused by the death of Clerk Gorham Parks. Mr. Shankland came to Albany from Cortland in 1882, when he went into the office of the clerk of the court as one of his assistants. The appointment meets with hearty satisfaction. The new clerk is a brother-in-law of Chief Judge Andrews, who is to be retired on December 31, under the Constitutional provision fixing 70 years as the limit of service on the bench.

### English Notes.

The pensions of Lord Esher and Lord Ludlow have been gazetted. Lord Esher receives an annuity of £3,750 for life, and Lord Ludlow an annuity of £3,500 for life.

The lord chief justice (Lord Russell, of Killowen) has so far recovered from his recent accident as to be able to resume his seat in court.

While Mr. Justice Kekewich was returning home from Watford recently, in a hansom cab, the horse fell and the learned judge was pitched forward with considerable violence; but, beyond receiving a rather severe shock to the system and a bruise on one of his legs, he suffered no further injury.

Lord Coleridge, Q. C., has been elected president of Trinity College, London, in succession to Sir Richard Webster, Q. C., M. P., who has filled the office for four years.

Among the erroneous notions which have recently been expressed concerning the bench, none is more incorrect than the popular idea that the judicial staff is unsatisfactory because the majority of its members owe their positions to political services. We do not for one moment admit that an eminent lawyer should be disqualified for a seat on the bench because he has devoted time to politics. But putting this aside, so far from it

being true that the bench is recruited from the House of Commons, only nine out of the twenty-eight judges now on the bench have sat in Parliament. The nineteen judges who never had parliamentary seats are Sir Nathaniel Lindley, Sir Francis Jeune, Lords Justices Smith, Henn, Collins and Vaughan Williams, Mr. Justice North, Mr. Justice Stirling, Mr. Justice Romer, Mr. Justice Kekewich, Mr. Baron Pollock, Mr. Justice Hawkins, Mr. Justice Mathew, Mr. Justice Day, Mr. Justice Wills, Mr. Justice Wright, Mr. Justice Kennedy, Mr. Justice Barnes, Mr. Justice Ridley and Mr. Justice Channell. But a very few of these even attempted to enter parliamentary life. The nine judges who have sat in the House of Commons are Lord Russell, of Killowen, Lord Justices Rigby and Chitty, Mr. Justice Byrne, Mr. Justice Grantham, Mr. Justice Bruce, Mr. Justice Lawrance, Mr. Justice Bigham and Mr. Justice Darling. It may be said of the majority of these judges that their positions at the bar would have given them commanding claims to seats on the bench, which they would certainly have obtained even had they not been members of the House of Commons. — Law Journal (London).

A return has just been published showing the receipts and expenditures in respect of the High Court of Justice and the Court of Appeal during the year ended March 31, 1897. The total receipts during this period are given as 481,048l. 4s. 10d., this being a decrease of 16,691l. 4s. 7d. on the total for the previous year. The total expenditure was 618,514l. 9s. 9d., which gives a net decrease of 15,984l. 16s. 5d. as compared with the figures for the year ended March 31, 1896.

It is stated that the Irish solicitor-general, Mr. William Kenny, M. P., is to be elevated to the bench, and will take his seat as a judge of the High Court in Ireland at the commencement of the coming year.

### Legal Laughs.

The recent retirement of Lord Justice Ludlow from the English bench has brought out certain stories as to his gentle manners in court. On more than one occasion his amiability in taking pity on a confused witness has led to unforeseen results. One was being badgered about a denial of drunkenness, when the judge addressed him kindly from the bench. "Did you say 'I was not drunk,' sir?" he asked. "I never said anything about you at all," was the reply.

Charles Pickard of the Chicago bar brings home from the east a neat little story of Judge Fitzgerald, a famous New Jersey jurist, whose sayings are current wherever two or three lawyers are gathered together.

It seems that there was an option allowed counsel as to beginning their cases in Judge Fitzgerald's

ald's court or in the chancery court. A lawyer came to him with a case in the privileged category, and Judge Fitzgerald asked in his peculiarly squeaking voice:

"Why did you begin service in my court?"

"Well, your honor, the statute gives me the privilege to bring it in —"

"Oh, I know you have the option; but why did you begin it here?"

"Well, I thought I had a right to —"

"Of course you had a right, but don't you know you can charge twice as much in the chancery court as you can here?" — Chicago Post.

### Notes of Recent American Decisions.

**Accident Insurance — When Policy Takes Effect.** — Where an application for accident insurance is made to an agent of a mutual association, who has no authority to accept a person to membership, and who has to send the application to the association by mail for acceptance, on such acceptance and issuance of the certificate of membership the latter does not relate back to the time the application was made, in the absence of anything in the application that binds the association in the interim of time; and in case of accident to the applicant after the application is made, and before its acceptance, the association is not liable. (*Rogers v. Equitable Mut. Life & Endowment Assn.* [Iowa], 72 N. W. Rep. 539.)

**Bills and Notes — Fraudulent Representation.** — A statement by the promoter of a corporation that stockholders would receive from 10 to 25 per cent. on their money paid for stock is an expression of opinion, and the fact that the corporation became insolvent and ceased to do business six months later does not invalidate a note given in payment for stock. (*Swan v. Mathre* [Iowa], 72 N. W. Rep. 522.)

**Carriers — Misdelivery of Property.** — Where a common carrier misdelivers property shipped over its road, the consignee is not bound to accept a tender thereof made more than three weeks after the expiration of the time during which he agreed to extend the period of delivery, and after he had brought suit against the carrier for the conversion of the property. (*Hamilton v. Chicago, M. & St. P. Ry. Co.* [Iowa], 72 N. W. Rep. 529.)

**Carriers of Passengers — Injury — Negligence.** — A passenger who, being carried beyond his station because asleep, is permitted to alight at a place other than a station, and who, after walking some distance on the track, falls into a culvert thereon, cannot recover for the injury therefor from the railroad company. (*Fisher v. Paxton* [Penn.] 38 Atl. Rep. 407.)

**Carriers of Passenger — Ticket as Evidence of Contract.** — A passenger may, in the absence of

actual notice to the contrary, assume that the carrier has furnished him with a ticket correctly stating the terms of the contract actually made, and is not bound to inspect the ticket to see that the carrier has performed its duty. (*Gulf, C. & S. F. Ry. Co. v. Copeland* [Tex.], 42 S. W. Rep. 239.)

**Constitutional Law — Unjust Discriminations — Game.** — Acts 1896, No. 98, prohibiting fishing for profit in two counties by citizens of other counties without license, and without limitation upon the fishing rights of residents of such two counties, is an unjust discrimination, and repugnant to Const. art. 1, sec. 5, providing that no person shall be denied the equal protection of the law. (*State v. Higgins* [S. Car.], 28 S. E. Rep. 15.)

**Construction of Will — Remainder Over to Lawful Issue of Beneficiary — Status of Adopted Child of Daughter of Testatrix.** — A testatrix, at the time of the execution of the will residing at Dresden, in the kingdom of Saxony, directed the executors to invest one-third part of the residuary estate and apply the net income thereof to the use of a daughter during her life, and it was further directed, upon said daughter's decease, "that the principal of such share be paid over or transferred by my executors to her" (said daughter's) "then living lawful issue, if any, and if she leaves her surviving no such issue, I direct that the same be then added in equal parts or proportions to the principal of the several shares of my residuary estate hereinafter directed to be held in trust for my ten grandchildren hereinafter named." At the time of the execution of the will the testatrix was residing at Dresden, and had resided there for many years; her said daughter was married to a citizen of Saxony; had had two children, both of whom had previously died, and said daughter never had any other children of her body, but, previously to the execution of the will, said daughter and her husband had duly adopted, under the laws of Saxony, as their child, a niece of the husband. *Held*, in construing the will as a whole, and guided by all the facts and circumstances properly to be considered in such construction, that it was not the intention of the testatrix that such adopted child of her daughter should be entitled to said daughter's share, upon the latter's death, but that the same should revert to and be added to the principal of the several shares of the residuary estate of the actual grandchildren of the testatrix. In construing a written code of a foreign State, where there is no light that can be thrown on such construction by adjudications of the courts of the sovereignty establishing the code, and no evidence that the question presented has ever been discussed or adjudicated upon in such sovereignty, the meaning to be given to the words used is to be determined by the courts, whose duty it is to pass upon the question. *Hartwell v.*

Tefft ([R. I.], 34 L. R. Ann. 500) distinguished, on the ground that such decision turned upon a statute giving to an adopted child "the status of a descendant and all the legal consequences and incidents thereof the same as though he were born in lawful wedlock," while the code of Saxony does not purport to give to an adopted child such a status. The court likewise refuses to be bound by other adjudications, in which the word "issue" has been held to include adopted children, as they also turn upon the phraseology of local statutes. *Held*, that the decision of the present case must turn upon the actual intention of the testatrix when she executed the will, and not upon the relationship existing between the adopted child and its parents. (N. Y. Life Ins. & Trust Co., as trustees, etc., v. Teresa Vile & Ors., N. Y. Sup. Ct. App. Div., 1st Dept. Full opinion in N. Y. Law Journal, Nov. 23, '97.)

Contract — Speculative Damages.—Profits upon the sale of town lots at prices beyond their present market value, and which depend for their realization upon the working up of a "boom," and upon the contingencies and uncertainties of the future, are speculative and conjectural in character, and cannot be allowed as damages for the breach of a contract. (Carbondale Inv. Co. v. Burdick [Kan.], 50 Pac. Rep. 442.)

Criminal Evidence — Murder — Confession. — Less credence is not to be given a confession because the one making it was at the time slightly intoxicated. (Leach v. State [Tenn.], 42 S. W. Rep. 195.)

### New Books and New Editions.

The regents have just published, as Bulletin 38, a compilation of all the laws, ordinances and by-laws pertaining to higher education in this State. It includes not only the University Law, but also the educational articles from the Constitution and the various statutes governing professional education and licenses to practice, and other allied matters. Its practical utility is greatly increased by many annotations and cross-references and by a very full index, so that every lawyer or school officer will find it indispensable when considering any of the large class of questions covered. It is being sent to every institution in the university free, but lawyers or others interested may obtain copies from the regents' office, post free, at the nominal price of 15 cents for the 108 pages.

The Smith Premier Typewriter Company, Syracuse, N. Y., have just issued a booklet which is one of the most attractive we have seen in many a day. It is entitled "Our Juvenile Class," and introduces thirty-six little maidens from the principal cities of the United States and Canada, wherein the branch offices of the company are

located. The dainty little misses are presented in all manner of poses, and every one is sweet enough to kiss. As an advertising scheme of a standard and admirable article it ought to prove very effective. In addition, the booklet is quite worthy of preservation as a work of art. We are going to keep ours, but the Smith Premier Company doubtless have a good supply.

The Canadian Annual Digest (1896) of Cases Reported in the Various Dominion Reports, and of the Canadian Cases Decided by the Judicial Committee of the Privy Council. By Charles H. Masters, Reporter of the Supreme Court of Canada, and Charles Morse, LL. B., Reporter of the Exchequer Court of Canada. Toronto: Canada Law Journal Company. 1897.

This, the first annual volume of the kind, is designed, as the authors state, "to reduce into some semblance of congruity the annual output of case-law, which forms so important a part of the body of Canadian jurisprudence, and has heretofore existed as *rudis indigestaque moles*. Of course, with the civil law prevailing in the Province of Quebec, and the common law constituting the basis of the respective systems obtaining in the other provinces, absolute and entire uniformity of doctrine cannot be looked for; but where there are no radical differences in the laws there can be no great dissonance between the judicial decisions of the several provinces, and, so far, there ought to be no insuperable difficulties in the way of a general co-ordination." With this object in view the authors, who are thoroughly well qualified, have produced a most valuable work for which there has long been a demand. Such examination as we have been able to give the volume indicates that the authors have spared no efforts to make the work exhaustive, reliable and free from errors. The volume consists of 371 pages, in handsome binding, and is certain to prove of very great value to practitioners both in the United States and Canada. It is the intention to have the digest issued early in the year in future.

### Books Received.

A Handbook on the Annexation of Hawaii, by Lorrin A. Thurston. The book gives a brief description of Hawaii, its people, government, laws, commerce, finance, educational system and resources, and contains a digest of the official opinions of American presidents, secretaries of state, ministers and military and naval officers concerning the annexation or control of Hawaii. The author favors the annexation of the island, and answers various objections thereto.

Proceedings of the Oregon State Bar Association, at the sixth and seventh annual meetings, held at Portland, Ore., on August 20 and 21, 1896, and August 19 and 20, 1897.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, DECEMBER 11, 1897.

### Current Topics.

Judge Case, of the Court of Common Pleas, Hartford, Connecticut, recently overruled the demurrer of the defendants in a suit which had been brought against a manufacturing company of that city, for alleged violation of the so-called "Weekly Payments Law." The defendant had raised the point that such a measure was "class legislation, pure and simple, and of the most flagrant kind," and further, that it impaired the obligation of the contract freely entered into by the employees of the company. Judge Case said that while it was true that the plaintiff had deliberately contracted to accept fortnightly payments, nevertheless, the legislature possessed the constitutional power to restrict the right of a corporation to make such an agreement. Individual employers in Connecticut are not required to make weekly payments, but the power which creates and sustains corporations — the legislature — is at liberty to impose reasonable conditions in the interest of the community, and it cannot be deemed guilty of exercising arbitrary discriminations when it subjects corporations to burdens not placed upon individual employers who enjoy no special privileges or immunities. Thus, instead of invoking the general police power of the State to justify weekly payment statutes, Judge Case puts it on higher grounds, viz.: That corporations are supposed to owe their life-giving franchises to the public needs subserved by them, and that the law treats them not as agencies for private gain, purely,

but as servants of the community. It will be interesting to see whether the highest court of the State upholds this view.

A commission is now, and has been for some time past, engaged in the revision and codification of the public statutes of Massachusetts. The commissioners consist of the Hon. Edward H. Bennett, dean of the Boston Law School; the Hon. Chas. U. Bell, of Lawrence, and the Hon. Wm. M. Butler, of New Bedford. The preliminary work has been done on about 100 chapters. It is hardly to be expected that so difficult a task can be completed in less than three or four years, which would carry the work up to the year 1900. This is about the length of time required by similar commissions, appointed, one in 1832, to prepare the Revised Statutes, and another in 1855, to prepare the General Statutes, although the commission appointed in 1880 reported the draft of what is now the Public Statutes, in a much shorter time. But the number of laws to be consolidated and arranged increases with each successive revision. No great change in the arrangement or detail of the Public Statutes is contemplated by the commissioners. It is proposed, however, to insert marginal references, not only to the corresponding provisions of the Public Statutes, but also to the original and all earlier legislation on each subject, so that the reader will have before him all references necessary to an historical study of the statutes. The examination of this legislation, as well as of all the judicial decisions affecting the statutes, has been assigned to the legal assistant and secretary of the board, Charles N. Harris, the editor of the recent supplement to the Public Statutes. It is also proposed in the report to the legislature, as an experiment, while retaining the division of the several subjects into chapters, to number the sections continuously throughout the book. This plan has been followed generally in other States, and it is thought to render citation of the statutes simpler, and to facilitate references given in the index. The report of the commissioners, as submitted to the legislature, will contain notes at the end of the several chapters show-

VOL. 56 — No. 24.

ing the changes that have been made and the reasons therefor, together with such recommendations as, in their opinion, will supply deficiencies in existing laws. The name of the new revision is not an unimportant feature. It must be distinctive, brief and capable of abbreviation. For this purpose the commission has under consideration the title of "Massachusetts Statutes." Whether a partial report will be submitted to the legislature has not yet been decided.

What is known as the "Striking Lathers' Case," the first to be passed upon by the highest legal tribunal in that State, has just been decided by the Supreme Court of California. It involves important legal principles, and is certain to be quoted as a precedent. The official syllabi, for a copy of which we are indebted to the San Francisco Law Journal, gives a succinct statement of the facts in the case, that of *People, etc., v. James Holmes, Wm. Starr, D. Dunn, Wm. Dowling, E. G. Woltz and W. McCoy*, from which it appears that one Mars, and his son, lathers by trade, were at work on the Shirley building, at the corner of Fourth and Welch streets, San Francisco. The defendants (striking lathers), pursuant to a pre-determined plan, came to the building where Mars and son were at work and endeavored to persuade them to quit work. They failed, whereupon they assailed Mars and son and forcibly and violently drove them from their work and from the building. The elder Mars had atheromatous veins, and the beating he received from the strikers caused a rupture and the formation of a blood clot on his brain, and, proximately, his death a few days afterwards. The defendants were convicted of "involuntary manslaughter, not a felony." Afterwards they moved for their discharge, and for a new trial, and the appeal was from the order denying both motions and from the judgment. Amongst other things the trial judge (Belcher) charged the jury that: "No person has any right, by violence or unlawful means, to prevent another from exercising a lawful trade or calling, or from doing any other lawful act; and if two or more persons conspire together to prevent another person,

by violence or unlawful means, from exercising a lawful trade or calling, or doing any other lawful act, and while engaged in carrying out such conspiracy the conspirators commit a felony, \* \* \* they are all liable for the acts of any one of their number done in pursuance of such conspiracy." The judge further charged that if there was sufficient evidence to satisfy the jury that the defendants were acting with a common purpose and a common design to commit a crime, and there was no proof of a previous combination or confederacy to commit the offense in question, nevertheless the conduct and action of the several parties and the parts they severally performed in the actual perpetration of the offense were sufficient to make the acts and declarations of each, from the commencement of the consummation of the offense, evidence against the others. The Supreme Court says the verdict clearly shows an intention to convict; that the words "not a felony," contained in the verdict should be rejected as surplusage, and the general verdict of "guilty of involuntary manslaughter" should stand as the verdict; and where an affidavit purporting to be signed by eight of the jurymen was read in explanation of the verdict, upon a motion for a new trial, the court properly refused to consider it and properly regarded it as an attempted impeachment of the verdict, which it is well settled cannot thus be done. It was further held that the defendants cannot, upon appeal, call in question the verity of their own bill of exceptions, and, if the fact was that the defendants were not all present at all stages of the proceedings, they should have made the fact clearly to appear, as error must affirmatively appear. When the evidence showed that the Lathers' Protective Union held a meeting on the evening before the alleged homicide and passed the following resolution: "Moved and carried that all members who will not work to-morrow meet at Sixth and Market to-morrow morning at eight o'clock, and appoint a committee to interview all non-union men. Charge made by Mr. Starr against Mr. Cahill, Trade Brothers and McCluskey, for violating the rules; referred to the executive committee"

— conceding that this formal resolution, on its face, neither in terms nor by necessary implication, conveyed and intention to commit an unlawful act nor to commit a lawful act by unlawful means, it was still competent to inquire into the subsequent conduct of the members of the union to ascertain whether or not there was a joint intention, not disclosed by the resolution formed at its passage or subsequently, to do an unlawful act or to do a lawful act by unlawful means; and how far the subsequent conduct of defendants went to establish a conspiracy and to what extent they were involved in it, whether that conspiracy had its origin at the meeting of the Lathers' Union, or later, or at all, whether the crime alleged was committed in pursuance of the conspiracy found to have been formed, or was the act of some of the persons present done "as a fresh and independent product of the mind of some of them, and outside of and foreign to the common design," were questions exclusively with the jury. The conspiracy element of the crime charged becomes important only as a means of establishing the commission of the crime charged; and it is in this view evidence was submitted to show a conspiracy, and the above instructions and following one were given defining it: "A conspiracy exists when two or more persons conspire to commit an unlawful act or to commit a lawful act by unlawful means." Where the court charged the jury: "1. Before you can find any of these defendants guilty of the crime charged you must be satisfied beyond all reasonable doubt that the deceased came to his death by some act of violence committed upon him by these defendants, or some of them;" "2. If you can account for the death of C. A. Mars upon any other hypothesis than that of the guilt of defendants, or any of them, you must do so, and acquit defendants;" and "3. If you are not satisfied beyond all reasonable doubt as to the cause of the death of C. A. Mars, you must acquit the defendants" — it was within the province of the jury under this instruction to adopt the hypothesis of spontaneous rupture, but they were not bound to do so; nor did this instruction, taken as a whole, say to them that

they might or must adopt *any possible* theory as to the cause of death, and it would not have been good law if it had. As to the admission of one of the alleged conspirators to be used against another, the court says the rule is well settled that after the conspiracy is terminated, and the crime has been committed, the admissions of co-conspirators are not admissible against others, but the facts and circumstances here raised a question for the jury to decide as to *when* the conspiracy, if any there was, terminated, and whether the acts of violence proven were not a part of the design to force the deceased to quit work, where some of the defendants had the day before the alleged homicide made the request; on the next morning some of defendants again requested deceased to quit work, but he refused; and, when they came a third time, accompanied by a large force of men, the assault was made as soon as deceased came down off the scaffolding within reach. The contention that the court incorrectly instructed the jury in an instruction wherein it stated the law as laid down in *People v. Kelly*, 55 N. Y. 565, and after stating the New York rule on the subject it failed to state whether it was the law in this State, cannot be maintained, as the jury must have accepted the statement as the law here, and if they did not, no injury could have arisen of which defendants could complain; it would only be in the event that it was bad law, and was followed, that harm could have followed. Where the court instructed the jury that "the law presumes that the natural and even *possible* consequences were intended by the author of the act. If of sound mind, the natural and proximate consequences. And if the act intended was unlawful, even the *possible* consequences. So if the act produces harm not intended, it holds him responsible for all the consequences;" and this was preceded by a correct statement of the rule of law in such case as this, taking the whole instruction together, it cannot be said that it enlarges the correct doctrine by making a person liable for all possible consequences. The contention that the court erred in instructing the jury that involuntary manslaughter is killing "in the commission of a



lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection," cannot be maintained.

According to the London Law Times, one of the causes which has already been argued and is now awaiting judgment in the House of Lords is that of *Allen v. Flood*, wherein the question is whether a threat on the part of the delegate of a trades union to order workmen to come out on strike, provided two non-union men were still employed on the works, and which resulted in the master's dismissing the men, was such a course of conduct as gave the two discharged workmen a right of action for damages against the delegates of the union. "The question," says the Times, "was argued before their lordships in the session of 1895 and was entered in the list of those cases waiting for judgment at the beginning of last session. The appeal had been heard before the lord chancellor, Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey. The judgment of the court, however, was not delivered, and the cause of the delay was said to have arisen from the fact that the lord chancellor and Lord Herschell differed. Of the five other noble and learned judges, two were said to agree with the conclusion arrived at by Lord Halsbury, and two with that put forward by Lord Herschell, and that the 'odd man out,' so to speak, whose decision in fact would turn the scale, was Lord Shand. It is expected that their lordships will deliver their reconsidered decision shortly, and their judgment is awaited with great interest, as it must affect all trade unions to no small extent throughout the country."

### Notes of Cases.

A firm of wholesale druggists in the province of Quebec received an order for bismuth from an apothecary, but by mistake sent him antimony, which he in turn sold as bismuth, believing it to be that substance. A dose of antimony, in a prescription calling for bismuth, was consequently administered to a sick woman, with injurious effects; and a suit for damages was brought against the firm from which the apothecary obtained the antimony in the first instance. The trial court de-

cided that the firm was responsible for the injury. The Superior Court of Quebec held that there was no such legal relation between the original vendors of the drug and the injured person as to render the defendants liable, but that the real responsibility lay with the apothecary. The Provincial Court of Queen's Bench took the contrary view, saying that, although there was no contract, there was a liability. On November 12 the defendants applied to the judicial committee of the privy council in London for leave to appeal to that tribunal (which is the court of last resort for colonial cases), and special leave was granted.

The Supreme Court of Illinois held, in the case of *Niblack v. The Park National Bank*, reported in the Chicago Legal News, that if a check be presented for payment to a bank during business hours and the doors be closed, this is due diligence on the part of the holder of a check; and that it may be protested for nonpayment; that had the maker himself presented the check the banker would have had the right to refuse payment, and could have appropriated his deposit to the payment of the indebtedness; that where a bank holds a demand note or a note past due, it has the right to charge such obligations up to the maker's deposit account, and if it does so before a check drawn by the depositors is presented for payment, it will be entitled to hold the deposit against any check afterward presented. The court said that the appellant, Niblack, a third party, presented the check, which amounted to the transfer of so much of the fund to him as the check called for, and no right of set-off existed in favor of the bank thereafter; that the party presenting the check received it for value; that it had been drawn against a fund sufficient to pay it, belonging to drawer; that, taken in the usual course of business, it was clothed with all the rights which the customs of business gave it, for commercial transactions, and that when presented the fund still stood to the credit of the maker, and that it had no legal right then to refuse payment. The court further held that the fact that the comptroller took possession of the bank did not make any difference in the relation of the parties, the comptroller and the receiver afterward appointed by him having acted for the bank; and that since a banker's lien does not extend to money and deposits when checks are presented by third persons, who are holders in the regular course of business, neither the comptroller nor the receiver had any right to make a transfer before the bank itself.

The Supreme Court of Michigan has just rendered its opinion upon the vexed question as to the lengths to which the State may go in fixing railroad rates. The court holds that "the fixing of rates is a legislative or administrative act, not a

judicial one, and \* \* \* the court cannot place itself in the shoes of the commission, and try *de novo* the question what are reasonable rates; and on appeal \* \* \* the court can review the acts of the commission only so far as to determine whether the rates fixed by it are unreasonable and confiscatory, and to what extent, in much the same manner as an appellate court determines whether or not the verdict of a jury is excessive and to what extent." The court further held "that in finding the amount of capital on which a corporation had a right to earn a reasonable income, what it would cost to reproduce the property is the sole measure, not the securities issued upon it." The rates fixed by the commission in the case under review were such as would produce  $2\frac{1}{2}$  per cent. net income on the cost of reproducing the terminals, and five per cent. net income on the cost of reproducing the rest of the road, and the court held that, under the circumstances, that was a fairly liberal income, and the rates fixed by the commission were not disturbed. (*Steenerson v. The Great Northern R. R. Co.*, 72 N. W. R. 713.)

In *Rush v. St. Paul City R'y Co.*, decided by the Supreme Court of Minnesota, in November, 1897 (72 N. W. R. 733), it was held that where the gist of an action on trial is the condition of the *locus in quo*, or where a view of it will enable the jurors to better determine the credibility of the witnesses, or any other disputed fact, if, in such a case, jurors, without the permission of the court or knowledge of the parties, examine the locality for the express purpose of acquiring such information, their verdict will be set aside, unless it is clear that such misconduct could not have affected their verdict. The court expressed the opinion that this rule must be given a reasonable operation, and not applied where there is only a possibility that the result was influenced by the alleged misconduct. It was nevertheless held, applying the rule, that a new trial must be granted because of the action of two of the jurors in making independent and unauthorized examination of the *locus in quo*.

The court said in part: "It cannot be tolerated that jurors should go on a private search for evidence in such cases, and make an inspection of their own accord, because the parties have no opportunity of meeting, explaining or rebutting evidence so obtained. This rule must be given a reasonable operation, and not applied where there is only a possibility that the result was influenced by the alleged misconduct; but it is to be applied where the court cannot determine with any reasonable certainty whether the result was affected or not. (*Koehler v. Cleary*, 23 Minn. 325; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Woodbury v. City of Anoka*, 52 Minn. 329, 54 N. W. 187.) Now, in this case, the view of the jurors was not casual and incidental, but deliberately under-

taken with the admitted purpose of obtaining information and evidence bearing directly upon material questions in the case. It was a private — that is, personal — search for evidence not given in court. Their view of the locality was unauthorized, and without the safeguards which the statute (Gen. St. 1894, sec. 5372) has provided in order to secure a perfectly fair view. But it is urged by defendant that it is perfectly clear from the record that the result was not affected by the misconduct of the jurors, because the map of the place where the accident occurred, introduced by the defendant and admitted to be correct, showed everything which an actual view of the place could disclose. The record does not sustain this contention. The map was not introduced in evidence until near the close of the evidence, and after both jurors had examined the place of the accident. They obtained for themselves the evidence they desired upon the questions which seemed to have troubled them, and necessarily must have formed some opinion from such evidence as to how the questions should be decided, before the map was offered in evidence. Again, the map does not purport to give the obstructions, if any there were, or the location or size of the window from which the witness Smith saw the accident, as claimed by her, or the houses on any other street in the vicinity other than University avenue. The civil engineer who made the map testified, in substance, only that it was a correct diagram of the streets at Marion and University avenue, and that the distances marked thereon were ascertained by actual measurements, and were correct. The juror Haberman admits that he went to the place for the purpose of determining by his own personal observations what were the opportunities of the witness for observing and seeing what she testified to in court as to the accident, and that he made such observations. That is, he sought and obtained by himself evidence to enable him to determine the credibility of the witness, and weight to be given to her testimony for the defendant as to the distance the car was from the boy at the precise time he fell upon the track. The same suggestions apply to the juror Bede. He sought and obtained for himself evidence that he might the better weigh the evidence given by the witnesses, and more justly determine from the density of population in the vicinity of the accident (not on University avenue alone) what would be a reasonable rate of speed for the street cars to maintain at that point. The fact that the defendant, after the jurors had obtained this evidence for themselves, gave in evidence the map, and the further fact that the jurors state in their rebutting affidavits that their examination of the place of the accident had no influence upon them in arriving at a verdict, are not sufficient to enable any court to determine with any reasonable certainty whether the result was affected or not by their action. That

they honestly believed that it was not cannot be doubted; but their minds may have been unconsciously affected by what they saw. There can be no question that what was done by the two jurors may have had an influence on their minds unfavorable to the plaintiff. Their avowed purpose in making the examination was to learn something proper for them to consider in coming to a verdict, and, having obtained the information sought, it would be strange, indeed, if it did not have any influence upon their minds in reaching a verdict.

#### REMEDIES GOVERNING THE RIGHT TO FOLLOW PROPERTY WRONGFULLY TAKEN OR CONVERTED AS AGAINST THE WRONGDOER'S ESTATE, CONSIDERED.

THE non-transferability to the representatives of a deceased person of remedial rights that arise from the violation of a right "intimately connected with his individuality" has been voiced by the common-law maxim, "*Actio personalis moritur cum persona*." This maxim has given rise to a fair quantity of criticism, in many cases deservedly pungent. A rule similar to this one prevailed in the Roman law, and it has been even conjectured that the word "*personalis*" is probably mistaken for "*pænalis*." If this be true, the maxim would certainly, while possessing higher scientific value, conduce to an augmentation of perspicuity in the construction and application of the rule. The reason that strictly personal actions should have been regarded as extinguished by our ancestors is probably due, as some authorities maintain, to the element of individual vindictiveness brought into court by those pursuing remedies arising strictly personally. Accordingly, it was deemed unwise to perpetuate for and against the personal representatives of the deceased an heritage of ignoble private revenge and hatred. Mr. Tyler has elegantly expressed his opinion regarding the question thus: "But with regard to injuries to the person, or to reputation, as assaults, slanders, malicious prosecutions and other such wrongs, the common law, in its noble charity, covered the wrongs with the oblivion of the grave, and would not suffer actions for them to be brought by or against an executor or administrator." The inability of our ancestors to separate the notions of wrong in a punitive sense, and restitution, largely contributed to bring about the rigid enforcement of such a harsh rule. Still, while these primitive conceptions of justice have long since been modified by a series of statutes, a sound principle of ethics and law forbids the total abolition of the doctrines to which it has given birth. It may be instructive to examine a little more closely into these doctrines as embodied in various systems of substantive law and procedure.

In the Roman law actions by and against per-

sonal representatives existed more liberally than at common law. The principle of compensation had also been evolved into a higher state of development. Poste (Addition of Gains, page 588) says: "The general rule relating to transmission" (of actions) "is, that all actions are transmissible both actively, that is, to the heirs of the plaintiff, and passively, that is, to the heirs of the defendant. The exceptions are that, (1) as to active transmission, vindictive actions (of which the type is *actio iniuriarum*), i. e., actions brought to avenge wrong to the feelings rather than to repair wrong to the property, are not transmitted to the heirs of the plaintiff; and that, (2) as to passive transmission, penal actions, whether bilaterally or unilaterally penal (the latter sometimes called *Rei persecutoria ex delicto*), are only transmitted against the heirs of the defendant so far as the inheritance has been enriched by his wrong." Justinian (Book 4, 12) is to the same effect. Thus we perceive that many centuries before Bracton and Fleta one system of law had already worked out the principle of restitution in a partial form. Yet while permitting actions to be brought by heirs and executors in the interest of the inheritance, that is, actively, they experienced an insurmountable difficulty in suffering them to be brought against the personal representatives to the diminution of the inheritance, except where such estate had been unjustly enriched. This evidently points to the fact that the doctrine of restitution was recognized by the old jurists to be closely—frequently inseparably—connected with the idea of wrong, or the doctrine of technical tort. While affording practically free scope to remedies in the interest of heirs and personal representatives against a living defendant, they hedged about with exceptions the right of a plaintiff to recover against the estate of a deceased defendant damages for merely personal wrongs. They enunciated a theory of unjust enrichment, as a result of the Prætorian jurisdiction, but undoubtedly, like our common-law judges, must have encountered considerable perplexity in defining and limiting the equitable *spectre* which they had invoked.

The early decisions of English judges followed rigorously the barbarous rule that the Roman law materially modified. (*Osborn v. Gillett* [1873], L. R. 8 Ex. 88.) It is not necessary to discuss a long list of cases holding this doctrine. The well-known statute of 4 Ed. 3, c. 7 (1330), was the first exception permitting executors to sue in cases of trespass. This statute was very liberally construed, and was extended to all actions for injury to personal property. The statute of 3 and 4 Will. 4, c. 42 (1833), "actionable injuries to the real estate of any person committed within six calendar months before his death, may be sued upon by his personal representatives, for the benefit of his personal estate, within one year after his death. And a man's estate can be made liable, through his personal representatives, for wrongs done by him

within six calendar months before his death 'to another in respect of his property, *real or personal*.' " (Pollock, Torts, \*57.) Lord Campbell's act (9 & 10 Vict., c. 93 [1846]), entitled "An act for compensating the families of persons killed by accident," conferred a remedy on the personal representatives of a person whose death had been caused by a tortious act, or by such negligence or default that if death had not followed, that person might have maintained an action. This act being inadequate to the accomplishment of the end sought, the amending act of 1864 (27 & 28 Vict., c. 95), enlarged upon the former enactment as to afford any of the persons in whose interest the right of action is given the privilege of suing in their own names in case of the failure of personal representatives within six months to seek a remedy. But even these statutes fail to afford complete justice in many instances, even although a very liberal interpretation was adopted. The common-law maxim remains still in active operation, and it is not for us to directly decide whether it should be abrogated. In most States of the Union it has, by a succession of statutory changes, been rendered substantially just.

It is permissible frequently at common law to waive the tort, and sue upon the theory of unjust enrichment. But before proceeding to this properly equitable remedy let us discuss that class of cases from the standpoint of tort, in which, regardless of the maxim, *Actio personalis*, a right to recover against the wrongdoer's estate exists. Lord Mansfield, in *Hambly the Trott*, 1 Cowp. 375, thus states the rule: "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor." The maxim would apply in this class of cases were it not for the fact that the remedy is *not one sounding in damages*. It is brought for the specific recovery of goods, or the proceeds or the value of the property which, "in the lifetime of the wrongdoer, could have been recovered from him." It expressly excludes a recovery for the acquisition of damages, *because of a wrong*, although indirectly the wrongdoer's estate may have been incidentally benefited, and this seems sound enough, since there are many cases in which, in one sense of the word, a tort-feasor's property may be casually benefited as a result of the tort, and yet where it would be inimical to public policy to visit the wrong of the deceased upon innocent parties. And in principle and justice, although the damages that arise may be liquidated and specific in a case where casual and pecuniary enrichment has ensued, yet it is no less true that the tortious element is the predominating and sole ground of recovery in such a case as in an action for a common assault or malicious waste. While it is true that no unjust enrichment has *positively* taken place, redounding to the profit of the wrongdoer in the latter instances, still no one can deny that

the principle of equitable compensation should be invoked here as much as in the former cases, especially where the earning capacity of the sufferer previous to his demise was essentially impaired. But the common law has *consistently*, at least, denied the remedy in tort in each class of cases.

This leads us to the consideration of the case of *Phillips v. Homfray* (24 Ch. Div. 439, 454). That case may be summarized as follows: A converts and carries away coal from a mine under B's land, and B sues for the value of the coal, and asks for damages. Pending the inquiries A dies. B can recover for the value of the coal, but not *damages for the use of the passages through which the coal was conveyed, nor for injury resulting to the mines or the surface of the ground* caused by A's unlawful labor. This illustrates in a luminous manner the design of the common-law rule to prevent the estate from suffering because of the owner's individual wrong, except for the purpose of insuring restitution, since if it were extended there would be no means of fixing a limit for the expansion of such a dangerous doctrine. It would only be a question of time when torts of a purely criminal nature would be made to cast their responsibility upon personal representatives. The reasons for strictly defining this doctrine are to-day so practical as, in the absence of statutory enactment, to prevent any court of last resort from granting a recovery in a similar case.

And now it is proper to contrast this doctrine with the theory of compensation, where, through an election of remedies, the tort is waived and a recovery established in assumpsit upon a *quantum meruit*. To maintain an action against an executor or administrator by calling into operation the doctrine of unjust enrichment, it is not only necessary that there should be indirectly a benefit to the estate of the defendant, but the plaintiff must *not*, by a mere substitution of one form of action for another, work a recovery. Confessedly, while it may seem at first anomalous that even in tort, which generally sounds in damages, no allowance for damages is made, and that but compensation is given upon a really equitable principle, yet this just application and limitation of the tort theory will forever preclude a recovery in assumpsit by a specious alteration of remedy. If the intention of the court to prevent recovery upon any but equitable grounds in tort is a sound precaution, it is certainly even truer and of greater force in precluding virtually damages in the action of equitable assumpsit, in a case like *Phillips v. Homfray*. We admit that the remedies of tort and assumpsit are not concurrent, but we furthermore contend that *Phillips v. Homfray* is not a case for the doctrine of election to apply, since if the *plaintiff cannot recover in tort* it would be absurd to hold that a waiver takes place. Therefore it is submitted that the elegant and scholarly work of Mr. Keener, at page 165 of his treatise on the law of quasi-contract, is founded

upon an inadequate conception of the doctrine of waiver of tort. He writes: "From an equitable point of view it would seem that wrongful user and not wrongful deprivation of another's property, resulting in the enrichment of the tortfeasor, should be the principle underlying the doctrine of waiver of tort," and this, according to his views, applies whether the enrichment is *positive* or *negative*. He entirely overlooks the fact that the recovery in tort in *Phillips v. Homfray* excludes altogether that aspect of the case which seeks damages because of a "wrongful user" — viz., for the tort itself.

The opinion of Lord Justice Bowen, at pages 455 and 456 of this case (which, by the way, Mr. Keener overlooks), confirms our view. "Two illustrations can be given the above distinction with regard to the *liability of executors*. The produce, proceeds or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors and retaken from them. If he has wrongly cut timber, *the timber or its proceeds or value can be followed*. But no action for waste — *permissive or voluntary* — as such, lies against the executors of a tenant for life. By non-repairing a hoedse, or by ploughing up ancient meadow the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognize in this indirect benefit which he may have received any ground for proceedings against his creditors. A second illustration may be given of the distinction we have referred to. The rent or the produce or profits of land which have wrongfully been received by a person other than the rightful owner (as a rule, and subject to certain exceptions, that we need not now discuss), may be pursued by the rightful owner, and recovered from the wrongdoer, or, if he be dead, from his estate. But there is a sense in which the term "profits" is used with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as where an action for mesne profits is maintained to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. *An action for mesne profits in this narrower sense will not lie at common law.* \* \* \* *As long as the maxim, Actio personalis moritur cum persona, is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable.*" The illustration cited by the learned judge must put at rest the contention that the doctrine of unjust enrichment applies here, and even statutes enlarging this principle would work a radical and unwarrantable subversion of the common law. If it is a sound rule that the law should, in an action of tort, exclude the idea of damages for equitable reasons, to permit a recovery in equity would not only be ridiculously inconsistent, but destructive verily of equity itself. It is altogether fallacious to say that, because, in a sense,

one "negatively" enriches the estate by saving expenditures (but *through the direct commission of a criminal tort*), equity should decree a recovery, in effect penally and in damages. Assuredly the maxim, *Acquitas sequitur legem*, is here pointedly applicable.

ALEXANDER HIRSCHBERG.

NEW YORK CITY, Dec. 1, 1897.

#### MAGAZINES FOR DECEMBER.

The Christmas "Harper's" opens with a narrative poem by Gen. Lew Wallace, entitled "The Wooing of Malkatoon." The incidents take place in the far east, the characters are mainly of the Mohammedan faith, and the story is rich in Oriental coloring. The most conspicuous phenomenon in the modern magazine world is perhaps the tendency to adopt the best aims and methods of the daily press. The magazine writer of to-day is, so to speak, an edition de luxe of the newspaper reporter, and the most prominent of these is Mr. Richard Harding Davis. Mr. Davis' article on "The Queen's Jubilee" is an excellent example of reportorial writing carried to its highest possible pitch. In spite of all that has been written on the subject, what Mr. Davis has found to say is so intimate, spirited and dramatic that the whole scene and circumstance of the greatest pageant of modern times is flashed upon the mind with a renewed freshness. It has long been the custom to denounce the influence which the newspapers are wielding upon the literature of the country; yet the vigor and dash of the best of our magazine writers was not learned by the study of the classics at college, but at the reporter's desk. An article on "George William Curtis at Concord," by Mr. George Willis Cooke, is made up mainly of letters which, though written at the age of 20, are full of the wonderful charm which afterward pervaded the "Easy Chair." A striking feature is a Lin McLean story, by Owen Wister, entitled "Destiny at Drybone," in which the various incidents and adventures which have gone to make up the life of Lin McLean are brought to a dramatic close.

The Christmas "Century" reflects much of the holiday spirit. The opening article is "Merry Christmas in the Tenements," by Jacob A. Riis. Mr. Riis shows that even in the most poverty-stricken parts of the city gaiety and good-feeling are to be found at the Christmas season. The article has many characteristic illustrations by Jay Hambidge. The late Gen. Francis A. Walker is represented by a paper on "The Causes of Poverty." W. Lewis Fraser writes a critical sketch of "A Religious Painter," Fritz von Uhde, and a number of famous paintings by this artist are reproduced. In the series of wood engravings by T. Cole of "English Masterpieces," Gainsborough is the artist represented in this number, with critical comment by Prof. John C. Van Dyke. A richly illustrated paper on "Tennyson and His Friends

at Freshwater" is written by V. C. Scott-O'Connor, and contains many new portraits of the Tennyson family, published with the consent of the present Lord Tennyson. Miss Eliza Ruhamah Scidmore tells of "The Wonderful Morning-Glories of Japan," which are taking the place of the chrysanthemum in the affections of the Japanese people. Accompanying the article are illustrations of many striking varieties of the flower. "Edwin Booth in London" is a paper by E. H. House, in the course of which is given a description of a notable visit paid by the actor to Charles Reade. There are six short stories in the number.

The illuminated cover of "Scribner's" is an invitation to an appetizing Christmas feast. Our own Henry M. Carter furnishes the decorations for an important poem by Rudyard Kipling, which was written for his friend, W. Hallett-Phillips, of Washington, a few days before the drowning accident which terminated his life. The poem is called "The Feet of the Young Men," and is a stirring song of the hunting fever. James Whitcomb Riley recently came across a new Stevenson portrait in the possession of one of the latter's kin in Indiana. He has written a sonnet, which, with the picture, showing Stevenson as he was in 1879, is a notable feature. More than a year ago A. B. Wenzell painted eight pastels to accompany a poem, "The Poring of Vivette," by J. Russell Taylor. These were sent to Paris, and the great wood engraver, Florian, has translated them into color by means of three wood-engraved blocks for each picture. The result appears in this number. Walter A. Wyckoff, the college man who became a day laborer, concludes the first part of "The Workers" with a description of life in a logging camp in the mountains of Pennsylvania. During the year 1898 there will appear in "Scribner's" Mr. Wyckoff's narrative of his experiences in the congested labor market of Chicago. He was there in the World's Fair year. The president of the Royal Academy, Sir Edward J. Poynter is the subject of an elaborately illustrated article by Cosmo Monkhouse. The artist has selected for reproduction in this article a number of his unpublished sketches. There are short stories by Robert Herrick, Joel Chandler Harris, Clara E. Laughlin, Henry Van Dyck, Sarah Barnwell Elliott and William Maquadier Browne. Maxwell Parrish, who drew the cover for this number, is a young Philadelphia artist, whose illustrations in the Fiction Number of "Scribner's" last August won him immediate recognition for originality and cleverness.

The "Review of Reviews" has several interesting features. Ernest Knauff contributes an elaborate study of "John Gilbert and Illustration in the Victorian Era;" Dr. Clifton H. Levy tells "How the Bible Came Down to Us," with a number of reproductions from ancient Biblical manu-

scripts and printed texts; Lady Henry Somerset pays a tribute to the late Duchess of Teck; an English officer in the Indian service writes about the Ameer of Afghanistan; E. V. Smalley discusses Canadian reciprocity, and Mr. Alex. D. Anderson summarizes the progress of the American republics. There is also a twenty-three-page illustrated department devoted to the season's new books, with an introductory chapter by Albert Shaw on "Some American Novels and Novelists."

#### CARL SCHURZ'S ESTIMATE OF DANIEL WEBSTER.

IN the November issue of Harper's Magazine Carl Schurz gives a notable estimate of the life, character and motives of that most complex of the American statesmen of the past generation — Daniel Webster. In the course of the article Mr. Schurz says: "In the house of representatives he attracted the attention of the world abroad by a stinging philippic against the 'Holy Alliance,' in a eulogy on the Greek revolution, and by a sober exposition of the Monroe doctrine in a speech on the famous Panama mission. But his most remarkable achievement was an argument against Henry Clay's 'American system,' tariff protection as a policy — the very policy which was destined to become the corner-stone of the Whig platform. Webster's free-trade speech — for so it may be called — summed up and amplified the views he had already expressed on previous occasions, in a presentation of fundamental principles so broad and clear, with a display of knowledge so rich and accurate, and an analysis of facts and theories so keen and thorough, that it stands unsurpassed in our political literature, and may still serve as a text-book to students of economic science. But Clay's tariff was adopted nevertheless, and four years later Webster abandoned many of his own conclusions, on the ground that in the meantime New England, accepting protection as the established policy of the country, had invested much capital in manufacturing enterprises, the success of which depended upon the maintenance of the protective policy, and should therefore not be left in the lurch. For this reason he became a protectionist. This plea appeared again and again in his high-tariff speeches which followed: but he never attempted to deny or shake the broad principles so strongly set forth in his great argument of 1824.

#### WEBSTER'S REPLY TO HAYNE.

Webster reached the highest point of his power and fame when, in 1830, he gave voice, as no one else could, to the national consciousness of the American people. Before the war of 1812 the Union had been looked upon by many thoughtful and patriotic Americans as an experiment — a promising one, indeed, but of uncertain issue.

Whether it would be able to endure the strain of divergent local interests, feelings and aspirations, and whether its component parts would continue in the desire permanently to remain together in one political structure, were still matters of doubt and speculation. The results of the war of 1812 did much to inspire the American heart with a glow of pride in the great common country, with confident anticipations of its high destinies, and with an instinctive feeling that the greatness of the country and the splendors of its destinies depended altogether upon the permanency of the Union. The original theory that the Constitution of the United States was a mere compact of partnership between independent and sovereign commonwealths, to be dissolved at will, whatever historical foundation it may have had, yielded to an overruling sentiment of a common nationality.

"This sentiment was affronted by the nullification movement in South Carolina, which, under the guise of resistance to the high tariff of 1828, sought to erect a bulwark for slavery through the enforcement of the doctrine that a State by its sovereign action could overrule a Federal law, and might, as a last resort, legally withdraw from the 'Federal compact.' Against this assumption Webster rose up in his might like Samson going forth against the Philistines. In his famous 'Reply to Hayne' he struck down the doctrine of the legality of State resistance and of secession with blows so crushing, and maintained the supremacy of the Federal authority in its sphere and the indissolubility of the Union with an eloquence so grand and triumphant, that as his words went over the land the national heart bounded with joy, and broke out in enthusiastic acclamations. At that moment Webster stood before the world as the first of living Americans. Nor was this the mere sensation of a day. His 'Liberty and Union, one and inseparable, now and forever!' remained the watchword of American patriotism, and still reverberated thirty years later in the thunders of the Civil War. That glorious epoch continues to hold the first place among the monuments of American oratory.

#### WEBSTER AND THE PRESIDENTIAL FEVER.

"Unhappily for himself, Webster was not satisfied with the theatre of action on which his abilities fitted him for the greatest service, and on which he achieved his highest renown. At a comparatively early period of his career he ardently wished to be sent as minister to England, and he bore a grudge to John Quincy Adams for his failure to gratify that desire. Ever since his 'Reply to Hayne' had made his name a household word in the country an ungovernable longing possessed him to be president of the United States. The morbid craving commonly called 'the presidential fever' developed in him, as it became chronic, its most distressing forms, dis-

ordering his ambition, unsettling his judgment, and warping his statesmanship. His imagination always saw the coveted prize within his grasp, which in reality it never was. He lacked the sort of popularity which, since the administration of John Quincy Adams, seemed to be required for a presidential candidacy. He traveled over the land, south and north and east and west, to manufacture it for himself, but in vain. The people looked at him with awe and listened to him with rapture and wonder, but as to the presidency the fancy and favor of the politicians, as well as of the masses, obstinately ran to other men. So it was again and again. Clay, too, was unfortunate as a presidential candidate. But he could have at least the nomination of his party so long as there appeared to be any hope for his election. Webster was denied even that. The vote for him in the party conventions was always distressingly small, usually confined to New England, or only a part of it. Yet he never ceased to hope against hope, and thus to invite more and more galling disappointments. To Henry Clay he could yield without humiliation; but when he saw his party prefer to himself, not once, but twice and three times, men of only military fame, without any political significance whatever, his mortification was so keen that, in the bitterness of his soul, he twice openly protested against the result. Worse than all this, he had to meet the fate—a fate not uncommon with chronic presidential candidates—to see the most important and most questionable act of his last years attributed to his inordinate craving for the elusive prize.

#### THE CAUSE OF WEBSTER'S FAILURE.

"The cause of this steady succession of failures may have been partly that the people found him too unlike themselves—too unfamiliar to the popular heart—and partly that the party managers shrunk from nominating him because they saw in him not only a giant, but a very vulnerable giant, who would not 'wear well' as a candidate. They had, indeed, reason to fear the discussions to which, in an excited canvass, his private character would be subjected. Of his moral failings those relating to money were the most notorious and the most offensive to the moral sense of the plain people. In the course of his public life he became accustomed not only to the adulation but also to the material generosity of his followers. Great as his professional income was, his prodigality went far beyond his means, and the recklessness with which he borrowed and forgot to return betrayed an utter insensibility to pecuniary obligation. With the coolest nonchalance he spent the money of his friends and left to them his debts for payment. This habit increased as he grew older, and severely tested the endurance of his admirers. So grave a departure from the principles of common honesty could not fail to cast a dark shadow upon

his character, and it is not strange that the cloud of distrust should have spread from his private to his public morals. The charge was made that he stood in the senate advocating high tariffs as the paid attorney of the manufacturers of New England. It was met by the answer that so great a man would not sell himself. This should have been enough. Nevertheless, his defenders were grievously embarrassed when the fact was pointed out that it was, after all, in great part the money of the rich manufacturers and bankers that stocked his farm, furnished his house, supplied his table, and paid his bills."

### READ THE STATUTES.

IF I were to be asked by a young man proposing to study law, with what work he should begin, my answer would be the above. As the Bible is to the theological student, so should the statutes be to the law student. I realize fully the indignant protests which will be heard against a proposition conflicting with all our preconceived notions regarding the study of the law. Perhaps no less than nine-tenths of the lawyers advise their students to begin with Blackstone, and the other tenth with Kent. Such is the force of habit that they find it difficult to advise a method of study so much at variance with their own apprenticeship and the expectations of the world. The novice in the law is constantly asked how he is getting along with Blackstone, and of course he hates to confess that he has not read that celebrated author now canonized as the patron saint of the profession; hence he expects, when he starts to reading law, that this famous work will first employ his mind. For all other reasons the time-honored custom of beginning the study of law with Blackstone's Commentaries has continued till it has outlived its usefulness. To say that this work is the most thorough classification of the law and the most elegantly written of any text-book is to say very little in its favor, when it is admitted that a vast amount of it is obsolete. No person who reads only the text-books, such as Blackstone, Kent, Chitty and Greenleaf, can have very vivid ideas of the law which they will be called upon to practice. With the divine right of kings, the theory that the king can do no wrong, primogeniture, the base of English land tenure, the doctrine that women are inferior to men so far as regards the right of property, personal liberty or personal security, we have nothing to do at the present time. As well adopt the theory of certain churchmen that the Bible is not reliable, and expect the Bible student to gain comfort and instruction from its perusal as to expect the law student to take as his guide through the mazes of the law a text-book which all lawyers agree contains vast quantities of law repealed, amended and obsolete.

What would become of our common school system if pupils were obliged to use text-books which their teachers knew were not to be depended upon; where the first book on geography placed in their hands would be one published in the middle of the last century, and a dictionary of the same period to consult as to the proper use of words? If is only in implicit confidence in the word of the text-book that the student can hope to make any real progress in his search after truth. The laws of England in the time of Blackstone are as much different from the laws of Illinois to-day as the astronomy of Galileo is from the astronomy of modern times.

It is urged that to know the law it is necessary to study its origin. In a certain sense this is true, where the meaning is dependent upon some long-established custom or such law had in view some certain event of history. This sometimes occurs, but it is far better to use the ancient law books merely as reference books than to reverse the process, and incumber the mind with a thousand useless details of forgotten lore, in order that two or three of them may at some future time assist in the understanding of some obscurely worded modern law. The whole system is utterly opposed to rational methods of study in any profession, trade, or calling. What teacher in astronomy would start his pupils in their investigations by requiring them to master the astronomical works extant in Galileo's time, or what doctor would require his students to study Galen, Hippocrates or Æsculapius, or what rhetorician would insist upon his students relying upon Johnson's dictionary to acquire the meaning of words? As well might the primary teacher begin his instruction by teaching the child to read Wickliffe's Bible, because the language there used is the foundation of the English language of to-day, or teach him how to write by having him learn the chemical constituents of the ink he uses. It is said that lawyers are by instinct or training the most conservative of business men. If so, it is easily understood how a system of instruction so absurd should retain its hold upon our profession. That a study of the ancient law writers may be profitable to one who knows what is the law to-day I am not prepared to deny.

But to begin the study of law by studying its origin is as devoid of common sense as for a farmer to learn his business by deep researches into the ancient methods of farming, a thorough investigation into the different implements employed, the evolution of the mowing machine, a critical analysis of the history of the steam power that propels his threshers: an apprenticeship in a machine shop to learn how bolts are constructed or ploughshares wrested from the forces of nature. Every one knows an ignorance of these matters does not interfere with good farming no more



than an ignorance of Saxon, German, Latin and Greek interferes with the correct use of the English language, although from these sources mainly has our vernacular been developed. Except in the study of law the futility of minutely inquiring into the origin of present means is universally recognized. That task, properly belonging to antiquarians, has rightly no place in the methods of study to be pursued by the law student. Even theology recognizes more practical plans for the instruction of its pupils. Instead of denying to them a perusal of the Bible, it makes this the base of all their researches, and all branches of learning are made subservient to the grand aim of enabling its students to understand the Scriptures. Hence Hebrew and Greek are studied after the Bible has been perused. Dubious expressions are made clear by a subsequent acquaintance with the original tongues, ancient history and customs. As in the Bible there is much that needs no explanation, so in the statutes there is much that a layman can understand, and the means of elucidating technical phrases are so abundant in this day of encyclopedias and law dictionaries that the running man may read. The statutes are a never-ending source of information to the student or the practical lawyer. The statute-book contains the United States Constitution, the State Constitution and the State laws. It is the *sine quâ non* of every lawyer's library; it tells what the law actually is to-day, and if we fail to interpret it to our satisfaction we can resort then to the text-books or to the reports. This is what the lawyer has to do, and thus reverses the system adopted when he was striving to gain admission to the bar.

When he desires to find out what is the law he will look first to see what the statute says about it, and then at the reports which construe it. Not till these means are exhausted will you find him rummaging through the text-books. Thus lawyers regard the ancient writers as merely reference books to be used when the written law furnishes no clue to the problems before them. An examination of the judicial decisions of the present day will be sufficient to convince the devotee of Blackstone or Kent that he is pursuing a shadow where he seeks the substance. The courts of appeal find that a vast number of their cases have little to do with the common law, but depend on the construction of statutes. How important then is it for the student to acquaint himself with the written law and the construction which has been placed upon it, instead of taking up his time with laws long forgotten and covered with the dust that has fallen thick upon the institutions, manners and customs unsuited to the requirements of the nineteenth century. Let him leave to the antiquary, study of the curious learning as the husbandman relinquishes to the geologist the task of investigating the structure and history of the soil he tills. — R. L. Walker, in the Chicago Legal News.

#### PREFERRED CREDITORS.

THE provision of the Bankruptcy Law which sets aside a conveyance of property made with the view of preferring one creditor to another (Bankruptcy Act, 1883, s. 48), frequently raises difficulties in practice, as the invalidity of the conveyance depends upon the state of mind of the debtor, and not upon the circumstance that certain creditors are in fact preferred. Where there is no special indication of the motive which influenced him, it is natural to judge of his intention by the actual result, and the advantage given to the creditors taking under the conveyance may be sufficient proof that this advantage was the motive which influenced the debtor. But if he is exposed at the time of the conveyance to some special penalty or liability which the conveyance will avert, it is possible to attribute the conveyance to the desire of the debtor to save himself rather than to an intention to give an undue preference. This was recognized in *Ex parte Taylor* (35 W. R. 148, 18 Q. B. D. 295), where the debtor had misappropriated bonds which had been allowed by trustees to be in his custody, and shortly before his bankruptcy gave the trustees a mortgage on part of his property as an indemnity against any liability they might have incurred. It was held that the bankrupt's dominant motive in creating the mortgage was, not to prefer the trustee, but to save himself from exposure. A similar decision has been given recently by the Court of Appeal in *New, Prance & Garrard's Trustee v. Hunting* (45 W. R. 577; 1897, 2 Q. B. 19). One of the debtors, Prance, had committed various breaches of trust, and, two days before the bankruptcy of the firm, he conveyed property to trustees, upon trust to raise thereout a specified sum of money and apply it in making good the breaches of trust. The deed recited that he was desirous of rectifying the breaches of trust and of shielding himself as far as possible from liability for proceedings in respect of them. It was held that, although the result of the deed was to give a preference to the *cestuis que trust* over the other creditors, yet the dominant motive in the mind of the bankrupt was to avert the punishment to which he had exposed himself, and hence the conveyance was not impeachable. The case of *New, Prance & Garrard's Trustee v. Hunting* also confirms the important difference which exists between an ordinary conveyance in trust and a conveyance in trust for creditors. Unless the settlor expressly reserves a power of revocation, an ordinary conveyance in trust is irrevocable, notwithstanding that it has not been communicated to the beneficiaries. The conveyance makes the gift in their favor complete, and puts it out of the power of the settlor to take away what he has bestowed (*Ellison v. Ellison*, 6 Ves. 656). But under the doctrine of *Garrard v. Lord Lauderdale* (3 Sim. 1, 2 Russ. & My. 451)

a conveyance in trust for creditors stands in a different position, and although the transfer of the property is complete, yet the property still remains under the control of the debtor until notice of the conveyance has been given to the creditors, or some of them. And it seems that the mere notice to the creditors will not take away the debtor's power of revocation; there must, further, be evidence that the creditors have in some way relied on the conveyance, or have expressed their satisfaction with the arrangement (*Harland v. Binks*, 15 Q. B. 713). At first sight it is not easy to see why a conveyance in trust for creditors should differ in this respect from an ordinary trust, but the distinction has been put upon the ground that in the former the trust is not so much a final trust for the benefit of the creditors as an arrangement made by the debtor for his own personal convenience and accommodation, and in *Johns v. James* (26 W. R. 821, 8 Ch. D. 744) it received the approval of James, L. J. "If it were supposed that such a deed as that created an absolute irrevocable give him no opportunity of paying a creditor who happened at the time to be a creditor, the result might have been very often monstrous. It would give him no opportunity of paying a creditor who was pressing; no opportunity of settling an action; no opportunity of getting food for himself or his family the next day, or redeeming property pledged." But though a conveyance in favor of creditors generally is thus revocable until accepted by them, the principle does not apply to a conveyance in favor of a particular class of creditors, where, as in *New, France & Garrard's Trustee v. Hunting* (*supra*), the object of the conveyance is to secure payment of their debts in any event. It is then not an "agency deed" — that is, a deed in which the trustee is an agent for the debtor — but an irrevocable conveyance in trust for the specified creditors. — *Solicitors' Journal*.

#### STANDING MUTE ON ARRAIGNMENT.

THE case of an accused person who, through natural infirmity, is unable to plead or to understand the nature of the proceedings, does not very often come before the courts. Such a case occurred on the 6th inst., at Marylebone Police Court, when a man named Harris was charged before Mr. Curtis Bennett with having murdered his wife, and having attempted to murder his daughter, and with having attempted suicide. The result of the latter attempt had been a very serious wound in the throat, necessitating tracheotomy. As a result of the operation the prisoner was unable to speak, and as he could neither read nor write, there was no method by which he could communicate with the outside world, though he no doubt understood the nature of the proceedings going on around him. It was stated that his throat was paralyzed, and that there was little hope of his

being able to speak again. The learned magistrate said that this state of things appeared to raise an important question as to whether the accused could be put on his trial on a grave charge of this sort when he was unable to plead or to give instructions to his solicitors. It appeared that the man's friends had instructed the solicitor for the defense, and Mr. Curtis Bennett said that he would not stop the case at that stage. Consequently further evidence was taken, and the accused again remanded. It was alleged during the hearing that the prisoner was able to whisper, and in any case he could probably, when put to his plea, make a negative or affirmative sign with his head. But whether this be so or not, the case is a curious one, and hardly on all-fours with any to be found in the books.

If, on being arraigned at the trial, the defendant does not answer, a jury must be sworn to try whether he is mute of malice or by the visitation of God. By 7 & 8 Geo. 4, c. 28, s. 2, the court may, upon the former finding, order a plea of not guilty to be entered. If the jury find that he stands mute by the visitation of God, the jury must then be sworn to inquire whether he can plead to the indictment. If they find that he can plead by signs, the plea can be demanded and be taken by signs. Lastly, the jury must find whether the prisoner can understand the proceedings. If the prisoner is found by them to be incapable of comprehending the proceedings at the trial, so as to be able to make a proper defense, the court will direct the prisoner to be confined during her majesty's pleasure. If, however, the jury find that the prisoner understands the proceedings, the trial proceeds in the ordinary way. The chief cases upon the subject are: *R. v. Pritchard* (7 C. & P. 303) and *Reg. v. Berry* (34 L. T. Rep. 590; 1 Q. B. Div. 447). Other cases are: *R. v. Halton* (R. & M. 78), *R. v. Mercier* (1 Leach C. C. 183), *R. v. Steel* (1 Leach C. C. 451), *Reg. v. Whitfield* (3 C. & K. 121), and *Reg. v. Schleter* (10 Cox C. C. 409). The one point that none of these cases actually decide is the very one that seems likely to arise by reason of the curious combination of circumstances in the present case. What is to be done where the prisoner is mute by the visitation of God, and cannot plead or give instructions for his defense, but nevertheless can perfectly understand the nature of the proceedings? It would appear that, in such a case, the court would be justified in entering a plea of not guilty, taking care to inform the jury that nothing but the very clearest evidence of guilt should induce them to convict the prisoner, as he had to rely wholly on the exertions of others in the preparation and conduct of his defense. — *Law Times* (London).

Judge Reagan, a candidate for the Texas senatorship, is the sole survivor of Jefferson Davis' cabinet.

## THE CEREMONY OF OATH-TAKING.

IN most continental countries, says the London Globe, the practice of kissing the book is unknown, the ceremony of oath-taking being more akin to the Scottish than to the English form. A French witness has a very simple ordeal to pass through before unfolding his tale. The judge, seated beneath a crucifix, says, "You swear to tell the truth, the whole truth, and nothing but the truth," and the witness, lifting up his right hand, answers, "I swear it." In Austria a Christian witness is sworn before a crucifix between two lighted candles, and, holding up his right hand, says: "I swear by God the Almighty and All Wise that I will speak the pure and full truth, and nothing but the truth, in answer to anything I may be asked by the court." Jewish witnesses, while using the same words, add to their solemnity by placing their hands on the page of a Bible on which is printed the third commandment. A Belgian witness swears to be veracious in these words: "I will speak the truth, the whole truth, and nothing but the truth, so help me God and all the saints." In Italy the form is much the same, but the use of the Bible imparts a greater degree of seriousness to it. "I swear to tell the truth, the whole truth, and nothing but the truth," exclaims the Italian witness, resting his hand upon an open Bible. The Spanish oath is more elaborate. The witness, kneeling on his right knee, places his hand on the sacred book, and being asked by the judge, "Will you swear by God and by these holy Gospels to speak the truth to all you may be asked?" answers, "Yes, I swear." Thereupon the judge says: "Then if thus you do, God will reward you, and if not, will require it of you." In some parts of the country the ceremony is different. The witness forms a cross by placing the middle of his thumb on the middle of his forefinger, and kissing his thumb—a practice which would probably be very familiar to some English witnesses—exclaims, "By this cross I swear." The most curious European oath is administered in Norway. The witness raises his thumb, his forefinger and his middle finger. These signify the Trinity, while the larger of the uplifted fingers is supposed to represent the soul of the witness, and the smaller to indicate his body. Before the oath is taken a long exhortation is delivered, the most material parts of which are as follows: "Whatever person is so ungodly, corrupt, or hostile to himself as to swear a false oath, or not to keep the oath sworn, sins in such a manner as if he were to say: 'If I swear falsely, then may God the Father, God the Son, and God the Holy Ghost punish me, so that God the Father, who created me and all mankind in His image, and His fatherly goodness, grace and mercy, may not profit me; but that I, as a perverse and obstinate transgressor and sinner, may be punished eter-

nally in hell. \* \* \* If I swear falsely, then may all I have and own in this world be cursed; cursed be my land, field and meadow, so that I may never enjoy any fruit or yield from them; cursed be my cattle, my beasts, my sheep, so that after this day they may never thrive or benefit me; yea, cursed may I be and everything I possess.' " If the law's delay is among the grievances of the Norwegians, it would not be difficult to trace it to the "good mouth-filling oaths" that precede the real business of their courts. For real picturesqueness in oath-taking, the courts of less civilized countries must be visited. Like the soldier in Jaques' familiar speech, they are "full of strange oaths." The people who have shown themselves to be most resourceful in the making of oaths are the Chinese. Slicing off a cock's head is one mode of impressing a Chinaman with the importance of telling the truth; breaking a saucer is another; blowing out a lighted candle is a third. The beheading of the cock is supposed to represent the fate of the liar; the cracking of the saucer and the extinguishing of the candle indicate what will happen to the soul of the witness who does not tell the truth. In Mahomedan countries every witness holds the Koran in front of him, and bends down until his forehead touches the sacred volume. The position of the body is of the utmost importance in most countries, but in none has superstition left the supreme conscientiousness that distinguished the Irish witness in the days of the Brehons. He took three separate oaths, the first standing, the second sitting, and the third lying, as these were the positions in which his life was spent. Many Indians are sworn on tigers' skins, in the belief that if they defile their lips with lies their bodies will become food for tigers, while others stand upon a lizard's skin, and ask that their bodies shall be covered with the scales of the reptiles if they forswear themselves. The Burmese witness, who requests to be destroyed in no fewer than five different ways if he is guilty of perjury, is not content that the punishment should fall upon himself alone. He includes his relations. "Let us be subject," he prays, "to all the calamities that are within the body, and all that are without the body. May we be seized with madness, dumbness, deafness, leprosy and hydrophobia. May we be struck with thunderbolts and lightning, and come to sudden death."

## Legal Notes of Pertinence.

The Wyoming Supreme Court has decided that foreign-born citizens, in order to vote, must be able to read the Constitution of the State in English.

The post-office department at Washington has notified Postmaster Van Cott, of New York, that newspapers and other periodicals containing advertisements of schemes offering prizes by chance

will be excluded from the mails. The order specifies such advertisements as the "missing letter" contests.

In Mexico the law's delays are less vexatious than in the United States. Indeed, one hears nothing at all about delay in the administration of Mexican justice. A short time ago a paymaster went down into Sonora with between \$6,000 and \$7,000. He stopped over night at a ranch, where he was robbed and murdered. The robbers were caught by the local police, but the magistrate discharged them. Then the government took a hand in the affair. The robbers were caught again and shot immediately. The magistrate who acquitted them was also shot. The watchman at whose house the robbery occurred was shot. Some distant accessories after the fact were shot. In all sixteen men were shot. — San Francisco Call.

The Indiana Supreme Court holds that the statute making it the duty of the prosecuting attorney to sue for and recover in the name of the State for the benefit of his wife or minor children all sums of money lost by any person at gambling, for which he neglects to sue within six months, is constitutional. The court says that the title to money won at gambling never vests in the winner; also that the giving of the property to the loser's wife instead of to himself, when it is recovered, does not infringe his rights, because he cannot be entitled to compensation for property to which he has no right. The case was that of Mrs. Nellie A. Walley, who recovered a judgment in the Circuit Court for \$5,414.80 lost by her husband at a faro game.

The case of Joseph E. Kelley, who has pleaded guilty to an indictment for murder, charging him with the killing of Joseph Stickney, cashier of the Great Falls National Bank, calls attention to a peculiarity in the criminal procedure of New Hampshire. The public laws of that State require a person indicted for a capital crime to be tried before two justices of the Supreme Court; but he may be arraigned before the court when held by one justice, and if he plead guilty, the court as thus constituted may impose sentence upon him. Under such circumstances, however, it becomes the duty of the judge, in a murder case, to determine whether the prisoner is guilty of murder in the first degree or murder in the second degree. In New Hampshire all murder committed by poison, starving, torture of other deliberate and premeditated killing, is murder in the first degree, and is punishable by death, to be inflicted by hanging. Murder in the second degree is punishable by imprisonment not exceeding thirty years.

The so-called Railroad Mileage Book Law, passed by the New York legislature of 1895, will be subjected to a test as to its constitutionality. The law was made to compel all railroads operat-

ing over 100 miles of track in this State, and which charged over two cents a mile, to sell mileage books at the rate of two cents a mile. Most of the roads have complied with the law. After the law was passed, and before the Erie resumed the sale of the books, A. F. Beardsley, of Elmira, made application for a book, and it was refused. He brought an action against the company, in which he seeks to recover \$50, the penalty established by the legislature for refusal to comply with the law. Later the Erie resumed the sale of the books, but Mr. Beardsley refused to discontinue the action, stating that he will test the constitutionality of the law. The Erie is equally anxious to test the law. The case has just been filed with the Court of Appeals as an appeal from a decision of the lower court affirming the constitutionality of the law.

In June a French surgeon, named Lassalette, was convicted in Paris of malpractice for leaving a pair of forceps in the body of a patient upon whom he had operated for the removal of a fibroid growth by laparotomy. The patient died, and the forgotten instrument was discovered at the post-mortem. The defendant was sentenced to pay a fine of 500 francs and be imprisoned for three months. He appealed from this judgment. A French Court of Criminal Appeal possesses powers unknown to our system of jurisprudence. One of them is the power to increase the punishment imposed by the trial court. This power was exercised in the present instance, and a month was added to the appellant's term of imprisonment. The statement is made by a prominent medical man that so great is the liability to accidents of this sort that careful surgeons always insist upon counting all the instruments and sponges in the operating-room before the operation, and then just before the wound is sewed up, so as to guard against any such misadventure as occurred in this French case.

The Terrington (Norfolk) magistrates have given their decision in a case involving the legality of plucking geese alive, says the London Law Times. A Lincolnshire farmer, named Whitwell, of Holbeach Drove, and a Norfolk farmer, named Mendham, were charged by the Society for the Prevention of Cruelty to Animals with causing cruelty to geese by plucking them alive. It was alleged that the geese were plucked almost naked, and then turned out into an open field and it was contended that this inflicted gross cruelty. It was stated that the practice had almost been stopped, except in Lincolnshire and certain parts of Norfolk. The defense was that there was no cruelty in plucking geese at the proper season, if reasonable care were used, and it was stated that the plucking of these geese rendered the flesh more fit as an article of food. It was also argued that the stopping of the practice would considerably inter-

fere with the down industry, and already the trade was being diverted abroad. The bench dismissed the cases, with costs against the society. The same point has on several occasions been before the Lincolnshire justices, and conflicting decisions have been given; but in the more recent cases the prosecutions have failed.

### English Notes.

Sir Charles Edward Pollock, baron of the Queen's Bench Division of the High Court of Justice, died on November 22, in his seventy-fifth year. Baron Pollock was born October 31, 1823, the fourth son of the Right Hon. Chief Baron Pollock. From 1841 to 1844 he was private secretary to his father, then attorney-general. He was made a queen's counsel in 1866, baron of the exchequer in 1873, justice of the Exchequer Division of the High Court of Justice in 1875, and in 1879 was appointed to the Queen's Bench Division with the rank of baron of the court.

Judicial farewells in the form of a public function are of doubtful advantage, says the *Law Times*. Almost necessarily in the majority of cases they involve conventional compliments of doubtful veracity, and the art of the advocate who is the spokesman of the profession is required to avoid skating where the ice is too thin. Viscount Esher's good-by was about as satisfactory as a ceremonial of this nature can be. The profession evinced that respect for him which they all entertain, and his lordship expressed himself happy in that testimony, coupled with her majesty's mark of approval of his legal career. The *London Law Journal*, with characteristic frankness, adds these words to its good wishes for the retired jurist: "It must not be supposed that all Lord Esher's qualities are fit subjects for imitation by every member of the judiciary. The lightning-like rapidity with which he made up his mind, the superficial *brusquerie* with which he interrupted and practically silenced what he deemed irrelevant arguments, the indifference which he manifested to the grace of literary expression, were all very well in him. But we should not welcome a general development of these qualities among English judges, whose abilities are of a kind different from those with which Lord Esher is endowed."

There are thirty-six superior judges in the province of Quebec, while all England, with a population of 30,000,000, has only twenty-eight. Ireland comes nearer to Quebec in judicial numbers, there being seventeen superior judges to a population of about 5,000,000.

The Gray's Inn Moot Society held a moot in Gray's Inn Hall on Monday, November 22, before Mr. J. G. Butcher, Q. C., M. P., when the following question was argued: "In 1890, A granted to B a lease for ninety-nine years of a plot of land

with brewery buildings and premises on it. The lease was in the usual form of leases of land with buildings on it. The general words were: 'Together with all ways, drains, streams, water-courses, rights, easements and appurtenances to the premises belonging or therewith usually held or enjoyed.' Within two years from the date of the lease, B, with the sanction of A, for the purpose of obtaining the water necessary for the use of the brewery, sunk wells on the premises, and pumped up water to the brewery. This continued until the wells were deprived of water as mentioned below. In 1894, A granted a lease to C for ninety-nine years of an adjoining plot of land with a dwelling-house on it. The lease was in the same form as B's lease, except that C's lease contained what B's lease did not contain, a covenant by the lessee against sinking wells on the demised premises. C had full notice of B's lease. In 1895, C sunk a well on the premises comprised in his lease, and commenced pumping water out of the well and discharging it into an adjoining river. The effect is to intercept underground waters, which would otherwise have percolated through the strata and reached B's wells. The result is that B's wells are rendered useless and B is seriously injured in his business. B can obtain water for his brewery elsewhere, but at considerably increased cost. The sole object of C in thus acting was to injure B in his business. A refuses to interfere in any way. B brings an action against A and C for an injunction and damages. Will he succeed to any and what extent?"

### Legal Laughs.

The telegraph reports a good story on Hon. J. N. Dean, of Xenia, probate judge of Greene county, Ohio, who, in making out the papers for committing a man by the name of J. W. Murphy to the insane department of the county infirmary, absent-mindedly inserted his own name in the papers where that of the crazy man's should have appeared, and the mistake was not discovered until Constable Matthews presented Murphy at the infirmary. The officer then came back to town and informed the judge that he had proper papers for his commitment to a mad-house, and asked if he would go quietly or would have the handcuffs on. The judge altered the papers and grimly remarked that he would beg to be excused just now.

A counsel thought that he would overcome Lord Norbury on the bench. So on one day when Lord Norbury was charging a jury, and the address was interrupted by the braying of a donkey, "What noise is that?" cried Lord Norbury. "'Tis only the echo of the court, my lord," answered Counselor Readytongue. Nothing disconcerted, the judge resumed his address; but soon the barrister had to interpose with technical

objections. While putting them, again the donkey brayed. "One at a time, if you please," said the retaliating joker. — *Law Times* (London).

On looking, writes a correspondent, over the files of an old newspaper, the *Dublin Evening Post*, I alighted in the issue for August 24, 1797, on a paragraph which records a specimen of Lord Thurlow's caustic wit, which is, so far as I am aware, unknown to the present generation. The disinterred paragraph of one hundred years ago is as follows: "Anecdote of Lord Thurlow. Some years ago, when this nobleman was chancellor (Lord Thurlow resigned the great seal in 1792), a young barrister, the first time of his appearance before the placid countenance of his lordship, addressed the court in these words: 'I humbly move your Lordship in a cause of Smith against Jackson for a *common* (for commission) to examine witnesses.' His lordship, with the utmost *sang froid*, asked if there were many witnesses. The barrister replied there were. 'Why, then, said his lordship, 'take Salisbury Plain.'"

### Notes of Recent American Decisions

**Evidence — Illegitimacy — Burden of Proof.** — Wherever a question of legitimacy arises, the child whose origin is in question is presumed to be legitimate until shown to be otherwise, and the burden of proving illegitimacy rests upon the party alleging it. (*In re Matthews' Estate* [N. Y.], 47 N. E. Rep. 901.)

**Gift — Perpetuities.** — Testator gave national bank stock to the bank's cashier, in trust to distribute the dividends to designated employes during the corporate existence of the bank, "either under its present charter, or by virtue of any renewals or extensions thereof." The bank was incorporated on June 19, 1865, for the period of 20 years, and its existence was extended 20 years under the Federal law of 1882. Testator died in November, 1891, and no law then or has since existed authorizing any further extension. *Held*, that the gift violated the rule against perpetuities, and was void, in that the trust might not be completely performed in 21 years. (*Siedler v. Syms* [N. J.], 38 Atl. Rep. 424.)

**Post Nuptial Agreement — Release by Each Party of All Interest in Property of Other — Husband Died Intestate and Without Issue — Widow May Inherit Property of Husband.** — A husband and wife made and entered into an agreement of separation, whereby the husband conveyed to the wife certain real estate, paid her \$500 in money and allowed her to remove her own furniture, and both then stipulated that "each party releases any and all claim, right, title or interest, either vested or contingent, in or to any property, present or future acquired, belonging to the other." The wife survived the husband, who died intestate and with-

out issue, leaving certain real estate, subject to descent as nonancestral property under the provisions of section 4159, Revised Statutes. *Held*, that the effect of the language was to give to the husband of the wife the full dominion of his own property, with power to dispose of it by will or otherwise, without the assent of the wife during her life, but did not affect her right to inherit from him as his widow any property of which he died seized. (*Smith v. Smith et al.*, Ohio Sup. Court. Decision in full in *Ohio Legal News*, Nov. 29, 1897.)

### Notes of Recent English Decisions.

**Railway Company — Negligence — Liability for Defect in Wagon While Used by Another Company.** — The G railway company had a contract for the haulage of coals from their goods yard at D over a private line to some gas-works. The coal arrived at D either over the line and in the wagons of the G company, or over the line and in the wagons of the C company. In the latter case the wagons were not unloaded at D, but the C company permitted the G company to take their wagons over the private line to the gas-works. While the G company were so using wagons of the C company, the husband of the respondents, who was in the employment of the G company, was killed, in consequence, as was alleged, of a defect in the brake of one of the wagons of the C company. *Held*, that the C company were not liable. Judgment of the Court of Session in Scotland (24 Ct. Sess. Cas. 4th series, 429) reversed. (*Caledonian Railway Company v. Warwick* [H. of L. Chancery Div.], L. T. Adv. Rep., Nov. 20, 1897.)

**Husband and Wife — Restraint on Anticipation — Mortgage by Wife of Life Interest to Pay Debts of Husband — Order of Court Removing Restraint on Anticipation — Benefit of Wife.** — A married woman was entitled under her grandfather's will to a considerable income during her life, for her separate use, with a restraint on anticipation. In 1882, in order to pay the large debts of her husband and of their joint establishment, she mortgaged her life interest and a policy upon her life to secure an advance of £23,000. In 1887 she effected a further mortgage of her life interest and of a policy on her life to secure another £22,000 for the same purpose. In both instances the restraint on anticipation was removed, with the sanction of the court, upon evidence that it was for the benefit of the wife; and no reservation of any remedy against the husband was made in the order, nor was any condition imposed upon him. The moneys so obtained were applied in payment of the husband's debts. In 1893 the husband and wife separated by common consent. The wife now brought an action against her husband, claiming to be indemnified by him in respect of the moneys raised to pay his debts. *Kekewich, J.*, held that

the wife's claim failed. When a wife's life estate was made available for raising money for the payment of the husband's debts by removing the restraint on anticipation with the sanction of the court, it was inconceivable that either she or the court intended that a remedy should be reserved over against her husband, when no such reservation was made by the order of the court giving such sanction. (*Paget v. Paget* [H. C. of J.], Solicitors' Journal, Adv. Rep., Nov. 20, 1897.)

### New Books and New Editions.

A Treatise on the Modern Law of Real Estate.  
By Frank S. Rice.

In this work Mr. Rice, who has done much for legal literature, through his elaborate and highly successful treatise on "Civil and Criminal Evidence," and as the editor of the Probate Reports Annotated, has placed the profession under still further obligations to him. In the wilderness of modern adjudication, the great task of a text-writer in this realm is to extract from the varied forms of expression in cases involving always a different congeries of facts, a consensus of opinion upon a particular proposition. To state what the law at least is, on a selected set of facts, is comparatively easy; but to follow the law out to its extreme margin with all its deviations and sinuosities is more difficult. In this arduous task Mr. Rice has been eminently successful. The work is particularly well balanced with respect to the attention paid to the several topics. The author has stated with great care the old propositions that have attained the dignity of settled law, with well-selected citations, giving broader attention to the propositions concerning which the courts are still at variance. To the latter class of questions, and the marginal ground that outlie the settled realm, the author has devoted much study and research. The drift and trend of decisions are followed with full annotations of the subject. The statements of the text are amply sustained by authorities without the fault of undue padding. It is grounded upon State and Federal decisions, and is, therefore, pre-eminently American. The avowed purpose of the author not to argue the law, but to state it, is well met. The author has been able very much to abbreviate the volume by avoiding a repetition of the same propositions under cognate topics. "Waste," for instance, is treated exhaustively in one chapter without a needless repetition under "Remainder," "Reversion," "Estates for Years," etc. The work is vigorous in diction, and carries with it a conviction that the author thoroughly comprehended his subject, and has elaborated it with the facility of large experience. Nearly 6,000 illustrative cases, mostly from appellate courts of this country, have been examined and listed. The book contains 960 solid octavo pages of text, with

innumerable fine footnotes and references, and an elaborate index of over 50 pages.

It has already been adopted as a text-book in the law school of the University of New York.

The Law of Mines and Mining in the United States. By Daniel Moreau Barringer, A. M., LL. B., and John Stokes Adams, A. B., LL. B., of the Philadelphia Bar. Boston: Little, Brown & Co. 1897.

This excellent work, which the authors have very appropriately dedicated to the Hon. Stephen Johnson Field, justice of the Supreme Court of the United States, in recognition of his great work in the development and interpretation of the Mineral Land Law, aims to give a complete and accurate statement of the special rules of law which have been deduced by the application of general rules to the questions that arise as to the rights and duties of miners and mine owners in their relation to the law, to one another, and to those in contact with whom they are brought by reason of the business of extracting the various kinds of valuable minerals from the earth. It has been the constant aim of the authors not only to clearly state the law as it is to-day, but to furnish the reader with every authority and important dictum in support of the statements contained in the text. In order to make it complete and comprehensive the authors have not confined the work to the law which is applicable only to any particular part of the country, or to mines of any particular kind, but have aimed to cover the field fully, dealing also with the law of those States where the common law of real estate ownership applies. It is therefore of equal value as applied to the gold and silver, as well as all other mines of the far west, the coal, iron, copper and lead mines of the eastern, central and southern States, and to oil and gas wells, or other mineral deposits, wherever found. Among many important chapters are those on Mining Leases, Incidental Rights and Obligations, Equitable Principles, and Rights of Those Who Work in Mines. Carrying out the intention to give everything that a lawyer may need, the authors have included an admirably conceived Geological Preface of some 75 pages descriptive of the various kinds of ore deposits in the United States possessing economic importance. This has not been written from the standpoint of the scientist, but in accordance with the authors' idea that it will be impossible for the lawyer to appreciate many important legal distinctions which are based upon certain geological or physical differences, unless he has such a foundation of technical and practical preparation as is here afforded. The work throughout is thoroughly admirable, constituting a really notable addition to legal literature, and a most valuable compendium on the subject of which it treats.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y.

Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, DECEMBER 18, 1897.

### Current Topics.

THE ALBANY LAW JOURNAL feels that it owes no apology to its readers for surrendering a considerable part of the present issue to an event which so vitally and intimately concerns the jurisprudence of the Empire State as the retirement from the Court of Appeals of its chief judge, the Hon. Charles Andrews. Not only by reason of his long connection with that tribunal, but because of the strong and enduring impress he has made upon its history, does the event referred to become one of the first importance to the people at large, who have always maintained a just pride in their highest judicial tribunal, as well as to the noble profession which has given to that court so many able, learned and distinguished men, among whom the retiring jurist concededly takes first rank. Entering the court at the age of 43, in the full vigor of bright manhood, and surrendering, at that time, a large and lucrative practice, he has, for more than a quarter of a century, devoted himself assiduously to the difficult and delicate work which necessarily devolves upon a judge of a court of last resort. His retirement with the close of the present year, in obedience to the inexorable mandate of the Constitution of the State, will remove the last survivor of the original tribunal. It is but the expression of the universal sentiment and conviction of the people of the State that Charles Andrews has made an ideal judge. We feel that we but voice the general sentiment of lawyers and laymen when we say that he has ever maintained the

court's best traditions; that he has added to the deep and universal respect in which it is held throughout Christendom; that he has placed upon its records many bright and luminous pages; that he has ever jealously safeguarded its spotless reputation; and that he has in this, his life-work, honored the high court as well as himself. It would be a work of supererogation to add anything of value to what is elsewhere so felicitously and truthfully said with reference to the services of Judge Andrews as a member of the court, and his deeply regretted retirement. Our present purpose is merely to add our own humble tribute to those of his former colleagues on the bench and in the profession, and to join in the expression of the hope that the future may hold in store for him many years of well-earned repose — and may we not add, of continued usefulness; for to a man of Judge Andrews' temperament and habits severe mental labor is almost a necessity. Although Judge Andrews has reached the allotted three score and ten, and has performed during the long period of his connection with the court a vast amount of work of the most exhausting kind that can fall to the lot of mortals, he surrenders the place he has so signally honored in the full plenitude and maturity of his powers. Under such circumstances, what suggestion could be more timely than that of the Hon. Joseph H. Choate, so felicitously expressed in his letter, published elsewhere in this issue, that the retiring jurist, inspired by the illustrious example of Chancellor Kent, should "give us, in some similar way, the rich fruit of his great learning." Such a contribution would be awaited by the profession with deep — almost impatient — interest, and would certainly be entitled to rank among the choicest treasures of our jurisprudence. Let us hope that Judge Andrews will decide to devote some part of his leisure to such a work.

The question whether a lawyer can recover for professional services rendered to a corporation, in the preparation and trial of a criminal case, set in motion by the complaint of an officer of such corporation, was decided



in the affirmative by the Supreme Court of Michigan, in the case of *McCurdy v. New York Life Ins. Co.* It was claimed by counsel for the defendant that only the people and the respondent are interested in a criminal prosecution, and that a contract by a lawyer to render services in such a case, at the employment of private parties, is against public policy and void, citing *How. Ann. Stat.* 560, which prohibits any prosecuting attorney from having the assistance of any counsel "who has received any compensation from any person or persons who are interested in the prosecution of the party charged with felony;" and 3 *How. Ann. Stat.*, sec. 557, which provides: "Nor shall any attorney be permitted to prosecute or aid in prosecuting any person for an alleged criminal offense where he is engaged or interested in any civil cause or proceeding depending on the same state of facts against such person directly or indirectly." The court pointed out the fact that there is no provision of the statute which requires the prosecuting attorney to appear in examinations in criminal cases in Justices' Court, except when requested to do so by the examining magistrate. This examination cannot be said to be a trial, but it is an investigation to decide whether a crime has been committed, and whether there is probable cause to believe the accused is guilty. The Supreme Court did not think there was anything in the statutes or in the decisions of the court that would preclude the plaintiff from recovering for the services rendered.

The defendant being a corporation, could act only through its officers and agents. If, as in this case, it had reason to suppose one of its agents was guilty of a crime, it had a right to employ an agent or attorney to investigate the facts of the case and the law applicable thereto, and to present its showing to the officers of the law, with a view to having the guilty person brought to justice. If the defendant employed the plaintiff to do work of this character, and he did such work, he was entitled to recover therefor.

It was decided, in the case of *People, etc., v. McMakin*, Hamilton County (Ohio) Com-

mon Pleas Court, that a city has no right to enforce an agreement between private parties as to the dedication of a street. In July, 1873, McMakin bought about 1¼ acres of land on the Hamilton pike, in the city of Cincinnati, of Frederick Parker and wife, and covenanted in the granting clause that at any time Parker or his heirs or assignees should demand it, McMakin, or any one who took title thereafter, would, without compensation, dedicate for street purposes a strip thirty feet wide off the north side of the tract. Neither Parker nor his wife prosecuted the suit to have the dedication made. The city of Cincinnati alone sought to enforce the agreement for the use of third persons. Judge Jelke refused to enforce the condition against McMakin in this suit. He held that the city was not a party to the contract. The clause in the deed did not create a reservation to the public. Parker only, or those claiming under him, could enforce the condition of the deed. Parker never conveyed his right to enforce the dedication to the city, and the city had no right against either him or McMakin. As Parker had demanded the dedication to be made, he could sue to enforce it, but the city could not, and judgment was given for McMakin.

What it terms one of the most extraordinary scenes ever witnessed in a court of justice is described by the *Solicitors' Journal* (London) as having occurred recently in the Assize Court at Northampton, England. The court is one of those in which the whole well is filled by a very large table, round which counsel and reporters sit. A man named Berry was put in the dock, charged with burglary. The substance of the indictment was read to him, and he had just been asked in the usual manner whether he was guilty or not guilty, when, with a yell, he leaped over the front of the dock and over two rows of counsel, on to the table, apparently making straight for the judge. He fell on his hands and knees, but was up in an instant with his hands to his trousers, some say with the intention of tearing them off, some say with the intention of getting something out of his pocket. One of the barristers

present, however, sprang upon the table and seized the desperate man, and was joined by one or two of his learned friends. The strange sight was then seen for a short time of a couple of barristers in wigs and gowns fighting with a prisoner on the table of the court. Of course the warders and police soon reached the table, and the man was removed, struggling violently and shrieking blasphemies. Wills, J., the presiding judge, ordered the trial to be postponed till the next day, and directed that the prisoner should then be put on his trial in fetters. Next day the ruffian was brought before the court, but he was so obstruperous that the learned judge ordered him to be sent below, and the trial to proceed in his absence. Commenting upon this feature of the case, the Solicitors' Journal says: "This is certainly a very unusual course; probably unprecedented. Almost all the authorities on the criminal law of England state that a prisoner charged with felony *must* be present in court during the whole of his trial. Sir James Stephen, however, says in his Digest of the Law of Criminal Procedure, that if a prisoner misconducts himself in such a manner as to make it impossible to try him with decency, the court probably has power to order him to be removed and the trial to proceed in his absence. The learned author states that he had never heard of a case in which this was actually done, but that Lord Cranworth, when Rolfe, B., threatened to have Rush, the Norwich murderer, removed if he persisted in a singularly indecent course of cross-examination. He also mentions a case in which a convict at Portland was tried at Dorchester for the brutal murder of one of the warders of the prison before Shee, J., then sitting as commissioner. This prisoner behaved with such extraordinary violence that the judge had to give orders for him to be fastened with chains or straps, and also (it is believed) to be gagged, before his trial could proceed. Not even in such a case, however, was he removed from the court; and probably most persons will agree with Sir J. Stephen that, in a trial involving the penalty of death or any severe punishment, the prisoner should

not be removed until every other possible measure has failed. In charges of misdemeanor, on the other hand, the authorities agree that, the accused having pleaded in person, the trial may proceed in his absence. There have been instances of this, but they are very rare. In the famous Tichborne case, for example, the defendant was one day taken ill in the course of the trial, and was allowed to leave the court until his recovery, the trial meanwhile proceeding in his absence. Probably, even in this case of misdemeanor, however, the trial would have been adjourned if the defendant had objected to its proceeding in his absence."

---

The apparently official announcement from Washington, to the effect that Governor John W. Griggs, of New Jersey, had been tendered and had accepted the office of attorney-general of the United States, so soon to be vacated by the elevation of Attorney-General McKenna to the bench of the Supreme Court, has been hailed by bench and bar alike with genuine pleasure, though it came somewhat in the nature of a surprise. Governor Griggs' career has been honorable and distinguished. Prior to his election to the important office which he now holds, Governor Griggs had won high rank at the bar, and by his conduct in office has greatly enhanced his reputation for ability, uprightness and statesmanship. The firm stand taken by him early in his administration against unnecessary and superfluous legislation has had excellent results. Following this up, as he did, with an elaborate address, last summer, before the National Bar Association, on the vices and dangers of excessive legislation, which attracted national attention, Governor Griggs performed a real and important service to the country. Two years ago he declined a place on the Supreme bench of New Jersey. If, as now seems probable, he is to become the successor of Judge McKenna, the president and the country are to be congratulated. His youthful virility and unquestioned ability will be of great value in the department of justice.

## CHIEF JUDGE ANDREWS AND THE COURT OF APPEALS.

By SIMON W. ROSENDALE.

The retirement of Chief Judge Charles Andrews marks an important era in the history of the judiciary of this State. While, as a rule, the public is not much moved or affected by sentiment, in this instance there is scarcely a lawyer in this State — on the bench or at the bar — who will not feel a touch of keen regret at the parting of Judge Andrews from the Court of Appeals. The court will go on, but the presence of its senior member will be missed. Illustrious courts there have always been in this State, because of their component elements; eminent men on the bench have given distinction to the courts. I refer especially to the Court of Appeals of this State since its reorganization in 1870, which has deserved, as it has received, the highest regard and respect, and whose members have been made distinguished by reason of their membership in it.

There has clustered around the record of Judge Andrews a tender sentiment, the outcome of great general regard for the court of last resort. The fact that he is the last survivor of the original court, as well as his own amiable individuality, has tended to strengthen that sentiment, so that, as the time approaches when he is to retire, a feeling of general regret prevails. He relinquishes his life-work in full health and vigor and able to enjoy repose which the possession of faculties requires. Men are themselves not always the best judges of their own capacity, or loss of capacity, particularly as applied to the discharge of duties as affected by declining years, and we have had instances — unfortunately not so few as to be deemed rare — of attempted discharge of duty outliving real capacity.

The Court of Appeals, of which Judge Andrews became a member, was created pursuant to special constitutional provision. It will be remembered that, to insure minority representation in the court, no elector could vote for more than four associate judges, although six were to be elected. The election was a special one held for the purpose, in May, 1870. An unusually small vote was cast. Candidates Folger and Andrews were the highest among their colleagues; they were elected by a slightly prevailing number of votes over their co-candidates; neither had had any experience on the bench, and the new Court of Appeals was organized July 1st, 1870, at Albany, composed of Chief Judge Sanford E. Church and Associates William F. Allen, Rufus W. Peckham, Martin Grover, Charles J. Folger, Charles A. Rapallo and Charles Andrews. They are placed in this order in the official list of the judges of the court, as printed in Volume XLIII of the New York Reports. Into this tribunal, in which there were three veterans of

the Supreme Court, a trio of intellectual giants — Peckham, Allen and Grover — this new material was introduced. Judge Andrews was the youngest man. The work before the court was great, and while the Commission of Appeals disposed of the business up to that time accumulated, the court soon found itself engaged in constant work in endeavoring, without success, to keep up with its calendar. This incessant work, while perhaps irksome, had the natural effect to bring the minds of



RUFUS W. PECKHAM, SR.

the judges together, and out of this close and constant mental contact there came, in the course of time, a unification, a full and harmonious development of the very soul of the tribunal — if I may be permitted to so use the term — which, while intangible, is nevertheless a living, potent force in all such bodies of men.

The career of Judge Andrews at the bar and as a member of the Court of Appeals is an interesting one. Born in New York Mills, Whitestown, Oneida county, May 27, 1827, he received his preliminary education in the common schools and at Cazenovia Seminary. Immediately following his admission to the bar, in 1849, he began the practice of his chosen profession in the young and growing city of Syracuse. The youthful attorney soon gained an enviable position at the bar of Central New York, and the fact that before his elevation to the bench, in 1870, he had occupied, and most acceptably discharged, the duties of such offices as district attorney, mayor of Syracuse and delegate-at-large to the State Constitutional Convention of 1868, is sufficient evidence of the prominence he had attained before assuming his judicial duties. In all these capacities he won high reputation for ability, fidelity and integrity.

Chief Judge Folger, succeeding Chief Judge Church, deceased, resigned in 1881, and Judge Andrews was appointed chief until the next election, pursuant to the Constitution. The occasion



**CHIEF JUDGE CHARLES ANDREWS.**



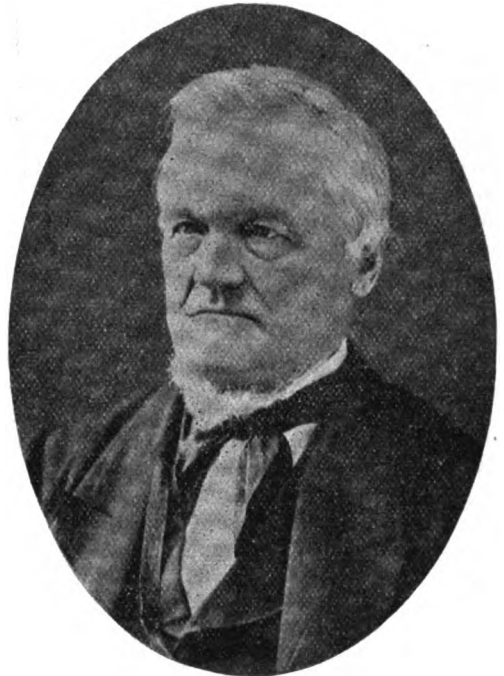
of the election in 1882 of a chief judge offered an opportunity for a tribute to Judge Andrews' judicial standing, and at the same time constitutes an event to be fairly taken as a popular expression in favor of electing the chief from among the judges, as against the selection of a non-member of the court. The Democratic nominee was William C. Ruger. This was the year of a gubernatorial election, and it will be remembered as the year of the candidacy of Grover Cleveland against Judge Folger. It turned out to be a "land-slide;" but it is worthy of note that, while the Democratic pluralities for governor and lieutenant-governor were over 190,000, the plurality against Judge Andrews was about 73,000, upon about the same total vote and the same number of candidates. He resumed his place as an associate judge. In 1884 the terms of the only surviving original members of the court—Rapallo and Andrews—being about to expire, each was nominated by both parties and unanimously elected. This fact may well be said to be an argument in favor of the elective judicial system, and illustrates as well that the people can be relied upon, in emergencies, to act in accordance with the "eternal fitness of things."

The death of Judge Rapallo, in 1888, left Judge Andrews the sole survivor of this original court. When Chief Judge Ruger died, in January, 1892, the question was presented as to who should be his successor. There are many who believe that, as to the chief judgeship of the Court of Appeals, the provision of the Constitution of 1846 might well have been retained. This provided that the judge elected to the court having the shortest time to serve should act as chief—as a sort of elder, like in the council of elders spoken of in the Old Testament, of which it was said that "one acted as head, though only the first among equals."

The nomination for chief judge was in the hands of the respective State committees, no State conventions being called that year (1892). After considerable discussion, and under somewhat peculiar circumstances, Judge Andrews was finally nominated by the Republican State committee and endorsed by the Democratic State committee. It was understood that the suggested Democratic nominee for the chief judgeship (Judge Peckham) would not accept the Democratic nomination except in the event of Judge Andrews not being nominated by the Republicans. He was thus nominated by both parties and thus unanimously elected chief judge, although the State was carried by the Democrats by a considerable majority. This action again may well be regarded as strikingly commendatory of the elective judicial system, and Judge Andrews, the senior judge, became the permanent chief judge of the court.

The volumes of the reports of the Court of Appeals of the State of New York, from Volume I to CLIV, inclusive, represent the work of the court of last resort in this State for a half-century. The

difference in the class of cases, as well as the questions presented, is readily seen in these volumes carrying reports of them. The difference, observable from a casual examination, tells the story of the development of the commonwealth and its interests, and the application of the rules of law to the changed and progressed condition of human affairs. So also of the volume or quantity of the work discharged by the judges. Volume I, New York Reports, covers the work of over a year—from September, 1847, to and partially including December, 1848. Since Volume XLIII, which begins the work of the new Court of Appeals, to



MARTIN GROVER.

which we have been alluding, up to Volume CLIV, the average number of volumes has been between three and four each year (there being five volumes of the Commission of Appeals and ten of the Second Division). While it may be true that the work of the court may be equally well dispatched with a less number of, or shorter, opinions, nevertheless the facts referred to demonstrate that about four volumes are now required to carry the work of but one originally.

The duties discharged by the Court of Appeals since 1870—which is practically the court of last resort of this generation—are of the gravest character. The strength and vigor of the court has been everywhere recognized, and from the time of its organization there has been a general feeling that the State of New York has been most fortunately equipped as to its highest court. It is true that Judge Andrews is but one member of the

court, with but one voice and with but one vote, and is entitled to but his proportion of the credit which is due to the court as a whole. While his talents and qualifications as a judge are recognized, it is doubtless true that in his career as chief judge he has won the deepest regard and affection of the public. Judge Andrews' opinions—than which no man could have a greater or more lasting monument—are models of judicial logic, clear, well-reasoned, sound and able. There can be no higher testimonial to his ability than the unstinted praise uniformly given by his associates, both past and present. They testify, publicly and privately, to his soundness as a lawyer—to his great value in the work of the tribunal, as well in consultation as in open court—and this great praise but verifies his public record written in his opinions.

In a republic, especially, it seems more necessary that public officers shall so act as to inspire respect for its institutions. It is safe to say that the functions of a court of justice are not wholly discharged even if the cases be regarded as correctly decided. The high respect which the Court of Appeals of this State has won for itself has been, in no small degree, the result of its patience and courtesy at hearings. The credit for much the larger share of this part of the glory of the court of right belongs to the chief judge. It has been well said that "the virtue of justice consists in moderation as regulated by wisdom." The disposition and dispatch of the business part of the court is largely within the control of the chief judge. While, at times, it might appear to impatient associates—or to an impatient lawyer waiting for the next case—that some of the arguments might be profitably shortened, it is certain that business could not be better disposed of than by the graceful *presidium* of this chief judge. Out of the turmoil and bustle of trial terms, and the more or less haste at General Term and Appellate Divisions, the lawyer feels that in this forum he has reached an atmosphere of calm and dignified patience, where he is sure to be fully heard. It may be stated as a truth that, quite as much as to the litigants, it is of the highest importance to the public that arguments should be patiently listened to, so that it becomes almost a part of the substantial duty of the court.

Lord Chief Justice Coleridge, while in this country, cited an instance occurring upon an argument which was not likely to take place in our Court of Appeals. He spoke in answer to an interrogatory as to whether English judges often interrupted arguments of counsel as the result of impatience. He gave an instance which he had witnessed at an Appellate Term in England. A member of the bar was arguing at what the presiding judge thought was undue length, when suddenly the judge said to the lawyer, "Mr. —, is your client in court?" to which the barrister replied:

"He is not, your lordship." "Then don't you think you had better sit down?" came the crushing rejoinder from the judge. Such an exhibition would be quite impossible before Judge Andrews. While with firmness and dignity the arguments are continued, still counsel are not infrequently reminded of the limitations as to time, or as to the sufficiency of presentation of certain points, and the interruptions, it may be added, are always graciously done. The extent to which this method of guiding the arguments of cases contributes to the confidence and respect in which the court is held is scarcely to be overestimated. This atmosphere which has been generated, as it were, by the court, is so much part and parcel of it, and has so long prevailed, that it may be safely regarded as permanent and of its chiefest glories.

Judge Andrews is, so to say, an alumnus of the court—from the freshman in 1870 he has graduated with its highest honors. He grew and matured upon the bench, and while if he had not chosen a judicial career he would certainly have been prominent at the bar, as a judge he has become distinguished. He ripened in the field he had chosen. He has honored the exalted station which he has occupied. His retirement comes pursuant to the organic law, but as matter of regret, because in its present application it reaches one whose ability to continue the discharge of his onerous duties is still at its very highest, and one who is readily able to devote many additional years of service to the State. Judge Andrews' well-preserved condition serves to call attention to a change in the law which has been mooted, and it is possible that the writing of Judge Andrews' judicial obituary should be deferred. There have been a number of instances of enforced retirement of judges from this bench while they are still capacitated for the highest service. Judges Danforth, Earl and Finch are all capable of continued work, and of giving the State the benefit of their experience and ripened learning.

It has been suggested that provision be made by amendment of the Constitution whereby the services of retired judges of the Court of Appeals may be secured to it from time to time. This would insure to the State the services of most valued and experienced judges, who are now disqualified. Of the great help of such a provision it is needless to speak. It would be a decided improvement upon the Federal system, which authorizes, but does not compel, retirement, and under which we have had examples of continuance in judicial duties beyond the real serviceable period. This plan would give to the State the advantage of selecting those judges whose faculties would enable them to be of service; it would give to the State—probably through its chief executive—rather than to the judge, the prerogative of determining continuing fitness. This designation would probably be predi-

cated upon the request of the court for relief, and probably for a fixed period. While it would require several years to perfect the change, it is at least consoling to think that it is within the possibilities that we may again see in the discharge of

their duties Judges Andrews, Earl, Danforth and Finch. However this may be, the name of Charles Andrews is indelibly impressed upon the judicial records of this State as an eminent jurist and a model chief judge of its Court of Appeals.

## PERSONAL TRIBUTES TO THE RETIRING CHIEF.

FROM CHIEF JUDGE-ELECT ALTON  
B. PARKER.

*Editor Albany Law Journal:*

The retirement of Chief Judge Andrews, while in the fullness of his mental and physical powers, occasions universal regret. Twenty-seven years of conscientious and painstaking investigation of legal controversies, embracing, as it necessarily has, substantially every case of importance which has arisen during that period, has made his keen, well-poised mind a plethoric legal store-house, which his associates and the people of the State ought to be permitted to draw from, and could but for the age limit in the Constitution. The loss which the State has sustained by the retirement of Judges Danforth, Earl and Finch, and now Chief Judge Andrews, from the Court of Appeals, indicates that it would be the part of wisdom to so amend the Constitution as to permit the governor to assign judges of that court to serve therein after reaching seventy.

The judiciary, the bar and the people of the State have ever been proud of the first judges of the Court of Appeals, under its present reorganization. Judge Andrews was the youngest member, and without the advantage of long judicial experience which some of his associates possessed, but he was a well-equipped lawyer, and, being animated with a desire to render to the State the best service of which he was capable, he rapidly laid the foundation for a great career of judicial usefulness — a career which, tested by all of the elements which go to make up a truly great judge, is unexcelled by that of any of his many distinguished associates. Public recognition of this fact was given in a most striking manner when, in 1892, the Democratic party, in the face of an opportunity to elect a chief judge of its own political faith, refused to take advantage of it, and, instead, united with the Republican party in making unanimous his election as chief judge of the court of which he had been an associate for so many years. It is safe to assume that the patriotic leaders in the movement to rise above mere party politics in his selection as chief judge have never ceased to be proud of their work, for it is known of all men that he has made an ideal chief. In the years to come he will have successors who will put forth every effort to attain to the high standard of excellence which his incumbency of the office has established; but many will fail to reach it, while not one will surpass it.

The effort will be made, however, and thus it will happen that his example will continue to be a source of inspiration to others, resulting at least in a greater measure of usefulness on their part.

The extent of the debt of the people to Chief Judge Andrews can no more be measured than can their affection for him, but that the obligation is great, and the depth of the affection of the people unsurpassed by that entertained for any other public servant, is beyond question.

His ambition, therefore, has been fully realized, and all rejoice that it is so.

*Alton B. Parker*

MONTICELLO, N. Y., Dec. 7th, 1897.

FROM JUSTICE RUFUS W. PECKHAM.

SUPREME COURT OF THE UNITED STATES,  
WASHINGTON, D. C.,

November 10, 1897.

*Editor Albany Law Journal:*

I have just received your letter informing me of your intention to make the ALBANY LAW JOURNAL of December 15th a Court of Appeals souvenir edition, the leading feature of which is to be "a fitting recognition of the long and distinguished service of the retiring Chief Judge" of that tribunal. Your idea is a most happy one, and I am greatly pleased to have an opportunity of adding my own tribute of esteem and affection for the man and the judge.

I knew him before his first election as an Associate Judge of the Court. At that time he had achieved a position among the foremost of the younger lawyers of the State. The firm in which he was a partner was among the leading law firms of the country, and each of its members occupied an honored place in the ranks of our profession. Judge Andrews came upon the bench fresh from a practice second to none in western New York.



I know the doubt was suggested at the time whether he would not bring with him the nature of the advocate rather than the absolute impartiality of the judge. That doubt was very soon completely dispelled. His fairness, his impartiality, his readiness to listen, his utter freedom from conceit, and his untiring industry, added to the great ability which he displayed in forming those written judgments of the court of which he was the organ, not only very soon dispelled the doubt, but gave to the profession conclusive evidence that he added strength to the bench and that he was worthily occupying a seat in the judicial tribunal of last resort in our great State. Now, after more than twenty-seven years of most laborious service, at a time when he is as fully equipped as he ever was to continue his honorable and admirable judicial service, he retires to private life with the esteem and affection of the profession and of the people of the State whom he has served so faithfully and so well.

I had the honor for nine years of occupying a seat upon the bench with Judge Andrews, and I can truly say that my respect and admiration for him grew with each passing year. The last three of those years he was our honored and beloved chief, and during the whole time there was never a flaw in or anything to mar the brightness of his record.

The Court of Appeals has always been somewhat famed for its capacity to listen, and I think that the habit has been owing as much to the influence of the chief as to any other cause. Sometimes the newer members of the court would feel a little restive under what seemed to them unnecessarily prolonged argument over some plain matter, but the influence of Judge Andrews was always used in favor of respectful and constant attention to counsel, for he said it was better to listen even if it seemed too long than not to listen long enough, and in the end I think he was right. But to know Judge Andrews thoroughly it was necessary to be with him in the consultation room. There he stated his views, never at great or unnecessary length, but always clearly and forcibly, and at the same time would listen to those differing from his conclusions with the most marked attention, and in the end might be won over by arguments and by the discussion which took place among all the judges. The absolute and perfect fairness of the man shone forth on these occasions, and no false pride of opinion ever prevented him from changing his mind when convinced that he had been mistaken — a great quality in any man and especially in a judge.

He is the sole survivor of the men who took their seats on the bench with him in 1870. Long may he live to enjoy the well-earned repose which he will now be able to take for the first time since his admission to the bar. He carries with him the universal and most cordial good wishes of his old

associates and of the people who have so long honored and admired him.

Most truly yours,



FROM JUDGE FRANCIS M. FINCH.

*Editor Albany Law Journal:*

I am glad that you devote one number of your Law Journal to the judicial career of Judge Andrews, whose retirement is so close at hand. It is hardly possible to overestimate the service which he has rendered to the profession and to the State. Through a long drift of the years, from the moment when the court of last resort was reorganized and assumed its present form, above and outside of the ebb and flow of political changes, thoughtful only of what was just and true and right, he has remained steadily at his post, faithful, untiring and marvelously accurate and wise.

Very few of the people of the State at all appreciate the hard and exhausting labor which falls upon a judge of the court of last resort. No seven men can anywhere be found who are obliged to work so hard. A calendar hopelessly overloaded daily discharges its cases upon them, often complicated and difficult, many times vastly important and involving questions upon which the safety and prosperity of the people largely depend. Four hours a day for a term of a month the arguments proceed. It looks easy to listen; it is easy when one hears only the words but to listen and understand, to follow close and vigorous reasoning, to judge of it accurately and soundly, to see and detect a fallacy which deceives even its author, to seize and appreciate the real truth and justice underlying the controversy, that is the hardest of hard work and puts an exhausting strain upon brain and nerves. And then the case and the arguments are to be patiently studied, the authorities examined with a careful and thorough discrimination, and at the consultation table all thoughts to be concentrated upon the case and the just and accurate conclusion to be reached. Finally the opinion is to be prepared. Every word that flows from the pen must be scanned and weighed, for it is to bear the criticism of ten thousand trained eyes of an astute and intelligent bar, and serve as guide and precedent and authority through the years to come. Small wonder that few constitutions are strong enough to bear the toil, and that scarcely one escapes the collapse

of over-work. We talk sympathetically, as we should, about the toil of "laboring men" whose muscles only grow tired, but overlook almost utterly the workers of the bench whose labor exhausts the very fountain of life.

I marvel that Judge Andrews has borne the strain so long and ended it so well. From 1870 down to the last hours of the present year—a period of twenty-seven years—he has borne the burden and faithfully performed every duty. From volume 43 of the reports to volume 153 his opinions wind along in a clear and quiet stream, but growing stronger and clearer as they flow. Every branch of the law came under his vigilant eye, and no doctrine has escaped his study. Almost invariably his habit was to trace it back to its origin and learn its history and development and ascertain and weigh the reasons upon which it was founded. He loved to barricade himself with books and patiently and surely to master their lessons. The obvious characteristic of his opinions is thoroughness. They always exhaust the subject and leave nothing more to be said, while underneath all of them runs a current of absolute impartiality and love of what is just and right which dominates the argument and is sure to pervade the result.

But while I speak of him as judge I must not omit to add a word about him as a man and as a friend. I shall never forget the kindness and courtesy with which he steadied my steps when I came into the court, awed and dazed by the work before me. It was easy to respect him but impossible not to love him; and he radiated over us all an atmosphere of thoughtful kindness which made us not merely associates but warm and faithful friends.

And now he becomes one of the four veterans of the court, stranded on the bar of threescore and ten and waiting for the tide to float us off into the unknown sea. I wish for him a close of life serene and peaceful to the end.



CORNELL UNIVERSITY,  
ITHACA, N. Y., Nov. 20, 1897.

FROM JUDGE ROBERT EARL.

*Editor Albany Law Journal:*

The retirement of Chief Judge Andrews from the bench is an event of more than ordinary interest in the judicial annals of this State. He was the youngest man, with a single exception, ever

elected to the Court of Appeals since its first organization under the Constitution of 1846; and he has served a longer time in the court than any other judge—continuously since July 1, 1870. Previous to his election he had had no judicial experience, but he had served as district attorney of his county, as mayor of his city, and as a member of the Constitutional Convention of 1867. In these offices and in his large law practice he had acquired a familiarity with affairs and business methods, a knowledge of men and a capacity to deal with public questions and legal problems which, with his learning and talents, pre-eminently fitted him for the high judicial career which was before him.

At his first election in May, 1870, his party was largely in a minority, but he was elected as one of the minority candidates, he and Judge Folger having received more votes than any of the other candidates on the same ticket. When his term was about to expire, in 1884, his services had been so acceptable that he, with Judge Rapallo, was nominated for re-election by both political parties; and he was elected without substantial opposition. In 1892 he was nominated by both political parties for the office of chief judge and again unanimously elected, although his party was, as in 1884, in a minority.

My acquaintance with Judge Andrews commenced in 1851 when each of us, in the fall of that year, went to the general term at Watertown to argue his first case, both of us being then unmarried. In less than nineteen years thereafter we had both been elected to the Court of Appeals where we served together for nearly twenty-five years. During that time I worked side by side with him, and thus became familiar with his work; and it is my opinion that he has not been surpassed as a judge in all branches of the law by any of his predecessors or contemporaries upon the bench in this State. His opinions are distinguished by learning, lucidity, breadth and precision as well as grace of diction; and many of them will remain as landmarks of the law so long as judicial precedents are cited to guide the courts of our country to just and orderly conclusions. The departure of such a judge from the judiciary of the State, in the full possession of his mental and physical powers, with all his accumulated learning and experience, at a time when the people are so frequently exposed to crude experiments in legislation and rash assaults upon liberty and property, is a real public misfortune.

It would be an agreeable task, awakening pleasant memories, for me to call attention to many of his opinions read in my presence; but the space allotted to me on this occasion will confine me to two:—*Bertholf v. O'Reilly*, 74 N. Y. 509, and *The People v. Budd*, 117 N. Y. 1. These cases furnish fine illustrations of his power to grapple with great social problems and difficult constitutional

questions. In the first case, the Civil Damage Act of this State, the constitutionality of which had been challenged, came under consideration and was held valid. In that opinion, speaking of the constitutional protection of "Life, Liberty and Property," in words that could not be more apt and which will often be quoted as forcible statements of the law, he said: "The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without interference therewith or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful vocation for the support of life; the right of property, the right to acquire, possess and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State." In the second case, the act of this State (Chap. 581 of the Laws of 1888) regulating the charges of elevators for elevating grain was under consideration; and in an opinion concurred in by a majority of the court, he held the act to be constitutional. It is probable that the last word has not yet been said by the jurists of our country upon such questions as were involved in that case. Yet, however any one may differ from his views, no one will deny the force, learning and power of his opinion; and I believe his discriminating analysis of the prior decisions, and his views of constitutional law and public policy now have general judicial approval.

I will not speak specially of Judge Andrews' qualities as a citizen, associate and friend. My own warm friendship for him after many long years of most intimate association tells more forcibly than written or spoken words my high appreciation of his characteristics as a man. I am sure the best wishes of all who have been his judicial associates and of his numerous other friends will follow him in his retirement from the bench with the hope that his remaining years may be as full of contentment and happiness as his past have been of usefulness and honor.

*Robert E. Earl*

HERKIMER, N. Y., Nov. 20, 1897.

FROM JUDGE GEORGE F. DANFORTH.

*Editor Albany Law Journal:*

I have your letter of the 8th inst. I should be happy to oblige you in most ways, but in the re-

spect you refer to I cannot. Every word I wrote in just commendation of the retiring chief judge — of his ability to fill acceptably that high position — of his past performances and his present competency for equal effort, would seem in derogation of the enactment which compels his retirement at a time when the profession and the public can ill bear the loss. To do this would impeach its wisdom and benevolence and perhaps be regarded as in subversion of the law. I beg you, therefore, to have me excused.

Sincerely yours,

*George F. Danforth.*

ROCHESTER, N. Y., Nov. 20, 1897.

FROM HON. JAMES C. CARTER.

*Editor Albany Law Journal:*

You ask from me an expression of my estimate of the judicial qualities of Chief Judge Andrews, to be published on the occasion of his final retirement from the bench.

I do not like, in general, the paying of tributes to living men, especially living judges; but it is, perhaps, not inappropriate in the case of a judge who has closed, or is about closing, his career.

The qualities which have given Chief Judge Andrews a judicial character so universally admired are not the possession in a remarkable degree of any single faculty, stamping him as a genius in the law, but the possession, in harmonious unison, of a great variety of traits, some intellectual and others moral, a union without which no judge has ever become really great.

Among these I should name large natural gifts and the ambition to develop them; an early severe intellectual discipline acquired by general studies and general intellectual exercise; an early mastery of the general and most important principles of the law, which, with subsequent persistent study, had furnished him before he came to the bench with a large and varied learning; an entire intellectual candor, insuring a full and fair consideration of any argument addressed to him; perfect mental and moral integrity, a just appreciation of the greatness and solemnity of the judicial function, and the courage and resolution necessary to the discharge of it.

Many good judges have been made so by the learning and experience acquired after their elevation. But Judge Andrews brought the above equipment with him and was an excellent judge at the start. How admirably he has made ex-

perience contribute to his original merits I need not say. The whole bar of the State knows it well.

If I were to select what, to me, seems the particular in which he most excels I should begin by pointing out that the law exists for society, not society for the law; and that as society changes and advances particular rules must, from time to time, be re-shaped and precedents be carried further or departed from, in order that the law may fully perform its just and full service. This, so far as the unwritten law is concerned, is the work of the judge, and the successful execution of it his finest accomplishment.

It is here that the merit—we may properly call it the greatness—of Judge Andrews has been conspicuous. His great mastery of the reasons upon which the law is founded, and his vast experience have enabled him to perceive and appreciate the almost insensible changes and progress which are constantly going on in the modes of business, customs of life and the moral standards of men, which really make the law; to catch them at the right point and give them life and efficacy by adapting the law to them. This is a most valuable and necessary work, but one which can be successfully performed only by the class of greater judges, among whom Chief Judge Andrews will always stand enrolled.

*James C. Carter*

NEW YORK, Dec. 2, 1897.

FROM JUDGE EDWARD PATTERSON.

*Editor Albany Law Journal:*

The approaching retirement of the present chief of the judicial establishment of the State is a cause of deep regret to all connected with the administration of the law. For more than a quarter of a century Judge Andrews has occupied a prominent place in the court over which he now presides, and in which he has so discharged the onerous duties of his office as to entitle him to the high rank among American judges which is by universal consent accorded him. Entering upon his career as a judge fresh from the bar, and at an age when a practicing lawyer is still referred to by his elders as "my young friend," he was the junior member of the Court of Appeals on the organization of that tribunal, in July, 1870, and was one of the seven who made that court, as it was originally constituted, famous throughout the land. The accidental result of a popular choice of those seven men was as fortunate for the Commonwealth as could have been the wisest and most discriminating selection of an appointing power. It gave to the new court

Church, with his clear vision, vast common sense and indefatigable industry; Allen, with his wealth of learning, judicial experience and unexcelled reasoning powers; Grover, with his honest mind and rugged intellectual force; the elder Peckham, with his firmness, independence and culture; Folger, of whom but little was expected, but who quickly rose to distinction, and Rapallo, who, if not peerless, soon became and remained until his life ended, the first among peers. In daily consultation with such associates, the fine judicial qualities of Judge Andrews were developed. It was not long before his work compared favorably with theirs, and during the long period of his service there has been no decline in the excellence of that work and no departure from the high standards set and followed by that court in the earlier years of its existence.

The noticeable features of Judge Andrews' work are not peculiar to him in kind, but they are in degree. His published opinions display a full comprehension and accurate understanding of the subjects considered by him. Clearness of thought and of expression at once attract the reader, and keep the attention fixed to the end. His treatment of every question upon which he has written is ample and sufficient for the purposes of the case, without redundancy or the introduction of irrelevant matter. His reasoning is convincing, his illustrations always apt, his learning sound and abundant, but free from pedantry, and his style of a high order of literary merit, admirably adapted to juridical writing. In the multitude of topics on which he has written he excels, in my judgment, in the law of wills, of uses and trusts, evidence, criminal law and statutory construction.

It is generally very difficult to estimate the real value to the profession of a particular judge's service, while his usefulness to the public is plain; or to anticipate the judgment of coming generations of lawyers upon his work. What Hardwicke was to equity, Mansfield to the common law and Marshall to constitutional law, is known of all men. There is another class of great judges whose duties and opportunities are found only in the general administration of settled rules of law. Their expositions of it are usually matters of application, not of discovery; sometimes of the interpretation of statutes. Among such were Shaw, of Massachusetts; Bronson, of New York; Gibson, of Pennsylvania; Pierson, of North Carolina; Ryan, of Wisconsin, and others. Judge Andrews takes rank with those last named. The contemporary reputation of such men is largely due to their ability to impress upon the public mind the conviction that they speak with authority. But posterity applies to judges of the past the test of instructiveness. Have they taught anything? Have they clarified that which was obscure, reconciled that which seemed to be conflicting, made new applications of old principles, or re-stated

that which was known, in plain and more serviceable form? Judge Andrews has done all that, and more. He has established his right of precedence, and those who come after us will recognize his title to be permanent. Meantime, we of the present will feel keenly the withdrawal from active service of such a wise, learned and able judge. He has taught us much, and he has done honor to the craft of which he is a distinguished ornament. He will carry with him into private life the profound respect and sincere admiration of a critical. but just, profession, and be attended by

"That which should accompany old age,  
As honor, love, obedience, troops of friends."



NEW YORK, Dec. 2, 1897.

FROM HON JOSEPH H. CHOATE.

*Editor Albany Law Journal:*

I gladly avail myself of the opportunity you have afforded me to bear witness to the great value of the judicial services of Hon. Charles Andrews to the people of the State of New York and to the honorable profession of law. For more than twenty-seven years during the entire period of the existence of the present Court of Appeals, he has rendered noble and always valuable service as a member of that court, has long survived all of his original associates, and has now for several years presided over the court as chief judge. He stands to-day as the representative of the best work of this great court and as the depository of all its judicial traditions.

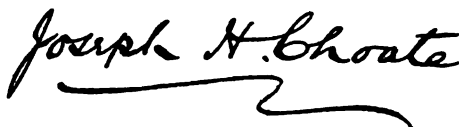
I regard it as no trifling claim to our gratitude that, at the age of forty-three, Judge Andrews being then already a conspicuous leader of the bar in Central New York, and certain of actual leadership in the whole State, was willing to sacrifice his lucrative practice and the certainty of still greater professional emoluments, for the purpose of devoting the rest of his active life to the public service in the discharge of the arduous and exalted duties pertaining to the great office to which he was then called. The people have indeed shown their appreciation of this by twice re-electing him, and retaining his services as long as the Constitution permitted. His present retirement by virtue of the Constitutional limitation while in full health and vigor of body and mind and better qualified than ever by his ripe experience for further service, is indeed a public calamity and calls strikingly to mind the case of Chancellor Kent who

was retired by the Constitution as it then stood at the age of sixty, and afterwards wrote his celebrated commentaries which were welcomed by the courts and profession of America and England as a rich contribution to our jurisprudence and are still among its best treasures. I hope that Judge Andrews will feel inspired by Kent's illustrious example to give us in some similar way the rich fruit of his great learning and experience.

No one who has not been a constant witness of the prodigious burden of labor that has been uniformly imposed upon this great court can appreciate the strain that is thrown upon its individual members and especially upon the chief judge. It has been his peculiar province to maintain the uniformity of the law of the State as administered by its highest tribunal, and as he has taken part in all of its decisions from the beginning until now, he was singularly fitted for the work, and, as the result shows, he has discharged this duty with wonderful fidelity and ability. Judge Andrews will carry with him into his well-earned retirement the affection and high esteem of the bar of the State without exception, and the grateful thanks of its people. His labors have been of the most exalted character and have been nobly performed. By the weight of his strong and generous personality he has maintained the dignity of the court, and by the sweetness of his temper and his uniform courtesy and urbanity he has won the confidence and love of all who practiced before it.

Long may he continue to enjoy the retrospect of a life nobly spent and the affectionate regard of his fellow citizens.

Yours very truly,



FROM JOHN G. MILBURN.

*Editor Albany Law Journal:*

Judge Andrews is held in such admiration and regard by the bar of the State that his retirement from the chief judgeship of the Court of Appeals is much more than a passing event. Apart from his purely personal qualities, his position and services in the court confer upon him a peculiar distinction. To the lawyers now in active practice, with few exceptions he alone has been a member of the court continuously since their first appearance before it. An association is broken when he leaves it which in that regard is unique. Besides, it is, as it were, the original court, organized in 1870, finally passing out of existence —

the severance of the last link with that body of exceptionally able men who made its first annals and laid the foundation of its great reputation. His retirement closes with honor and distinguished merit nearly twenty-eight years of judicial service—a period which has witnessed many changes in the membership of the court and a vast development of the law of the State. Originally the junior judge, it is a felicitous circumstance, considering the uncertainties and accidents of politics, that he retires as chief judge. The suffrages of the people have happily coincided with the esteem of the bar in raising him to that really great office; and bestowing upon him the greatest prize of the profession as the climax of his judicial career.

Respect and esteem do not adequately express the feeling of the bar for Judge Andrews, for it contains a personal element which gives it a depth and intimacy indistinguishable from a true and genuine affection. His fine courtesy, amenity, patience, sincerity and consideration for others have endeared him to us all. A gentleman by instinct, the bluntness and irritability which are not infrequently assumed to be the true judicial manner could only be repulsive to him. Subjected as every judge is to trials of temper, they never betrayed him into anything resembling harshness or an oppressive bearing. Through all the years he was uniformly urbane and considerate, and it seemed as if a personal tie insensibly formed itself between him and the members of the bar. The impression of him that will always remain in our minds is that of a most engaging and attractive personality. We shall remember him as embodying strength and firmness under perfect control, dignity free from any trace of formality or self-consciousness, courtesy humanized by kindness and tact, and as approaching the ideal of the perfect judge as nearly as it may be attained in an imperfect world. Add to these qualities a presence truly and exactly expressing the spirit within, and the secret of his charm and his hold upon us all reveals itself.

If I were asked what I consider his leading characteristics as a judge, I should say his penetrating insight, breadth of mind and strong sense of justice. By insight I mean the faculty of swift and sure penetration to the vital point of a case, no matter how encumbered by art or accident with confusing miscellanea; and by breadth of mind I mean the faculty of far sight in relating the final elements of a case to the widest generalizations of jurisprudence and the ends and purposes for which legal rules exist. Those are certainly mental gifts of a high order in judicial work, and he possesses them in a marked degree. In the argument of a serious case, one could almost feel his mind drawing at once right into the heart of the subject. The pertinent question put now and then never failed to show that it was the main question he had

reached, and upon which his thoughts were concentrated. The clear and forcible presentation of a case is made comparatively easy by some judges and impossible by others. The attitude of Judge Andrews was always one of inspiration and stimulus, and his habit of incisive attention irresistibly drew out the best powers of the advocate sensitive to such influences.

It is unnecessary to more than mention that love of truth and justice which shines through all his acts and deeds as a judge. It was a test which each case, so far as he was concerned, had to meet. Though every inch a lawyer, he regarded legal rules and principles as designed to work out justice along liberal and enlightened lines, rather than to thwart it by too close an adherence to tradition. Precedent had its legitimate force with him, but he did not allow it to restrict the natural and necessary processes of legal evolution. His aim was to administer the law not merely to preserve the integrity of a technical system, but as a body of rules regulating human affairs, and which, to be efficient, must be adapted to the ever-changing needs and conditions of a progressive civilization. These seem to me to be the mental traits and tendencies reflected in the judicial life and opinions of Judge Andrews.

I am deeply sensible of how fragmentary what I have written is, but it is offered as a tribute of personal regard and not as a studied estimate.

*John G. Milburn*

BUFFALO, N. Y., Dec. 6, 1897.

JOHN C. SPENCER AND NICHOLAS HILL.  
INCIDENTS IN THE OLD COURT OF APPEALS.

By L. B. PROCTOR.

THERE are many well versed in the legal history of the State of New York who believe that John C. Spencer and Nicholas Hill are the foremost characters in that history. To a very large extent this belief is well founded. Both possessed intellectual powers of the highest order, profound learning, an active, restless mind, capable of immense labor, discriminating judgment, singular patience and perseverance, subtle powers of analysis and synthesis, and a happy faculty of concentrating their reasoning to focal points. At the bar their apparently deep self-convictions, emphatic, well-balanced earnestness of manner, the corresponding simplicity and eloquence of their style, the close and logical connection of their thoughts and the easy gradation with which they passed from their exordiums to the perorations of their arguments rendered them the most accom-

plished forensic orators of their times. They impressed on the minds of judges and jurors their thoughts and their arguments with such force that they remained permanently in their memories. As was said of Chatham's speeches, "there was no mannerism about them, no appearance of effort, no straining after effect. Nothing could be more easy, varied and natural, and yet they had the infallible mark of genius; they caused all who heard them to feel that, if placed in like circumstances, they would have said, if they could, exactly the same things in the same manner."

Both Hill and Spencer had little imagination, and their minds exhibited the polish, and in some degree the coldness, of Parian marble; their arguments proceeded with almost geometrical precision, and yet they were rendered singularly attractive by the elegance of their diction. Here the analogy between these eminent jurists ends, for the ambition of Spencer was divided between the contests of the political arena and the forum. Hill had no political ambition, and official distinction was abhorrent to him.

Spencer's political ambition led him, in certain periods of his life, to subordinate the love of his profession to the desire for political ascendancy; but, unlike most lawyers who divide their ambition and energies, he was exceedingly successful in both spheres of action. He rendered his political career eminently fortunate by an insatiable activity of mind, knowledge of the widest scope, an aptitude for public affairs, inherited, indulged from youth and disciplined through manhood. This made him so conscious of his fitness for public station that his thoughts were closed to other considerations. He had the self-possessed gravity of Calhoun, with more suavity of manner. Like Calhoun, he was capable, indomitable; he was nearly as deficient in the plastic and congenial qualities that attract followers to party leaders as was the great southerner. The versatile success that made the careers of Spencer and Calhoun was not the result of flexibility of purpose or vacillation of opinion, but of ambition, wielding intellectual strength as a weapon, and opening for itself a successful sphere wherever it chose.

As a son of Ambrose Spencer, who was an illustrious jurist, appropriately styled the Marshall of the northern bar, and a statesman of commanding influence, John C. Spencer was early brought into the presence and society of Jay, Clinton, Burr, Tompkins and other great men, whose vigorous and comprehensive minds and patriotism adapted them to that critical period in the history of the nation which succeeded the adoption of the first State Constitution.

Spencer's first knowledge of politics was derived from witnessing in his early youth the vindictive party contests between Hamilton and Burr, and he saw how causes were tried by those great legal

champions. As a cabinet minister in two great executive administrations, as a member of the senate of the State of New York during the most turbulent period of its history, as a representative in congress at an equally turbulent period in the history of that body, he was a most powerful champion in successfully sustaining De Witt Clinton. Indeed, without John C. Spencer's powerful aid De Witt Clinton would have been compelled to succumb to the mighty influence that was brought to overwhelm him. In his championship of Clinton he was sustained largely by his father, Ambrose Spencer, who possessed abilities that would have rendered him powerful at the court of Louis XI, and that would have elevated him to a high position in any age. The elder Spencer was a brother-in-law of Clinton, with whom he coincided or differed as ambition or policy dictated. But his policy was usually accessory to the political advancement of Clinton.

On December 1, 1817, Mr. Clinton took his seat in congress, and he at once was recognized as one of the leading spirits in that body. Matters connected with the United States Bank had drawn the attention of congress to it, its financial affairs and their influence on the monetary condition of the nation. Henry Clay was speaker. So violent was the sentiment against the bank that a commission was appointed to investigate fully its affairs and report thereon. In recognition of his abilities, Mr. Clay appointed Spencer second on that commission. Perhaps no man on it was more thoroughly adapted to its duties than he. He brought to his work the most unflagging industry and the most critical examination of all the affairs of the bank, with the most penetrating powers of investigation. The work of the committee was long and thorough. To Mr. Spencer was committed the duty of preparing the report of the commission, which exhibited unequalled research. It sustained the opponents of the bank, showing the institution to be corrupt and dangerous. The real contest over the charter of the bank took place in 1816, and the commission to which we have referred was appointed to limit, by legislative action, the power and influence of the bank by exhibiting to the people its alleged corruptions. Mr. Spencer's report created profound attention throughout the Union; but the friends of the bank had sufficient power in congress to sustain the institution against this attack. This report, or portions of it, was destined to act an important part in the war waged against the bank at a later period in the history of the nation. Readers of Jackson's famous veto message and John C. Spencer's almost equally famous report against the bank will discover in these documents a strong similitude in reasoning and even in diction, so plain that Mr. Spencer's reasoning against the bank appears in the strongest light. But at the time of Jackson's contest





THE COURT OF APPEALS IN 1878.



against the bank the vicissitudes of politics and events had changed Spencer from an opponent of the bank to one of its strongest champions, and he was often confronted by his political enemies with his own powerful arguments against that institution. There is before us a leading Democratic journal of that day, in which there is an article headed, "*John C. Spencer's Artillery Against the Bank Turned Against Himself.*" He frequently said at a later period of his life that he met defeat as a champion against the bank and as a champion for it.

The Revised Statutes of the State of New York are his great and enduring monument. These statutes, notwithstanding the changes that have been made by codification, amendments and repealing acts of the legislature, are still indispensable to the practicing lawyer, the judiciary and the capable legislator. They reveal the masterly ability of each of Spencer's associate revisers. We have in them the evidence of the erudition and art of Butler, the indubitable evidence of the scholastic mind, knowledge of law and lucid intellect of Duer, whose learning was rendered practical at the bar and on the bench by daily observation of our system of jurisprudence. But on every page of that great work we trace the power of Spencer's gigantic pen and that wonderful, energetic wisdom which gave him the mastery in all his intellectual exertions.

Nicholas Hill concentrated all his mental powers, all his learning and all his ambition on his profession. He regarded politics, in detail and practice, at war with the practice of law, and a system whose motive power is petty ambition, lubricated by intrigue, deceit and mendacity, which, by a strange metamorphosis, often changes pigmies, for a time, into giants. He never attempted to turn to his advantage, professionally or otherwise, public measures which happened for the moment to attract popular attention; nor did he "fish with ever freshly baited hook in the turbid waters of ephemeral popularity."

Hill's love of and devotion to his profession gave him a mastery at the bar which few lawyers attain. He observed and scanned every principle of written and unwritten law, constitutional and statute law; he compared conflicting and analogous precedents with the acumen of the school-men. In his capacity for intellectual labor he resembled Lord Brougham, of whom it was said:

"He was not one, but legions. At 3 in the morning he would make a reply in parliament of most telling effect; at half-past 9 he would be found in his place in the court-room, working out a case in which a bill of five pounds was disputed, with all the plodding care of the most laborious junior. This multiplicity of avocation and division of talent suited the temper of his constitution and mind. Not only did he accomplish a greater variety of purpose than any other man,

not only did he give anxious attention to every small cause as well as to causes of vast importance, while he was fighting a great political battle and weighing the relative interests of a nation; not only did he write an article for the *Edinburgh Review* while contesting and preparing complicated arguments on Scotch appeals, by way of rest, but he did all this as if it were perfectly natural to him."

The labors of Brougham, though more sporadic than those of Hill, were not more intense or enduring. During the sessions of the Court of Appeals he was constantly in his seat at its bar from the opening to the close of the term, concerned in nearly every case on the calendar. He was often engaged in the argument of cases during the entire day. At night, after a brief rest, he would retire to his study, where he would remain until the clock told the hour of midnight. "The fires which burned on the fabric of his intellect would be as undimmed when the last page was turned, the last precedent reviewed, the last note carefully made, as those made at the beginning of his evening's work." During his vacation he would be at his office through the day, continuing his labors far into the night. Thus he prepared those voluminous and unequalled briefs, in many of which there was reference to an astounding number of cases, each thoroughly studied, classified and analyzed.

He brought the same elaboration to the preparation of his arguments at the bar that he did to his briefs, which rendered him so eminent as an orator. There is a lesson to be learned from his eloquence at the bar—the art of throwing away unnecessary ideas. A large proportion of the thoughts which rise to the mind in first considering a subject is not really essential to its clear and full development. No one ever felt this more strongly than Nicholas Hill. From his early youth he had been a profound student; he had caught the spirit of the Grecian oratory; and he knew that the first element of its power was a rigid scrutiny of the ideas to be presented and a stern rejection of every form of thought, however plausible or attractive, which was not clearly indispensable to the attainment of his object.

Nicholas Hill may well be regarded a martyr to his profession. He argued his causes in the courts with all the energy of his intellect, stimulating into corresponding action an overtaxed nervous system. These cares and anxieties followed him to the weariness of his midnight vigils and the unrest of his midnight pillow.

Mr. Hill's professional labors were not wholly confined to the forum. His pen was a busy one, a vehicle of his learning and a dispenser of his broad legal knowledge and effective eloquence. The part he took in preparing "*Cowen and Hill's Notes*" to "*Phillipps on Evidence*" evinces his



NEW YORK COURT OF APPEALS AS AT PRESENT CONSTITUTED.

erudition and wonderful industry. Mr. Phillipps' work has passed through ten editions, holding a deservedly high rank as an elementary exposition of the laws of evidence, while the notes of Cowen and Hill, elaborate and comprehensive beyond any work of the kind, have given this treatise the greatest value and widest reception.

Hill was regarded by the profession as a vital part of the Court of Appeals—an intellectual power in its system. His influence in it, though unassuming, was strong, penetrating and enduring. He attained a national reputation as a lawyer, and was the most conspicuous figure at the bar of the old Court of Appeals. Strangers visiting this court always exhibited a strong desire to see him, frequently requesting to have him pointed out to them.

In the autumn of 1857 a young lawyer from Rochester, with a friend who resided in Albany, visited the Court of Appeals, then in session. In the bar there was a large number of distinguished lawyers from all parts of the State. After looking them over for some time, the young man asked his friend if Nicholas Hill was among them.

"He is; he is always here. I sometimes think the court could not exist without his presence. I want to see if you can point him out to me from what you have read and heard of him," was the reply.

Closely scanning each face in the bar, the young lawyer at last fixed his eyes upon a man a little below the medium height, slenderly but firmly built; his eyes keen and penetrating, a high and broad forehead; a nose with Grecian form; a mouth expressive of great determination; a handsome and intellectual face, with dark hair in which the silver lines of advancing years began to appear.

Court had not yet opened, and Nicholas Hill, for he was the person we have described, was standing, conversing with James T. Brady and Charles O'Connor. It was a group that would have enchained the attention of Michael Angelo or Correggio. But to the young lawyer Mr. Hill was the object of close attention. At length he said:

"According to my ideas and conceptions, the gentleman who stands facing us, carrying his left arm in an easy but peculiar manner, is Nicholas Hill."

"You are right; that is Nicholas Hill. Look! James T. Brady and Charles O'Connor are talking with him, and Brady has said something very pleasing to Hill. See how heartily he laughs; but it is difficult to tell who laughs more heartily, O'Connor or Hill. Brady has been relating one of his delightful anecdotes. He can do that sort of thing with great effect."

The courtesy and generosity of Mr. Hill to his brethren of the bar, especially the younger members, were proverbial; he readily perceived and

liberally acknowledged whatever merit they possessed.

"I can never forget my first efforts at the bar. When I arose to address the court I used to be abashed with the thought of how much those wise judges knew, and how little I knew, and the idea that I was to instruct them in what they were to do seemed to paralyze my tongue for a moment; and, therefore, I think, when I see young men making their first efforts at the bar, that they feel something as I used to do," he often said.

The apparent haughtiness of John C. Spencer's manners detracted somewhat from his popularity. Yet, as we have seen, such was the respect the people entertained for his eminent ability as a lawyer and statesman that they disregarded this apparent haughtiness, and whenever he was before them for their suffrage, they sustained him with large majorities.

As no man ever made less parade of his intellectual endowments than John C. Spencer, there were few less disposed to tolerate learned vanity and pedantry in others than he, and he often rebuked ostentatious and empirical pretension with a caustic pen and satirical tongue.

His person was above the common height, erect and commanding. His bearing was dignified and courteous. His features were suggestive of that "insatiable activity of mind, knowledge of the widest scope and knowledge of public affairs," that rendered him an illustrious character in the history of the State and nation.

His arguments at the bar, so abundant in the earlier reports of our State and Federal courts; his speeches in congress, diplomatic and other official reports, and his contributions to the literature of his day, particularly his annotation of De Tocqueville on American Democracy, have inseparably connected themselves with the learning of the bar, the preserved treasures of literature and the erudition of American statesmanship.

It may well be said of John C. Spencer and Nicholas Hill that they were of that class of men whom Cicero describes as *Homines centennarimen*, who appear but once in a century. If the Revised Statutes of the State of New York are monuments that will forever perpetuate the fame of John C. Spencer and his great associate revisers; if Spencer's career at the bar is an ever-living evidence of his fame as a jurist; if his speeches in congress declare him an accomplished statesman, then the annals of the Federal Court, the Supreme Court and the Court of Appeals of the State of New York are ever-enduring monuments to the fame of Nicholas Hill.

---

Two of the three judges of the Philadelphia Orphans' Court hold the State Direct Inheritance Tax is unconstitutional, because there is lack of uniformity in the imposition of the same.

A  
LIVING DEAD MAN;  
OR THE  
STRANGE CASE OF MOSES SCOTT.

AN ACCURATE AND TRUTHFUL NARRATION OF THE COMPLI-  
CATIONS CAUSED BY A LITIGANT'S RETURN  
FROM THE LETHEAN SHORE.

---

COPYRIGHT, 1897.

---

BY PHIL. SKILLMAN,  
Olympia, Wash.

---

ALBANY, N. Y.:  
THE ALBANY LAW JOURNAL CO., PUBLISHERS.  
1897.

## INTRODUCTORY AND DE(A)DICATORY.

---

It is perhaps needless to say that the following sketch combines both fact and fiction. This is evident from even a cursory examination. Inasmuch, however, as I am necessarily more familiar with the facts than any reader can be, it may not be out of place for me to indicate in a general way the dividing line between the two.

Under the head of fiction the reader will readily class the records, decisions and proceedings of the several courts; in this he will be undoubtedly correct. All the other matters related or described are facts, pure and simple, of which I have personal knowledge.

It is usual, as I have often observed, not only to write an introductory, but also to dedicate the work; these are usually separately done, though for the life of me I cannot see why they may not be appropriately combined. I shall therefore disregard the usual practice, and I do now in express terms dedicate the following pages to each reader who will solemnly and deliberately declare that he got enjoyment enough out of them to pay for the perusal. As to all others — well, I am thinking seriously of going abroad for the benefit of my health, or creditors, and will ascertain how numerous the latter are before deciding when I will return.

If it helps some wearied attorney to pass away an hour or two while waiting the return of a verdict of his jury which has just retired, it will result in abundant satisfaction to the

AUTHOR.

# A LIVING DEAD MAN.

---

## CHAPTER I.

### AS YOU LIKE IT.

LIFE is said to be the greatest of mysteries. Death is also considered its key, but unfortunately, after we have obtained the key and unlocked the door, by the same act the door is locked behind us, and those left behind are none the wiser for our experience, for it is pretty generally conceded that a man must be dead at least a thousand years before any confidence is placed in any communication which he may make from the unknown world, and even then it is regarded as hearsay, and not capable of physical or ocular demonstration. Hence, it follows that the world is in a state of confusion; some asserting a proposition they cannot prove; others denying any existence after death, and equally incapable of demonstrating that fact.

From a philosopher's standpoint this subject might wholly be disregarded; but unfortunately the world does not so regard it; but, on the contrary, so far as history can inform us, it has been a subject of much controversy; innumerable books have been written *pro* and *con*; innumerable sermons have been preached; millions and billions of money have been used in building churches and tearing them down; war has been waged; lives have been sacrificed; nations created and destroyed; family ties sundered, and the world generally kept in a constant state of turmoil, when they might just as well have moved the previous question, and referred the whole subject to a committee, with instructions to report one day after death, and in the meantime the world could have taken a recess, or adjourned, and gone to playing solo, or indulged in other convention pastimes pending the report of the committee.

These things weary me, and if I were given to profanity I verily believe I should indulge in that pernicious pastime. The reason for it is this: I was alive and lived on this earth for thirty-five years; then I was dead for ten years, and now I am alive again. The

whole trouble was caused by a fellow by the name of Job, who, about 5000 or 6000 years ago, introduced a joint resolution calling for information on the subject as to whether or not "if a man die shall he live again." Before that time the convention had gone along smoothly and transacted its legitimate business, and since then it has been one continual wrangle.

Mahomet had a big lot of delegates from his ward, who voted solidly with him. The Pope brought a big outside pressure to bear on the convention, and intimidated a good many, especially of the Christians; while the Chinese got up another convention and walled the others out, or themselves in — it makes little difference which — and so it has gone on from bad to worse.

The query may naturally arise as to what all this has to do with me; simply this, that when a man is dead, or declared dead by a court of competent jurisdiction, it is almost impossible to disprove the fact and come to life again. From my experience I would not advise a dead man to attempt it unless he has a barrel of money.

It was once said of a peculiarly unfortunate individual, that it would have been money in his pocket if he had never been born; but I can reverse the rule, and aver, and prove, that it was a dead loss to me as a result of my rash attempt to come to life. Nothing but the Constitution of the United States saved me; I couldn't have succeeded in any other country. But just consider what a serious task it was. Many a live man with plenty of money has started out in search of his legal rights, commencing in the courts of original jurisdiction in the States, and ending up in the Supreme Court of the United States with his money all gone, his friends dead, his youth departed, and the only compensation which he received was a few pages of legal verbiage drooled out by a learned and sapient court, which he could not understand, and which cost money to hire a lawyer to translate.

This being the universal experience of a live man with money, just think of the disadvantage under which a dead pauper labors when *he* attempts to recover his rights, with the courts and juries flinging in his face the fact that he is defunctuary, as it were. I tell you it is a serious and discouraging matter, and no respectable dead man is going to attempt it unless better inducements are held out, and more respect shown him. I had better treatment than that when I was dead, for no one attempted to crowd me out when I drew up to the fire to warm, and I wasn't even asked to chip in to help pay for the firewood. Measured by the standard here, my

associates there would hardly be considered first class, though it is a fact that many of them did move in the first circles before they radiated, as it were. Still, even from that class I received warmer consideration than here.

And so, when I think it all over, I get indignant at the treatment I have received in trying to be alive, and I am satisfied the reader, when he learns the facts, will say, justly so.

Now, without further circumlocution, I will pass on to the actual events of my life.

## CHAPTER II.

### I AM ALIVE.

I stated before that I was alive for thirty-five years, then dead for a period of ten years, and am now alive again; and if I am not crowded too fast I will tell in subsequent pages how it all happened. But I must have time and proceed in chronological order. Any one with half sense can see that if I were to commence first with the ten years when I was dead, it would be difficult for me to convince any one of the truthfulness of my statements; for, as I remarked before, people have no confidence in the word of a dead man, or at least until he has been dead so long as to cast a natural discredit on his memory.

There was nothing unnatural or supernatural about my birth, childhood, or early manhood. I was not a seventh son, nor born under the malign or beneficent influence of any star, nor during any eclipse of the sun, nor while the moon was in limbo. Contemporaneous celestial history records no violent or mysterious movements of the heavenly bodies on my account. If there is any account of that sort against me it is clearly outlawed, and I shall claim the benefit of the statute of limitations — you hear my *tum tum*.

I came of a distinguished family, at least so far as both given and surname will indicate. The family name, Scott, was derived from Great Scott, of whom I am a lineal descendant. I need not inform the reader of the particulars of his life, nor of the associations which cluster around his name. Every household has heard his name uttered, connected with events both great and small, and I have heard strangers in foreign lands, and even those who have but a limited knowledge of the English language, invoke his name with the most intense earnestness and satisfaction.



## SNAP SHOTS AT BENCH AND BAR.

**Albany County.**

THE statement will not probably be anywhere disputed that no county in the State of New York has had a more distinguished bar than Albany. The fact that here is located the capitol of the State has unquestionably, to some extent, been influential in bringing to Albany men of eminence in the legal profession. Here the great courts of last resort have held their sittings since the adoption of the first Constitution. Here, too, the Supreme Court of the State, presided over by many of the ablest jurists of the nation, has held regular terms from 1777 down to the present time. The fact, too, that Albany has been for so long a period the seat of the law-making power has had a marked influence in bringing to the capital men of eminence in all walks of life, particularly the legal profession. It is not within the purpose or scope of the present article to enter into any extended history of the bar of Albany county. It is only to give a hurried glance—a bird's-eye view. Scanning the long list of distinguished men whose names have been enrolled upon the bar of Albany county, one comes across such as Robert Yates, John Lansing, Abraham Van Vechten, Martin Van Buren, Benjamin F. Butler, Rufus W. Peckham, Greene C. Bronson, Marcus T. Reynolds, Samuel Stevens, John C. Spencer, James Edwards, Azor Tabor, Amos Dean, Henry G. Wheaton, Nicholas Hill, Peter Cagger, Ira Harris, Lewis Benedict, Gen. Samuel Stevens, Matthew Hale, Samuel Hand, and many others who have long since passed to their reward. That the rich traditions and magnificent history of the Albany county bar are to be fully maintained is sufficiently evidenced by the records and achievements of the men now composing it, of some of whom brief sketches and portraits are herewith presented:

**THOMAS J. VAN ALSTYNE.**

Thomas J. Van Alstyne has long been known as one of the prominent members of the bar of Albany, and as one of its most influential and respected citizens. Mr. Van Alstyne is a lineal descendant on both branches of his family, from some of the earliest settlers of the country—paternally from John Martin Van Alstyne, who was a freeholder in Fort Orange as early as 1657—and maternally from Samuel Gile, a freeman and freeholder in Haverhill, Mass., early in 1640. Two of his great grandfathers rendered services in the council and in the field during the Revolutionary war.

Judge Van Alstyne was born in Richmondville, N. Y., July 25, 1827. After attending the village school he became a student at Hartwick Seminary,

and entered Hamilton College, from which he was graduated in 1848, receiving from that institution on graduation the degree of Bachelor of Arts, and afterwards, in 1850, that of Master of Arts.

During his stay at Hamilton College he also took a private and thorough course of instruction in the law under the preceptorship of Prof. Theodore W. Dwight.

After graduation, Mr. Van Alstyne, in 1848, entered the law office of Messrs. Harris & Van Vorst, of Albany, as a student, and before the close of the year was admitted to practice in the courts of the State, but retained his desk in the office of the above firm until sometime in 1850, when he "opened office for himself." In 1853 he formed a partnership with the late Matthew McMahon, which continued for about four years. In the spring of 1858, the present law firm of Van Alstyne & Hevenor was formed and has continued



to the present time. The practice of the firm has been large and varied, embracing many large and important cases.

In politics Judge Van Alstyne has always been a firm and consistent Democrat; and, although never having been a seeker after office, he has at different times been the recipient of nominations and elections by his party to high and responsible positions. In 1871 he was elected County Judge of Albany county by a very large majority, and, at the expiration of a term of six years, was re-elected by an equally flattering vote. Near the expiration of his second term as county judge (in 1882) he was elected Representative in Congress for the Albany District. In each of these positions he performed the duties devolving upon him promptly, faithfully and with distinguished ability. From the expiration of his term in Congress to the present year he has been content to devote his

time to his profession and other congenial pursuits, but in October (1897) he was nominated by his party for the office of mayor of Albany, and, after a heated canvass, was elected to the position by a large plurality over his next highest competitor. Although seventy years of age, Judge Van Alstyne is as active, hale and well preserved as most men at fifty, and, from appearance, gives promise of yet many years of active usefulness as a public officer and citizen.

#### D. CADY HERRICK.

Prominent among those Albanians who have achieved high rank among jurists, lawyers and scholars, is the Hon. D. Cady Herrick, Justice of the Supreme Court for the Third Judicial District of the State of New York. Judge Herrick was born at Esperance, Schoharie county, N. Y., April 12, 1846. He was educated at the Albany Classical



Institute and the Albany Law School, and, after studying law in the office of Tremain & Peckham, was admitted to the bar, at Albany, in the year 1867. From that time until his elevation to the bench of the Supreme Court he was actively engaged in general practice. Judge Herrick ran for district attorney in 1877, but was defeated. He succeeded, however, in reaching that office three years later, and was re-elected in 1883. He was afterward appointed corporation counsel by Mayor Thacher, holding that responsible office for three terms altogether, and in the fall of 1891 was elected to the Supreme Court bench by a flattering majority. Judge Herrick has been, from boyhood, and still is, a close student, deeply learned in the law, and possessing not only the knowledge but in other respects the mental equipment to make him an admirable judge. In forensic eloquence he is the peer of any man at the bar of Albany county, and when fully aroused to action in public debate is bold and defiant. In the early days of his professional career he had the experience of many

celebrated cases, notably that of the murderer, Emil Lowenstein, who was tried for the murder of John D. Weston. Though the murderer was convicted, the defense was conducted with remarkable skill. For many years Judge Herrick has been active and prominent in local and State politics, and has shown in this field of activity remarkable tact, shrewdness, skill and resourcefulness. Always consistently and conscientiously identified with the Democratic party, Judge Herrick was for many years one of the trusted lieutenants and confidants of the late Hon. Daniel Manning, whom he succeeded in the local leadership of the party. He is a member of the Democratic State committee, and has been for many years. On questions of municipal and constitutional law, Judge Herrick is generally recognized as high authority.

#### ALDEN CHESTER.

Alden Chester, justice of the Supreme Court in the Third Judicial District, comes of good old English stock, the Chesters having settled in New England about 1630, and his mother's family, the Drapers, having followed a little later on. Born in Westford, Otsego county, N. Y., he attended the district school, and afterward a private academy, but the death of his father threw him in a great measure upon his own resources. How ample these were is shown by his subsequent career. Having finally determined to enter the legal profession, he entered Columbia College Law School in 1869, having worked his way through, largely by the use of his pen. On his graduation



from Columbia in 1871 he received a prize of \$75 in the department of political science. In May of the same year he was admitted to the bar, taking up his residence in Albany and forming a law partnership with his cousin, Andrew S. Draper, now president of the University of Illinois, and one of the foremost educators in the country. This association continued until Mr. Draper was appointed by President Arthur judge of the Court of

Alabama claims at Washington, and from that time until his own election to the bench Judge Chester practiced alone. His career at the capital during this quarter of a century was a brilliant one. In 1882 he was appointed assistant U. S. attorney for the northern district of New York, under Martin I. Townsend, in which capacity he tried many important cases. In 1895 Gov. Morton appointed Judge Chester a member of the commission to prepare and report to the legislature a uniform charter for cities of the second class. Nominated for justice of the Supreme Court by acclamation at the Republican convention of the third judicial district in the fall of 1895, he was elected by a majority of nearly 5,000, being the first Republican chosen to this position in that district for upwards of thirty years. He has always taken a special interest in educational matters, and from 1881 to 1884 was a member of the board of public instruction of the city, and during the last year president of the board.

#### JAMES W. EATON.

While descended from English stock, which took root in the soil of the colonies as early as 1634, James W. Eaton was born in the old Capital city, in 1856. After leaving the Albany Boys' Academy, in 1875, he entered Yale College, from which he was graduated four years later. In the same year that he left college he began his legal



studies at Columbia Law School, but in May, 1880, he accepted a position as professor of Latin in the Albany Boys' Academy, where he taught for the succeeding two years. He was carrying on his law studies all the time, however, and in 1882 was admitted to the bar. Resigning then his position as teacher, Mr. Eaton began practice at once in the office of Judge Edwin Countryman, of Albany; and the following year formed a partnership with George W. Kirchwey, who had been a classmate at

Yale, which association lasted until 1891, when Mr. Kirchwey was appointed to a professorship in Columbia University. Since that time Mr. Eaton has practiced alone, and has achieved an enviable reputation. He is especially distinguished as a trial lawyer, and his pleadings before judge and jury are noted for fairness and sound argument, as well as for eloquence. Mr. Eaton has from early youth taken an active interest in political affairs. In the fall of 1891 he was elected as a Democrat, district attorney of Albany county, holding the office three years from January 1, 1892. His peculiar talents fitted him admirably for the office, whose duties he performed with great acceptability. Mr. Eaton has also found time to serve his profession as writer and teacher. In 1881 he published a work on the "Law of Domestic Relations," and he has written several shorter treatises on various legal subjects. Since 1888, also, he has been the lecturer on the law of evidence and contracts at the Albany Law School. He is prominent in the social life of the capital city, belonging to the Fort Orange Club, Masters' Lodge No. 5, F. & A. M., Society of the Founders and Patriots of America, and various other organizations.

#### LEWIS E. CARR.

Lewis E. Carr was born in the town of Salisbury, Herkimer county, N. Y., March 10th, 1842. His early education was obtained at the district



schools and the Fairfield Academy. On leaving the latter institution, he entered the law office of the Hon. Sherman S. Rogers, at Buffalo, and in May, 1864, at Albany, N. Y., was admitted to the practice of the law. Since his admission Mr. Carr has been engaged in the general practice of the law. In politics Mr. Carr is a Republican. The only political office he ever held was that of district attorney for Orange county, N. Y., from 1872 to 1875.

**CLIFFORD D. GREGORY.**

Clifford D. Gregory, the present county judge of Albany county, was born in the City of New York, was educated at Lafayette Institute, Brooklyn, and at Columbia College; studied law with Messrs. Parker & Countryman, Albany, N. Y., and in May, 1876, was admitted to the bar. He represented his ward in Albany — the 13th — from 1888 to 1892; was president of the Republican Executive committee of Albany county, 1890 to 1894; is the president and a life member of the Albany Club; director of the Albany County Bank and of



the Albany Insurance Company; a member of the Society of Colonial Wars, and a life member of the Fort Orange Club. In November, 1895, Mr. Gregory was elected on the Republican ticket, county judge of Albany county, which office he now holds. The following important cases have been tried before the present county judge: The Martin murder case, the Hempstead forgery case, the Vacheron (member of assembly) bribery case, and the celebrated kidnapping case of 6-year-old John Conway, as a result of which trial the kidnappers, Blake and Hardy, were sentenced to fourteen years and four months each

**HAMILTON HARRIS.**

A distinguished citizen of Albany whose fame as a lawyer, scholar and statesman extends far beyond the limits of his residence, is the Hon. Hamilton Harris. He was born at Preble, Cortland county, N. Y., May 1, 1820; his father, Frederick Waterman Harris, a native of the State of New York, but of English origin, was one of the pioneers of Cortland county; his mother, whose maiden name was Lucy Hamilton, was of Scotch ancestry, and possessed many of the noble qualities of that race. After a very thorough preparation young Harris entered Union College, then in the days of its greatest renown, with Dr. Knott 'at its head, and graduated with high honors in 1841. For the young and ambitious graduate the law possessed

irresistible charms, and he began his work as a law student under most favorable circumstances, with his brother, Hon. Ira Harris, a man of eminent legal attainments, who was then in the zenith of his remarkable professional career. In the autumn of 1845 Mr. Harris was admitted to the bar, and soon became a successful and accomplished advocate. Three years later he formed a partnership with the Hon. Hooper C. Van Vorst, afterwards judge of the Superior Court of the City of New York, which association continued until 1853, when Mr. Van Vorst removed to the metropolis.



Other partners were Hon. Samuel G. Courtney, Hon. Clark B. Cochrane and Hon. John H. Reynolds. Since the death of the latter Mr. Harris has continued to practice in association with his son Frederick, and with William P. Rudd. The firm has for a number of years been employed in the defense of most of the suits brought against railroad corporations in this county. Mr. Harris has had a distinguished and successful career in politics. He served as district attorney of Albany county as early as 1857; later as member of Assembly; member of the Republican State committee from 1862 to 1864; chairman of the Republican State committee from 1864 to 1870; president of the new board of Capitol commissioners, in which capacity he did probably as much as any other man to secure the erection of the New Capitol building. In 1875 he was elected to the State senate, in which body he took leading part and high rank. Two years later he was honored with a re-election. Mr. Harris is not only a brilliant advocate and accomplished lawyer, but a man of fine literary taste and culture, having always been an earnest friend of higher education; he possesses great knowledge of human nature and a very keen perception of character. He has the reputation, in his profession, of being cool, wary and adroit in the trial of cases, and is distinguished by his skill in cross-examination, and his ability as an advocate.

**MYER NUSSBAUM.**

The career of Myer Nussbaum once more illustrates the possibilities before young American manhood. Starting out in life without the possession of any special advantages, but determined, persevering and industrious, he has achieved his present honorable position by his own efforts. Born in Albany, March 13th, 1855, he obtained the full advantages of the excellent public schools of



the Capital City, and at once entered the law office of Messrs. Newcomb & Bailey, being admitted to the bar at Saratoga Springs in September, 1876. Since then he has been engaged in general law practice. In politics Mr. Nussbaum has always been identified with the Republican party. He served as police justice by appointment of Mayor Swinburne, in 1884; was a member of assembly in 1893, and in November, 1895, was elected on the Republican ticket State senator for three years.

**JOSEPH ALBERT LAWSON.**

Among the younger members of the Albany bar who occupy a first place in the profession is Joseph Albert Lawson. He was born in this city December 13, 1859, and this city has been his home almost continuously since. He was educated in the Boys' Academy of this city, graduating with honor in 1878. He attended the Albany Law School, graduating therefrom in the class of '80, after which he entered the Columbia Law School, New York city, from which he graduated in 1882, receiving the degree of LL. B. He was admitted to practice the same year by the General Term of the Supreme Court, and immediately began the practice of his profession in New York city by associating himself with the well-known law firm of Marsh, Wilson & Wallis. This continued but one year, when he returned to Albany and became a member of the firm of I. & J. M. Lawson, remaining with them until 1892, when he withdrew

from the firm and opened his present office in the Tweddle building. As a successful lawyer Mr. Lawson has earned well-merited recognition by the bar and people, and is building up an enviable law practice.

Among Mr. Lawson's experiences has been something in the way of newspaper work, the last



being as editor of the Sunday edition of the Albany Morning Express. He is a charter member of the Albany Press Club and of the Young Men's Democratic Club; also of the Masters' Lodge, F. & A. M., of which he is past master. Mr. Lawson enjoys the reputation of being a great wit, and is concededly one of the best post-prandial orators whom the Capital City can boast.

**GEORGE H. FITTS.**

The subject of this sketch was born in the city of Cohoes, Albany county, September 29, 1851. After preparing for college he entered Dartmouth.



from which he was graduated in the class of 1873. One year later he was graduated from the Albany Law School, and was admitted to the bar at Al-

bany in May, 1874. Mr. Fitts was city attorney of the city of Cohoes from May, 1888, to January 1st, 1896. He was elected surrogate of Albany county in November, 1895, which office he still holds.

#### GEORGE ADDINGTON.

Judge George Addington, of the City Court, was born in the Third ward of the city of Albany, April 24, 1860. His education was obtained in the excellent public schools of his native city and at the Albany High School, from which institution he graduated with honors in 1878. Judge Addington's father died in 1871 from the effects of a wound received in the Battle of Cold Harbor, Va. He was then thrown upon his own resources, and to support himself and mother, and to gain an education, he carried routes of local papers. He studied law with Mead & Hatt and Hale & Bulkley, and after his admission to the bar remained in the latter's office as managing clerk until 1885, when he began active practice. Mr. Addington was



nominated by the Republican city convention, in the spring of 1894, for judge of the City Court, and was elected by a most flattering vote, running ahead of Mayor Wilson, who headed the ticket. Upon the bench Judge Addington has shown the results of careful preparation and training, and his conduct of the office proved so satisfactory to the voters that he was re-elected last November for another full term, being the only candidate on the Republican city ticket elected. His decisions have been uniformly affirmed by the higher courts. Judge Addington is a member of the Benevolent and Protective Order of Elks, the Knights of Pythias, the Liederkranz Singing Society, and occupies the position of judge-advocate on the staff of the commander of the Sons of Veterans of the State of New York.

#### PETER A. STEPHENS.

Justice Peter A. Stephens, the Police Court judge in the city of Albany, was born in this city, March 4th, 1856. He has always lived here; was educated in our public schools, and graduated with honor from the High School. After leaving that institution he began the study of law in the office of Hiram L. Washburn, Jr., and in May, 1877, was admitted to the bar at the General Term of the Supreme Court at Binghamton, and immediately



opened an office at 78 State street, this city. In the fall of 1885 he succeeded Jno. A. McCall, Jr., resigned, as school commissioner for the short term, and was, in the following spring, elected for the full term of three years. On December 31, 1889, he was appointed police justice to fill the vacancy made by the election of Martin D. Conway to the office of surrogate of the county, and was elected the following April for the short term by a majority of 7,051, and in April, 1892, was re-elected by a majority of 5,765 for the full term of four years. For this position, during his two terms, he has shown marked ability, and has won hearty commendation for judicial fairness and keen insight into criminal character, especially from business men and our best citizens. Judge Stephens is conscientious in his close application to his official duties, always being the first in court and the last to leave. Nevertheless the judge devotes time not occupied on the bench to his law practice, which in itself would be considered enough for an ordinarily good worker, this being principally in the line of real estate and Surrogate's Court practice. For three years he was official searching clerk in the county clerk's office, examining titles to real estate, which experience has proved valuable to him in the line of real estate law. The judge is married and has an interesting family; is a member of many societies and orders, and is one of the most genial and companionable of men, being always welcomed wherever time will permit him to be a guest.

**ROBERT G. SCHERER**

Robert G. Scherer was born in Albany, March 20, 1861. His father, George Scherer, was one of Albany's prominent merchants in the early days of the war. Robert passed through the public schools of the city, and was given careful training under the well-known instructor, Prof. Carl Meyer. In his father's store during his school days and later he obtained a thorough business training that has been of great value to him in his professional work.

His law apprenticeship was in the office of Paddock, Draper & Chester. Mr. Draper is now president of the Illinois State University, and Mr. Chester is justice of the Supreme Court of the State of New York. After this he passed through Cornell University and Columbia Law School. Following his admission to the bar was a law partnership with John F. Montignani, which continued several years, after which the present firm of Scherer & Downs was formed, which is one of the most prominent of the younger law firms of the city.



We may briefly mention some of the many important litigations with which Mr. Scherer has been connected: The McPherson Collateral Tax Matter (104 N. Y. 306), decided ultimately by the Court of Appeals, which became the leading case on the subject; the noted case of *People v. Gibson* (109 N. Y. 389), in which the views of Mr. Scherer were unanimously sustained by the Court of Appeals. His management of the Milwain \$20,000 bond robbery and his conduct of the Greer will cases to a successful issue are well known. The Bender will case also, and the extensive assignments of Ward & Byrnes, Nelson Lyon and Sullivan & Ehlers are among others of importance. He was also connected with the Appell impeachment proceedings before the judiciary committee of the assembly in 1895, and secured the acquittal of Judge Appell.

In politics Mr. Scherer is a Republican. From 1885 to 1889 he was a member of the board of public instruction, and introduced many reforms into the school system, and in 1896 and 1897 was a member of the State legislature and was chairman of the judiciary committee. He is also a member of the committee on law reform of the State Bar Association.

In 1883 he married Anna, daughter of James T. Story, of Albany, and they have one daughter.

**RICHARD W. BRASS**

Richard W. Brass was born in Brooklyn, N. Y., January 28, 1861. His father was engaged in business in New York city, dying in 1863. His widow removed to Binghamton, N. Y., where, and in Munich, Germany, where they lived from 1863 to 1868, Mr. Brass received his education. Mr. Brass remained in Binghamton until 1882, beginning the study of law there with M. J. Keeler. Coming to Albany, he completed his legal studies with Judge A. B. Voorhees, and was admitted at Saratoga in September, 1883. In 1884 he formed a partnership



with Judge Voorhees, which continued four years. Since then he has been associated with E. W. Rankin in general practice, and has had the conduct of some important cases. He is a member of the New York State Bar Association, and for five years has been a director and treasurer of the Brandow Printing Company; also for several years a trustee of the estate of Catherine W. Van Rensselaer, under the will of her mother, Mrs. Elizabeth Bleecker. In 1886 he married Harriet C., daughter of Jacob Neville, a merchant of Middleburg, N. Y., and they have had four children. Mr. Brass is a Republican in politics, and belongs to many social and political clubs. He occupies a first place among the younger members of the Albany bar, and is a welcome guest in social circles. He has taken some interest in politics, and is regarded as having a very bright future.



**FREDERICK HARRIS.**

Frederick Harris, son of the Hon. Hamilton Harris, was born at Albany, June 14th, 1854. Passing through the various grades of our public schools, he entered Union College at the age of 18, from which he graduated with honor. As a finish, he sought to gratify his taste and polish his manners by foreign travel. He crossed the Atlantic the same year, traveling through England, France, Germany and Italy, studying the manners and customs of the old world. On his return he entered the Albany Law School, from which he graduated in 1877, and at once became a partner in the firm of Harris & Rudd, the remaining member of the firm being William P. Rudd.



Mr. Harris inherits his father's love of letters, literary and scientific tastes, yet he seldom steps aside from the arena of legal debate to illustrate these on the lecture platform.

He was elected president of the Young Men's Association in 1882 and 1886. In recognition of his great interest in educational matters, he was elected a trustee of the State Normal College. He is also a trustee of the Second Presbyterian Church and president of the board of trustees of the Homœopathic Hospital. In 1891 Mr. Harris received the nomination of the Albany Republican county convention for district attorney, and while he failed of election, yet he had the great satisfaction of running some 2,000 votes ahead of his ticket. Among his personal traits, Mr. Harris possesses a fine appearance, a vigorous constitution, refined manners and strict integrity, without the least mark of pride or ostentation. Mr. Harris is justly regarded as one of the most competent of the younger lawyers at the Albany bar, and his friends predict for him a brilliant future.

**WILLIAM F. RATHBONE.**

William F. Rathbone was born in Albany, N. Y., May 20, 1859. After obtaining a thorough education, he determined upon the law as a profession, and began its study in the office of Smith, Buchanan & Moak, being admitted to the bar at Ith-



aca, September 14th, 1882. Mr. Rathbone has made corporation law a specialty, and since his admission to practice has been connected with the legal department of the Delaware and Hudson Canal Company. While in politics an ardent and consistent Republican, he has never sought or held political office, devoting his entire energies to his chosen profession.

**JOHN MURRAY DOWNS.**

John Murray Downs was born in the city of Albany on July 9th, 1872; was educated in the public schools, the Albany High School and the



Albany Law School. After having studied law in the office of Reilly & Hamilton, he was duly admitted to the bar at Albany in February, 1894, and has since been engaged in general civil practice.



**HUGH REILLY.**

Mr. Reilly was born at the city of Albany, N. Y., March 14th, 1853. He was educated at private and the public schools, and was graduated from the Albany Academy in 1870. He taught school for a short time, and then entered the law school of Columbia University, and received his degree of Bachelor of Laws in 1874. On his return to Albany he entered the office of Peckham & Tremain, then consisting of Lyman Tremain, Rufus



W. Peckham and Grenville Tremain. In 1876 he formed a copartnership with Andrew Hamilton, under the firm name of Reilly & Hamilton, which has ever since continued. He was appointed by Governor Hill as district attorney of Albany county on June 4th, 1886, to succeed Hon. D. Cady Herrick, who then resigned. He was elected district attorney in November, 1886, was re-elected in 1889, and served until June 4th, 1891, when he was appointed by Governor Hill one of the judges of the State Court of Claims. He was reappointed to the court by Governor Flower in 1892, and still retains his seat upon that bench.

**CHARLES B. TEMPLETON.**

Charles Bradford Templeton was born in the city of Albany, and after finishing his preparatory course at the Albany Academy, entered Union College, from which he graduated, with the degrees of A. B. and C. E., in 1884. Two years later he graduated from the Albany Law School with the degree of LL. B., having previously carried on the study of the law in the office of Hungerford & Hotaling, in his native city. In May, 1886, Mr. Templeton was admitted to practice, and has largely devoted himself to real estate and to practice in the Surrogate's Court. For more than a year past he has been almost exclusively appointed by the surrogate as appraiser in proceedings had for the determination and assessing of transfer tax

upon the estates of both resident and non-resident decedents, and no appeal has been successfully



taken from any of his decisions. In politics Mr. Templeton has always been a Republican. He was the candidate of his party for district attorney in 1889, and for judge of the City Court in 1892.

**ANDREW HAMILTON.**

Mr. Hamilton was born at Albany, N. Y., April 29th, 1854. He received his instruction at the public schools and also at the Christian Brothers' and the Albany Academy. He entered the law offices of Judge Jacob H. Clute and Alvah H. Tremain. He continued in that office until his admission to



the bar, in 1875. Soon after he entered into a copartnership with Hugh Reilly, under the firm name of Reilly & Hamilton, which firm has since continued and still exists. He was elected as one of the judges of the City Court of Albany in 1882, and afterwards re-elected, continuing in said office until January 1st, 1887, when he resigned and ac-

cepted the office of assistant district attorney with Mr. Reilly, in which he continued until Mr. Reilly's resignation in 1891, when he was appointed district attorney of Albany county by Governor Hill. In 1892 he was appointed clerk of the State Court of Claims, which position he still retains.

#### JOHN T. COOK.

John T. Cook was born in Albany, N. Y., February 22, 1854. He was educated in the public schools, closing with a course in the Albany High School, in 1868. At this time he learned a trade, but the bent of his mind was in the direction of the law instead, and he entered the office of Smith, Bancroft & Moak, as clerk and law student, prosecuting his studies with them until he was admitted to the bar, at the January term of the Supreme Court, in 1879. He continued with the firm until the spring of 1884, when he began practice on his own account. Besides attending to this practice,



Mr. Cook has edited the "Eastern Reporter" and the "English Reports," and in connection with Irving Browne, Esq., then editor of the ALBANY LAW JOURNAL, he engaged in preparing Weed, Parsons & Co's edition of the reprint of the "New York Court of Appeals Reports." His annotated edition of the Penal Code and the Code of Civil Procedure of the State of New York is held in high estimation by the legal profession. Mr. Cook possesses a choice library, containing some two thousand volumes, besides a select private collection of books of general literature. In 1894 he represented the Seventeenth ward in the common council of Albany, and will, on the 1st of the coming month, enter upon his second term as assistant district attorney of Albany county. Mr. Cook is not only an excellent lawyer, but his work as one of the editors of the ALBANY LAW JOURNAL for a number of years proves him to be one of the most capable law editors in the country.

#### ANDREW COLVIN.

Andrew Colvin was born in New Baltimore, Greene county, on September 21, 1869. His preliminary education was obtained in the common schools and at the Albany Academy. On leaving



the latter institution he entered the Albany Law School, graduating in the class of 1890. Having previously studied law for the requisite period of time, in the office of the late Hon. Andrew J. Colvin, he was duly admitted to the bar in May of the same year, since which time he has been engaged in the general practice of the law.

#### FREDERICK W. CAMERON.

Frederick W. Cameron, one of the leading patent attorneys of Albany, was born in the Capital City, June 1, 1859. After finishing his preparatory



studies at the Albany Academy, in 1877, he entered Union College, from which he was graduated four years later. He is also, like so many other members of the Albany county bar, an alumnus of the Albany Law School, having graduated in the class

of '82, and being admitted to the bar in the same year. In politics a Democrat, Mr. Cameron has never held any political office except that of United States commissioner, being originally appointed in 1892 and reappointed in 1897.

#### EDWARD J. BRENNAN.

Edward J. Brennan is a grandson of James Brennan, Sr., a malster, who came to Albany from Ireland and died here in 1880, aged 82. James Brennan, Jr., has been connected with the Albany police force since 1870. He is a native of Albany, as is also his wife. Edward J., their son, was born in Albany, August 17th, 1860, was graduated from the Christian Brothers' Academy in 1876, and in 1877 entered the law office of Smith, Bancroft &



Moak, and was admitted to the bar in 1881. He remained with this firm as managing clerk until 1886, when he was elected justice of the City Court for a term of three years. Since 1889 he has been in the active practice of his profession, making a specialty of criminal law, in which he has been very successful. He is a prominent Democrat, has served as delegate to several political conventions, and is a member of the A. O. U. W. January 22d, 1896, he married Mary, daughter of George Schwartz, a well-known pork packer and dealer of Albany.

#### NATHANIEL B. SPALDING.

Nathaniel B. Spalding was born at Saratoga in 1863, the son of Rev. N. G. Spalding and Harriet (Dorr) Spalding. Edward Spalding, American ancestor, came from Spalding, England, early in 1600, and joined the Plymouth colony. The subject of this sketch is of the eighth generation of said Edward; was educated at the Albany Academy, Union Classical Institute and Union University; thereafter completing his law studies with Hon. Alden Chester, present justice of the Supreme Court, from whose office he entered the

practice of law in 1886. He has since continuously practiced his profession at Albany, and is at present of the firm of Spalding & Daring. This firm



conducts a large practice in commercial and insurance law, and is local counsel for the Prudential Life Insurance Company. Mr. Spalding is a member of the New York State Bar Association and American Law League; takes no active interest in politics and has never held office.

#### JOSEPH P. COUGHLIN.

Joseph P. Coughlin was born in the city of Troy, June 8, 1872; graduated from the La Salle



Institute, Troy, in the class of 1890; attended the Albany Law School, but did not graduate, leaving in the spring of 1894. Having studied law with the Hon. Myer Nussbaum, he was admitted to the bar in the spring of 1894. Shortly after his admission Mr. Coughlin formed a copartnership with the Hon. Myer Nussbaum, under the firm name of Nussbaum & Coughlin, which still exists, being actively engaged in general practice.

**ROBERT H. McCORMICK, JR.**

Among the young members of the Albany bar perhaps there could not be found a more popular, prominent and enterprising young lawyer than Robert H. McCormick, Jr. This has but recently been brought very prominently to the attention of our people by his aldermanic race and election in one of the most hotly contested municipal elections held in Albany for years. Mr. McCormick is a native Albanian; was born January 30, 1870, has always lived here, and will enter upon official life before the completion of his twenty-seventh year. He graduated with honor from our public schools. In the High School he chose the classical course, and graduated in 1888. After completing his education he was for a time in the insurance



office of his father, at the same time reading law, and in 1889 entered upon a law clerkship with the late William A. Allen. In 1891 he entered the law office of County Judge J. H. Clute as a minor clerk. Progressing rapidly, he was soon made managing clerk, and in September, 1892, was admitted to practice. On the first of April, 1896, he entered into his present partnership with the judge, under the firm name of Clute & McCormick. Mr. McCormick takes an active interest in politics, and is secretary and treasurer of the Second assembly district committee of the Republican organization of Albany county. He is a member of many secret societies, holding office in all, and very high office in some.

October 31, 1894, he married Estelle N., daughter of Horace R. Lockwood, of South Westerlo, N. Y.

**SMITH O'BRIEN.**

Smith O'Brien, the subject of this sketch, was born in the town of Berne, Albany county, February 12, 1850, and was educated in the Albany public schools and the Albany Law School. He studied law with the Hon. Jacob H. Clute, and was ad-

mitted to the bar in May, 1878. While busily engaged in general miscellaneous practice, Mr.



O'Brien has, since boyhood, taken an active interest and part in political affairs. He has always been a Republican. In 1878-9 he was superintendent of public documents in the State assembly, and was deputy clerk of the same body in 1884. In 1886 he was elected and served as member of assembly from the Second district of Albany county. Mr. O'Brien is now special deputy attorney-general under Attorney-General T. E. Hancock in prosecuting trespassers on the State forestry lands.

**CHARLES C. VAN KIRK.**

Charles C. Van Kirk was born at Greenwich, N. Y., September 21, 1862. He was educated in the public schools of his native town, passing



through the High School preparatory to entering Colgate University, which he did in September, 1880, graduating fourth in his class in 1884, and being elected to the Phi Beta Kappa Society. Leaving Colgate, he taught two years in Wilson's

Academy for boys at Troy. By this time Mr. Van Kirk had determined to make the law his profession, and to this end returned to Greenwich and entered the law office of Lowrie & Gibson, and remained with them until he was admitted to the bar, at Albany, in 1888, when he was admitted to the firm. This partnership existed until the election of Judge McLaughlin, of Port Henry, to the Supreme Court, when he withdrew and formed a partnership with Judge McLaughlin's old law partner, Mr. F. A. Rowe, of Port Henry, which continued until October 1st, 1897, when he came to Albany and formed a partnership with Mr. Patterson, of Troy, and Mr. Bulkley, of Albany, the firm becoming Patterson, Bulkley & Van Kirk. While in the firm of Rowe & Van Kirk, Mr. Van Kirk had charge of the court work of the firm, including the defense of many negligence suits at the iron mines of Witherbee, Sherman & Co. and the Port Henry Iron Ore Company, and the railroad running to the mines. He also represented the interests of Hon. Frank S. and Walter C. Witherbee in litigation growing out of the dissolution of Witherbee, Sherman & Co. He was also attorney for the Greenwich and Johnsonville Railway Company, a director in the bank and also in the railway company: also attorney for the town and village of Greenwich in all litigated matters.

### Rensselaer County.

THE history of the bench and bar of Rensselaer county dates back to the earliest days of the county, and without exaggeration, it may be said that the bar of Rensselaer has sent to the bench of the Supreme Court some of the most profoundly learned and wisest judges, and has produced some of the most eloquent pleaders who ever stood in courts of justice in this country. The Hon. Martin I. Townsend, in an address delivered on the occasion of the celebration of the hundredth anniversary of the naming of the city of Troy, held in that city in January, 1889, mentioned the fact that before 1820 John Woodworth had been called to Albany to fill the office of attorney-general, and that at about the same time William L. Marcy was also called there to fill the position of adjutant-general. Under the Constitution of 1821, which continued in force until 1847, John Woodworth and William L. Marcy were justices of the Supreme Court, then the only court of review below the Court for the Correction of Errors. John P. Cushman and Nathan Williams, who had studied law and commenced its practice there, but who had removed to Utica, held the office of circuit judge under the same Constitution. William L. Marcy was also United States senator, governor of the State, secretary of state and secretary of war. Under the Constitution of 1847 George Gould and Charles R. Ingalls have been justices of

the Supreme Court. The first judges of the Court of Common Pleas under the Constitution of 1821 were David Buel, Jr., Herman Knickerbocker and George R. Davis. Isaac McConihe, Archibald Bull, Francis N. Mann and Jeremiah Romeyn were also judges of that court. The judges of the Court of Common Pleas before the Constitution of 1821 were Anthony Ten Eyck, Robert Woodworth, James L. Hogeboom and Josiah Masters. The county judges since 1847 have been Charles C. Parmele, Archibald Bull, Jeremiah Romeyn, Gilbert Robinson, Jr., E. Smith Strait, James Forsyth and the present incumbent, Henry T. Nason.

The legal profession of Troy has furnished the following members of congress: Moss Kent, John Bird, John P. Cushman, William McManus, John D. Dickinson, Job Pierson, Hiram P. Hunt, David L. Seymour, Abram B. Olin, Martin I. Townsend and Frank Black, the present governor of the State of New York. Of State senators the bar of Rensselaer has furnished Moss Kent, Robert Woodworth, John Woodworth, Henry W. Strong, Ruggles Hubbard, John D. Willard, Wm. H. Van Schoonhoven, Roswell A. Parmenter and Albert C. Comstock. The profession has furnished the following members of assembly: John Bird, John Woodworth, Robert Woodworth, George R. Davis, Archibald Bull, David L. Seymour, Wm. H. Van Schoonhoven, Henry Z. Hayner, Amos K. Hadley, George Van Santvoord, John L. Flagg, Francis N. Mann, Jr., La Mott W. Rhodes and Charles E. Patterson. Of these George R. Davis was three times speaker, and Amos K. Hadley and Charles E. Patterson once each.

### MARTIN I. TOWNSEND.

Hon. Martin I. Townsend, who has long enjoyed the sobriquet of "Troy's Grand Old Man," was



born in Hancock, Berkshire county, Mass., February 6, 1810. In 1816 his parents took up their residence in Williamstown, where the education of

the son was completed at Williams College. He was graduated in 1833, going to Troy on December 1 of that year. Having chosen the law, he rapidly advanced in the profession and as a public man. He married Louisa B., the daughter of Oren Kellogg, Esq., of Williamstown, in 1836. She died November 19, 1890. Mr. Townsend was district attorney of Rensselaer county from 1842 to 1845; twice a member of the common council of Troy; member of the Constitutional Convention of New York State, 1866-67; regent of the University of the State of New York, and a member of the forty-fourth and forty-fifth congresses from the Seventeenth congressional district, 1874-1876. Distinguished in the law and as a public man, he has rounded out a magnificent history.

#### CHARLES E. PATTERSON.

Charles E. Patterson is a native of the Green Mountain State, where he was born (Corinth, Orange county) May 3d, 1842. After attending district school, Castleton (Vt.) Seminary and Washington Academy, Cambridge, N. Y., he entered Union College, from which he graduated in 1860, with the degree of A. B. The following year he removed to Troy and began his legal studies in the office of Seymour & Ingalls, of that city. On



May 6th, 1863, he was admitted to the bar, and in 1869 was admitted to practice in the Supreme Court of the United States. Since 1863, with the exception of three years spent in New York, as a member of the firm of Tremain, Tyler & Patterson, the subject of this sketch has been continuously engaged in the general practice of law in the city of Troy. Recently Mr. Patterson formed a partnership with Mr. Alpheus T. Bulkley, of Albany, who was for many years a member of the firm of Hand, Hale & Bulkley. With the latter Mr. Patterson will hereafter practice his profession in the Capital City. His clientage is large and varied,

and he has long been recognized as one of the leading attorneys of the State. Mr. Patterson is a director and one of the counsel of the United States Life Insurance Company of New York, and counsel for the Richmond Railway and Electric Company, for which he has appeared in the United States Circuit Courts in Virginia. In 1878 Mr. Patterson was nominated on the Democratic ticket for representative in congress, but was defeated. In 1881 and 1882 he was a member of the State legislature, and in the latter year he filled the important position of speaker of the assembly. In 1893 he received the honor of a nomination as delegate-at-large to the Constitutional Convention, but was defeated. He is highly regarded by his fellow-citizens for his ability as a lawyer and for his many engaging personal qualities.

#### ROSWELL' A. PARMENTER.

Roswell A. Parmenter first saw the light in Pittstown, Rensselaer county. He was educated in the Troy Conference Academy, Poultney, Vt., from which he was graduated in January, 1846. After studying law with Willard, Raymond & Woodbury, at Troy, N. Y., he was admitted to the bar, at Ballston Spa, in December, 1847, and has ever since continued to practice his profession in



the city of Troy. In politics Mr. Parmenter has always voted the Democratic ticket. He was State senator from Rensselaer county in 1874-5; city attorney for the city of Troy, 1871 to 1885, and again from February 4, 1886, and was corporation counsel of Troy from May 19, 1887, to October 2, 1890. He was the Democratic candidate for State attorney-general in November, 1881, but was defeated, as was the entire Democratic ticket, except the candidate for State treasurer. Mr. Parmenter is one of the oldest as well as one of the ablest and most highly honored members of the Rensselaer county bar.

**JOHN H. PECK.**

John Hudson Peck, LL. D., of Troy, N. Y., president of the Rensselaer Polytechnic Institute, was born at the city of Hudson, N. Y., on the 7th day of February, 1838. He is the eldest son of the late Hon. Darius Peck, a prominent and influential citizen and thorough lawyer, who was for many years county judge of Columbia county, N. Y. John H. Peck was prepared for college at the Hudson Classical Institute, and was graduated from Hamilton College with the class of 1859. He chose the law for his profession and studied at Troy, N. Y., under the direction of the Hon. Cornelius L. Tracy and the Hon. Jeremiah Romeyn, and was admitted to the bar, at Albany, in December, 1861. Very soon afterward he entered into a law partnership with Mr. Romeyn which continued until April, 1867. At that time he, with his former instructor, Mr. Tracy, formed the very successful law firm of Tracy & Peck, which was only



terminated by the final illness of the senior member. Since its dissolution Mr. Peck has been entrusted with the legal business of the Troy & Boston Railroad Company, the Troy Union Railroad Company, the Troy Savings Bank and with that of several private trusts and estates involving great interests. By his fellow-citizens and professional colleagues he is regarded as a conservative, judicious lawyer, thorough in application, assiduous in caring for the interests of his clients and entirely honorable in his methods. Outside of his profession, Mr. Peck has identified himself with educational interests. He became a trustee of the Troy Female Seminary in 1883. In May, 1888, he was elected president of the Rensselaer Polytechnic Institute, the pioneer school of civil engineering as well as the most celebrated in this country. To both these famous institutions of learning he has given the benefit of his counsel and studies. In public affairs Mr. Peck had always manifested an enterprising and progressive spirit. He was a valuable member of the New York Constitutional

Convention of 1894, serving on two important committees, education, and legislative organization and apportionment. Mr. Peck is one of the trustees of the Diocese of Albany, and was named as an original incorporator of the trustees of scenic and historic places and objects by the New York legislature of 1895. He is chairman of the new court house commission of his county, and one of the trustees for the erection of the Hart Memorial Library. He has written voluminously for the newspaper press and has delivered many occasional addresses. He was orator of the society of the alumni of Hamilton College at the commencement in 1889. The degree of LL. D. was conferred upon Mr. Peck at the Hamilton commencement in 1889.

**JAMES LANSING.**

Among the prominent members of the Rensselaer county bar Hon. James Lansing occupies a foremost place. Mr. Lansing was born at Decatur, Otsego county, N. Y., May 9, 1834. After a thorough education and a valuable experience as an instructor he married Miss Sarah A. Richardson of Poultney, Vt., and then took up the study of law at the Albany Law School. He graduated in 1864, and settled in Troy, entering the office of Warren & Banker. He served as clerk to the surrogate's court under Hon. Moses Warren. He then formed a copartnership with Hon. Robert H.



McClellan, and fourteen years later with William P. Cantwell, Jr. Mr. Lansing's present law partner is John B. Holmes. In 1889 Mr. Lansing was elected surrogate of Rensselaer county for a term of six years. He served with signal ability and decided many delicate and important cases. Twice after this he was honored with nominations by the Democratic party—once for surrogate and then for county judge. Republican supremacy in the county and state caused Mr. Lansing's defeat by small majorities. Mr. Lansing is one of the most honored of Troy's citizens



**WILLIAM H. HOLLISTER, JR.**

William H. Hollister, Jr., was born in Coxsackie, Greene county, N. Y., October 11, 1847; prepared for college at Phillips Academy, Andover, Mass., and at the Hudson River Institute, Claverack, N. Y., entered Williams College in the fall of 1866, and was graduated in 1870. After spending one year in the government service (census bureau) at Washington, D. C., he began the study of the law in the office of Gen. E. F. Bullard, Troy, N. Y., and was admitted to practice, at Binghamton, in October, 1874. For four years after graduation he was a partner of Gen. Bullard. In 1880 he formed a copartnership with Nelson Davenport, Esq., under the firm name of Davenport &



Hollister, which partnership still exists, and is one of the oldest law firms in the county of Rensselaer, being actively engaged in general civil practice. Mr. Hollister never held but one political office, that of school commissioner for the city of Troy, from 1878 to 1881. While a Republican, he has always reserved the right of individual judgment and independent action in political matters, refusing to submit to party dictation. He is an earnest advocate of clean politics. Mr. Hollister is deeply interested in educational and religious work. In 1895 he helped to organize the Young Men's Christian Association of Troy, and has since been one of the directors of the institution. He has been one of the trustees of the Troy Orphan Asylum since 1875, and the secretary of the board for nineteen years. Last year he was instrumental in establishing the Troy Daily Record, the only morning newspaper in Troy, and he is at present the vice-president of the company which publishes that journal.

**E. OGDEN ROSS.**

E. Ogden Ross is a native of Troy, where he was born February 5, 1856. After finishing his education, which was obtained at the Troy Academy and the Rensselaer Polytechnic Institute, he

having graduated from the latter institution in the class of 1876, he entered the law office of the Hon. R. A. Parmenter, in Troy, and was admitted to the bar, at Saratoga Springs, September 13, 1888. In politics always a Democrat, Mr. Ross has held



a number of responsible offices, including that of chief clerk in the office of the city comptroller and secretary of the contracting board, which position he still holds. He has been a trustee of the Second Street Presbyterian Church since 1876, and is secretary of the board; treasurer of the church building committee in 1881-2, and treasurer of the Laureate Boat Club from 1883 to 1888. He is a member of the Laureate Boat Club and of the East Side Club. Mr. Ross was married in November, 1888, to Miss Jean M., daughter of Wm. Neely, Esq., of New York city. Two interesting children are the fruit of the union.

**NELSON DAVENPORT.**

One of the oldest and best known lawyers of the Rensselaer county bar is Nelson Davenport. He



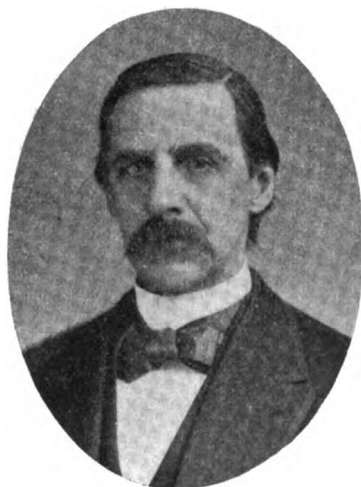
was born at Varna, Tompkins county, N. Y., September 13, 1827. After attending the Troy Con-



ference Academy three years he went to the National Law School, then located at Ballston, N. Y., two years, and was admitted to practice in the State courts July 1, 1850; in 1860 to the United States Circuit courts for New York State, and in 1890 to practice in the United States Supreme Court. For a few years he was in partnership with Gen. E. F. Bullard. Since 1882 he has been associated with William H. Hollister, Jr., under the firm name of Davenport & Hollister. Mr. Davenport has from youth taken a lively interest in political matters. In 1865 he was appointed by Gov. Fenton one of the commissioners of capital police, which office he held four years. In 1873 he received a similar appointment from Gov. Dix, remaining in the office until the law under which he was appointed was declared unconstitutional by the Court of Appeals. In 1895 Mr. Davenport was appointed by Gov. Morton one of the State commissioners of prisons, to hold office three years from June 25, 1895. Mr. Davenport is also one of the court house commissioners for Rensselaer county. Aside from law, politics and general municipal affairs, Mr. Davenport has taken special interest in agriculture. He owns and maintains at East Greenbush a country place of 250 acres, overlooking the Hudson. He is a member of the First Presbyterian Church of Troy and a trustee of the Young Men's Association of that city.

#### JOHN A. CIPPERLY.

John A. Cipperly was born in Brunswick, Rensselaer county, N. Y., February 8th, 1843. His ancestry is traceable to Holland, and his father was



Barnard J. Cipperly, who was also born in Brunswick. John A. Cipperly attended the common schools, the Wilburham Academy, Wilburham, Mass., also the Pittstown Institute, and subsequently taught in the public and select schools of his native county for six years. In the meantime taking up the study of the law, he entered the

office of Lottridge & Traver, afterwards in the office of Warren & Banker, and was admitted to practice in 1865. He then formed a copartnership with Mr. Traver on the death of Mr. Lottridge, under the firm name of Traver & Cipperly, which continued until 1872, when Mr. Cipperly associated himself with the late Hon. E. Smith Strait, then county judge of Rensselaer county, and continued with him until the death of Mr. Strait, in 1881, since which time Mr. Cipperly has had no partner. He has been connected with many important legal controversies, especially in the management and settlement of estates involving long and complicated accountings. Devoting himself to the duties and work of his profession, he has refused all inducements to seek office or engage in the uncertainties of political strife. Mr. Cipperly is married, has one son eleven years of age, and lives on the east side. He is a member of the East Side Club and of Mt. Zion Lodge, F. & A. M.

#### J. P. O'BRIEN.

Jarvis P. O'Brien, prominent among the younger lawyers of Troy, was born in Fort Edward, Washington county, N. Y., May 24, 1864. After receiving an excellent general education, including a full course in the Fort Edward Collegiate Institute, he went to Washington, D. C.,



and became a student in the law department of Columbian University. Though graduating in June, 1891, he remained at the university another year for a post-graduate course. Returning north, he took up his residence in Troy, entering the office of Smith & Wellington as a clerk. He was admitted to the bar in September, 1893, and at once began the practice of his chosen profession, in which he has already achieved a flattering degree of success. Mr. O'Brien has long been interested in public affairs, and has been active in support of the Republican party. He has been a

delegate to various political conventions, including the State convention of 1896. On the first of January of the present year he was appointed by Wesley O. Howard, the district attorney of Rensselaer county, to the office of assistant district attorney. Mr. O'Brien is a life member of the Firemen's Association of the State of New York.

#### W. E. HAGAN.

William E. Hagan was born in Troy, November 24, 1826. His father was a well-known merchant and later a resident of New York city. After finishing his education at the Troy Academy, W. E. Hagan entered the employ of Charles Heimstreet, a manufacturing chemist, and later began the study of chemistry and medicine in New York. Returning to Troy, he became, in 1854, a



partner of his old employer, and on the death of Mr. Heimstreet succeeded to their drug business, which he finally sold to A. M. Knowlson. Mr. Hagan was one of a committee who designed the first successful steam fire engine in the United States—the well-known Arba Read, in 1859. In 1865 he opened an office in New York, and acted largely as an expert in mechanics and chemistry as applied to the arts. Having devoted much study to the subject of handwriting, his opinion as an expert has been often called for in court in many important cases of the kind in the United States. He has written many papers on scientific subjects, and is the author of the well-known work, "Hagan on Disputed Handwriting," published in 1894. He is a member of several social organizations, was formerly a member of the Troy Citizens' Corps, and is now and has been for ten years a member of the Troy Club. Mr. Hagan, besides being an expert in handwriting, is a well-known patent lawyer, having an extensive practice in all parts of the country.

#### E. W. DOUGLASS.



#### FRANK W. THOMAS.

Frank Warren Thomas was born in the city of Troy, October 11, 1859. He attended the Troy Academy, and on leaving that institution entered the Brooklyn Polytechnic and Collegiate Institute, from which he graduated in 1880. Determining to enter the legal profession, he studied law in the office of McClellan & Lansing, of Troy, and in



the fall of 1880 was admitted to the bar at Albany. For a period of ten years Mr. Thomas was a member of the firm of Thomas & Patterson; for the past seven years he has been practicing alone, his specialty being real estate and corporation law. In politics Mr. Thomas has, since early manhood, been prominent in politics, being an earnest Republican. He has taken part in every campaign on the stump since 1884. He is also prominent in the social life of Troy, being a member of the Society of the Sons of the Revolution and of the Society of Colonial Wars, and other organizations.

**GEORGE W. DAW.**

George Weidman Daw was born in Cohoes, Albany county, May 24, 1855. The death of his father prevented him from securing, as he had intended, a college education, and in 1877 he entered the offices of Smith, Fursman & Cowen as a student at law. He was admitted to the bar in 1880, and immediately began the practice of his profession. In 1882 he formed a copartnership with Eugene L. Peltier, which continued until 1880, since which time Mr. Daw has practiced alone. He was attorney for the excise board of Troy from 1883 to 1886, was one of the organizers of the Rensselaer Union (now the Troy Republican) Club, and was one of the organizers of the People's Bank of Lansingburgh, of which he is a director. He is also a director of the R. T. French Company, of Rochester, N. Y. He was



acting chairman of the Rensselaer county Republican committee during the memorable Blaine campaign of 1884, having seventeen uniformed clubs under his charge. He is a member of the Troy Club; was the originator and is a director of the Riverside Club of Lansingburgh; is a vestryman of Trinity Church, Lansingburgh, and is prominently identified with several other local organizations. While in Southern California, in 1887, he plotted and laid out the now thriving village of Vernondale. His paternal ancestors were French Huguenots, who, in the latter part of the seventeenth century, came with other religious refugees to New Rochelle, N. Y. He was married on May 10, 1882, to his cousin, Miss E. Eugenia, only daughter of the late Daniel Weidman, of Albany, and they have had two children, Ellen Elmina and Georgena.

**JOHN P. CURLEY.**

John P. Curley was born in the city of Troy, November 17th, 1856. Soon after finishing his education he determined to enter the legal profession, and in pursuance of that determination be-

gan the study of the law in the office of the Hon. John H. Colby, ex-district attorney of Rensselaer county. In November, 1877, Mr. Curley was admitted to the bar at Albany, and since that time



has been engaged in the general practice of the law. In politics he has always been identified with the Democratic party. The only political office he has held is that of justice of the Justices' Court, which he has filled for the period of nine years. He was for three years the president of the Young Men's Catholic Literary Society, which has about one thousand members. He was also for three years the president of the Bachelors' Club, which has a membership of about fifty.

**IRVING HAYNER**

Irving Hayner was born in Brunswick, N. Y., April 8, 1838. He was educated in the public schools, and was graduated from Fort Edward In-



stitute in 1857. After having read law with the Hon. W. A. Beach, he was admitted to the bar in 1865, and at once began practice in Troy, where he now conducts a general law business. He rep-

resented the Fifth ward of Troy in the board of aldermen two years, and was school commissioner for six years. He is a member of King Solomon's Primitive Lodge, F. & A. M., Apollo Chapter, Apollo Commandery and the Mystic Shrine; is a director in the National State Bank, and is one of the charter members of the East Side Club, a prominent social organization, and has been its president for two terms. In 1868 Mr. Hayner married Carrie H. Halladay, of Vermont, and his children are Horatio, a lawyer; Mittie, Helen and Carolyn.

#### HENRY T. NASON.

Henry Townsend Nason, the present county judge of Rensselaer county, is the son of Henry Bradford Nason, LL. D., an eminent chemist and naturalist, who was for thirty-six years a professor in the Rensselaer Polytechnic Institute, Troy, and Frances K. Townsend, the daughter of Hon. Martin I. Townsend, of Troy. He was born August 13, 1865, at Troy, N. Y. He fitted for college at the Williston Academy, Easthampton, Mass., and



graduated from Yale in the class of '86, with high honors. Two years later he graduated from Columbia College Law School, and in the same year formed a copartnership in the practice of the law with his grandfather, the Hon. Martin I. Townsend, and the Hon. William J. Roche, under the firm name of Townsend, Roche & Nason. As the junior member of this well-known firm, Mr. Nason diligently pursued the duties of his profession until November 3, 1896, when he was elected county judge of Rensselaer county over his opponent, Hon. James Lansing, by the flattering majority of 3,044. Mr. Nason enjoys the distinction of being the youngest county judge ever elected in the county of Rensselaer. He has proved an ornament to the bench, as he had previously been to the bar.

#### CHARLES R. FAULKNER.

Charles T. Faulkner was born in Troy, N. Y., September 4, 1867, and received his education in the public schools and at the Troy High School.



His law studies were pursued in the office of Hon. C. E. Patterson, and in 1890 he was admitted to practice. In 1895 he was appointed a school commissioner, and served one term as president of the board. Mr. Faulkner is a member of the Pafraets Dael Club.

#### MARTIN L. MURRAY.

Martin L. Murray first saw the light on February 29th, 1872, at Troy, N. Y. Mr. Murray was one of the youngest scholars that ever graced the doors of La Salle Institute. His study and deportment in the institute were always good, and when



he entered the Troy High School he carried out his previous reputation of close application to his work. He was graduated from Troy High School in 1890. Afterward he attended Williams College for two years. He studied law with his brother, the late Judge James T. Murray, and then with Patterson & Faulkner. Mr. Murray was admitted

to the bar on May 10th, 1894. On the death of his brother he was appointed to fill the vacancy of justice of the Justices' Court. It is a fact that Mr. Murray is the youngest justice ever elected to fill a justice's chair. The majority received by him for this position over his opponent shows the esteem in which he is held among his people.

#### W. O. HOWARD.

Wesley O. Howard was born in Troy, N. Y., September 11, 1863. He received a common school education in Grafton, N. Y., and an academic education in Lansingburgh, after which he taught school for seven years. Entering the law office of Robertson, Foster & Kelley in the fall of 1886, he was with that firm about two years, and then went with William W. Morrill to finish his legal studies, and was admitted to the bar in the fall of 1889. Mr. Howard was attorney for the board of supervisors for two years. He had the management of the prosecution and collection of the evidence against the repeaters and election offenders in the



winter of 1893, and was attorney for the committee in charge during the whole examination. He was one of the attorneys for the committee of safety, which continued the same work, and was also one of the attorneys for the senate investigating committee. He was secretary of the Republican county committee for three years. He was elected district attorney in the fall of 1896. He is a prominent member of several social and fraternal organizations, including the Knights of Pythias. Mr. Howard was married October 1, 1884, to Carrie A. Millias, of Grafton. They have two daughters. Mr. Howard's residence is Bath-on-the-Hudson.

#### CALVIN S. MCCHESNEY.

Calvin S. McChesney was born in Pittstown, Rensselaer county, N. Y., December 15, 1857. After receiving a district school education he entered the military academy at Peekskill, N. Y., in January, 1875, graduating two years later. He

then entered Yale, and graduated therefrom in the class of '81. Finishing his education at the Yale Law School, he settled in Troy, and entered the



law office of Warren, Patterson & Gamble, where he remained until 1889, when he opened an office for himself. In 1893 Mr. McChesney associated himself with Clarence E. Betts, under the firm name of McChesney & Betts. Mr. Betts retired from the firm January 1, 1896, since which time Mr. McChesney has continued to practice alone, doing a large and lucrative business. He is a member of the Pafraets Dael Club, of which he is president, and is also a member and the quartermaster of the Troy Citizens' Corps.

#### EUGENE BRYAN.

13 State street, Troy, was born in Schaghticoke, Rensselaer county, August 30, 1861. He was edu-



cated in the district schools and Mechanicville Academy, and graduated at Albany State Normal College, January, 1895. He attended the Albany Law School, studied law with Warren, Patterson & Gambell, and was admitted to the bar in June, 1889.

**CLARENCE E. McNUTT.**

Clarence E. McNutt, the subject of this sketch, was born in Warrensburgh, N. Y. His early education was received in the schools of Troy and Ithaca, N. Y. Mr. McNutt graduated, in 1877, from the Fort Edward Institute. After graduation



he entered the law offices of Smith, Fursman & Cowen as a student, being admitted to practice September 10th, 1880, at Saratoga Springs. Mr. McNutt's practice is general in its nature. His clientage promises a brilliant future to one of Troy's most popular young attorneys. Mr. McNutt does not hold any political office, nor has he in the past sought any, devoting all his time and energy to the practice of his chosen profession.

**GEORGE A. MOSHER.**

On October 6th, 1845, at Sharon, Vt., George A. Mosher, the well-known patent attorney, was born.



He attended Royalton Academy, Royalton, Vt., and Union Academy, Meriden, N. H., for some

years. When only 18 years of age he graduated from Dartmouth College. This was in 1863, and soon afterward he entered the office of R. A. & F. J. Parmenter, to study law. Patent law was chosen as a specialty by Mr. Mosher, and when he was admitted to the bar, in 1868, it was with a very decided taste for and knowledge of patent laws and infringements. Mr. Mosher has for some years stood high as a mechanical expert in patent matters. A liberal patronage was showered upon Mr. Mosher to such an extent that he found it necessary to take a partner in 1893. Mr. Frank C. Curtis was made one of the firm of Mosher & Curtis in 1893. The firm devote their time exclusively to patents and patent laws.

**FRANK C. CURTIS.**

Frank C. Curtis was born in Troy, N. Y., on June 3d, 1869. He attended the public schools for a few years, and then entered Troy High School, from which he graduated in 1888. The study of law was taken up in the office of George A. Mosher. In 1891 he was admitted to the bar. Mr.



Curtis made a specialty of the study of patent law, and after being admitted to the bar he formed a partnership with Mr. Mosher. Mr. Curtis is a Republican in political faith, but has never held or cared for office. He has won considerable prestige as an expert on laws referring to infringements of patents and patent rights. The firm of Mosher & Curtis occupy handsome offices at 301 River street, Troy. The practice of the firm is confined to the courts of the United States.

### Oneida County.

#### WATSON T. DUNMORE.

Watson Thomas Dunmore was born in the town of Rush, Pa., March 28, 1845. After preparing for college at Wyoming Seminary, Kingston, Pa., he entered Wesleyan University, Middletown, Conn., from which he was graduated in 1871. After reading law with ex-Governor Roswell Farnham, of Bradford, Vt., he was admitted to the Vermont bar, in 1874, and a year later graduated from Hamilton College Law School. In June of 1875 he was admitted to the New York bar, and in the following September commenced practice in Utica, where he has since



continued to reside, being engaged in the general practice of the law. For a number of years Mr. Dunmore has been prominent in politics in Oneida county. He was elected special county judge of the county in 1886; was re-elected in 1889; was elected county judge in 1892; was elected State treasurer of the New York State League of Building and Loan Associations in 1889, '90 and '91; was promoted to the presidency of that organization in 1892, and was one of the six Americans chosen to read papers on building and loan associations at World's Congress of Building and Loan Associations at Chicago. He was also one of the organizers of the Homestead Aid Association of Utica, which now has assets of upwards of \$700,000. He has been its attorney since it was organized, in 1884, and is now its president.

#### THOMAS D. WATKINS.

Thomas D. Watkins, who has twice served as corporation counsel of Utica, was born in the town of Plainfield, Otsego county, September 4th, 1870. After finishing his studies at the West Winfield Union school, and Winfield Academy, he entered Cornell University Law School, from which he was graduated in 1892, with the degree of B. A.

In April of the following year, he was admitted to the bar, at Syracuse, N. Y. Since that time, with the exception of the duties necessarily devolving



upon him as counsel to the corporation of Utica, which duties were so satisfactorily performed as to give him a renomination and re-election. Mr. Watkins has been engaged in the constant and successful practice of his chosen profession.

#### ISAMUEL J. BARROWS.

Samuel J. Barrows, who has been for a long time one of the foremost figures of central New York in social, political and professional life, was born in Chenango county about seventy years ago. His lineage is distinguished, beginning on this side of the ocean in 1637, when John Barrus



took his wife from their ancestral home in Yarmouth, England, to brave the hardships of pioneer life in Salem, Mass. The grandfather of our subject fought in the ranks of the Continental army at Bunker Hill, Trenton, Princeton and Bennington; and his father served in the War of



1812. The whole record is interesting and inspiring.

Mr. Barrows spent the early years of his life on his father's farm. Most of his time was necessarily devoted to farm work; but he managed to obtain some schooling at odd intervals, and to attend for a few months the academy at Norwich, N. Y. By the time he was twenty-one he had acquired sufficient education to be intrusted with the management of a district school. He taught for only a short time, having his mind made up to study law; and in 1848 he began his legal reading at Utica in the office of Joshua A. Spencer and Francis Kernan. He was admitted to the bar in the same city in 1851, and became managing clerk in the office of the late Judge Ward Hunt. A year of service in this capacity completed his preparation for his profession, and in 1852 he opened an office in Utica on his own account. He has practiced there continuously since, always without an associate, and has attained a reputation as one of the ablest lawyers in the county. He has been unusually successful as a trial lawyer. The one notable exception to Mr. Barrow's concentration of energy upon the law has been his public service. As early as 1853 Mr. Barrows was elected city attorney of Utica, and served for one term. In 1857 he became attorney and counselor for the board of excise of Oneida county, and held the position until 1870. In March, 1879, he was appointed corporation counsel of the city of Utica, and served in that capacity for five consecutive terms. It is worthy of note that he was first appointed to the office by a Republican council and later by a Democratic council.

In 1889 Mr. Barrows was elected mayor of the city of Utica, and served one term. Extensive public improvements were undertaken during this time, notably the construction of a large amount of asphalt pavement, the betterment of the city sewerage system, the substitution of electricity for horse power in the street railways, and the sale of the abandoned Chenango canal lands at a profit of \$6,000 to the city; and Mr. Barrows' record in connection with these and similar matters entitles him to a high place in the esteem of his fellow-citizens.

### Legal Notes of Pertinence.

It is said that District Attorney Olcott, of New York, has agreed to accept from Governor Black an appointment to fill the vacancy on the New York City Court bench caused by the resignation of Mayor-elect Robert A. Van Wyck.

Assistant Secretary of the Interior Davis decides that a soldier's widow, not dependent on daily labor for her support, is not entitled to a pension. He has rejected the claim of the widow of an Illinois volunteer for this reason. She owns

fifty-one acres of land near Chicago, valued at \$150 an acre, and yielding a net annual income of \$200; the house in which she lives is worth \$6,000 clear, and the only dependent is a daughter capable of self-support.

Vickers, defendant in the Tindall-Vickers sensational breach of promise suit at Metropolis, Ill., against whom the jury returned a verdict of \$12,500, has brought suit against his attorney. The Supreme Court affirmed the judgment of the court below, and Vickers now seeks to recover \$25,000 from his counsel, alleging that the bill of exceptions was not properly prepared.

The Supreme Court of Montana has sustained the constitutionality of the Inheritance Law passed by the last legislature. The law imposes a tax of five per cent. on bequests to any beneficiary not a relative where the estate amounts to over \$100. The tax on estates directly inherited, where the value of the estate is over \$7,500, is one per cent.

The Illinois legislature has been called to meet in extra session. Governor Tanner in his call names six questions to be considered. They are: To amend laws for the assessment of property; to amend the primary election law; to apportion the State into senatorial districts; to establish metropolitan police boards for cities having a population over 100,000; to appropriate \$60,000 for maintenance of the Soldiers' Home at Quincy; and to make an appropriation to pay the expenses of testing the legality of the Inheritance Tax Law.

Justice Davy, of the New York Supreme Court, recently handed down an important decision in the case of *Nellie French v. Alvin Seamans*. This was an action tried at the Bath trial term in September. The plaintiff sought to recover damages for breach of promise. Seamans was 74 years old, and the shock was so great when the verdict of \$1,000 for the plaintiff was returned that he dropped dead. The question of law that arose was an important one. Justice Werner, who presided at the trial, desired to leave town to get to Rochester on a certain train. The case was the last one of the term, so Justice Rumsey, of the Appellate Court, offered to take the verdict. Counsel consented and Justice Werner went home. When the verdict was rendered for the plaintiff a motion for a new trial was made. Justice Rumsey held that he had no power to decide the motion, but, the attorneys consenting, he granted a stay until Justice Werner could hear the motion. Before Justice Davy last October a motion to set aside the verdict and all the proceedings on the trial on the ground that Justice Rumsey, under the Constitution, had no jurisdiction to receive the verdict, was argued. Justice Davy, in his decision, holds that the acts of Justice Rumsey were perfectly legal. This is the first time the question has arisen under the new Constitution.



## Detroit Legal News.

ISSUED WEEKLY.

Publishes advance sheets of all Michigan  
Supreme Court Decisions.

SEMI-ANNUAL DIGEST.

Subscription Price, \$2.00 per Year.

Send for sample copies.

DETROIT LEGAL NEWS,

45 Hodge's Block

DETROIT, MICH.

FORMS OF

## *Federal Pleading, Practice and Procedure.*

By FRANK O LOVELAND,

Clerk of the U. S. Circuit Court of Appeals, Sixth Circuit.

This book is in an eminent degree practical, and is a fitting supplement to any treatise on Federal practice. The majority of the forms have been taken from actual contested cases, to which reference is made in the notes, making each form have the additional value of a precedent.

This book begins with Forms at Law, starting with the caption, and including some sixty-seven forms. Then follows the subdivision in equity, in which the formal parts of a bill are first given in some eight-ten forms, and then twenty-two forms of bill in special cases. Then follow bills not original, twelve forms; demurrers, thirty-one forms; pleas, twenty-one forms; answers, thirty-four forms; exceptions, five forms; disclaimer, replication and notices, motions, orders and decrees, sixty-eight forms. Following these subdivisions comes the title receivers, in which are included some twenty-nine elaborate and carefully annotated forms, followed by ancillary proceedings, with twenty-two complete forms. Patents for inventions is a subject very elaborately treated, with copyrights and trade-marks, occupying almost a hundred forms. Criminal proceedings, from the filing of a complaint before the commissioner to the prisoner's commitment and subsequent escape, with the dismissal of the contempt proceedings against the jailer, take up another hundred forms.

Admiralty has another hundred forms. Removal from State Courts, twenty-one; Appellate proceedings, forty-four; and the Supreme Court of the United States some fifteen very interesting forms.

One Volume, in best Law Book Style, of more than 800 Pages.

PRICE, \$6.00 NET

W. H. ANDERSON & CO., Law Book Publishers,

515 MAIN ST., CINCINNATI, O.

T. MOULTREY MORDECAI.

PHILLIP H. GADSDEN

## MORDECAI & GADSDEN

Attorneys at Law.

43-47 Broad Street, CHARLESTON, S. C.

Practice in the State and Federal Courts. Special attention given to Collections, Real Estate, Corporations, Commercial and Insurance Law.

Attorneys in South Carolina for Postal Telegraph Cable Company; Plant System of Railways; Charleston City Railway; The American Bonding & Trust Company, Baltimore, Md.; State Savings Bank; Tide Water Oil Company of Georgia; Mutual Life Insurance Company of New York; United States Casualty Co.; Armour & Co., Chicago, Ill.

Refer to President or Cashier of any bank in Charleston: National Park Bank or United States National Bank of New York; Standard Oil Company of Louisville, Ky.; First National Bank, Charleston; Daniel Miller & Co., Baltimore, Md.; J. H. Parker, 43 Wall St., New York; also any well known collection Agency in the United States.

10 2-97

## ALEX. DOWNEY.

Chartered Stenographic Reporter and

Official Reporter Admiralty Court.

COMMISSIONER FOR

Ontario, Quebec, N.W.T., New York, Mass., Rhode Island and Illinois.

Commissions to take testimony carefully and promptly executed.

C. O. ANGUS, C. S. R.,

Commissioner for Minnesota, Ohio and Indiana.

79 Adelaide St. E., Toronto, Can. Sept. 1-97.

## MAJOR'S CEMENT

Specially prepared for Household Purposes. Mends glass, crockery, furniture, meerscham, anything that breaks. **MAJOR'S RUBBER CEMENT.** A wonderful sticker. No bicyclist should be without it. Superior for repairing punctures and attaching tires to rims. **MAJOR'S LEATHER CEMENT.** Of surprising adhesive power. Each sold at 15c and 25c per bottle. At druggists or by mail. **MAJOR CEMENT CO.** Established in 1878. 461 Pearl Street, New York City

1870.

1898.

...Twenty-Ninth Year...

## THE ALBANY LAW JOURNAL

A Weekly Record of the Law and the Lawyers.

This sterling Law Periodical which, on the 1st of January, 1898, enters upon the TWENTY-NINTH consecutive year of publication, holds a deservedly high place in the estimation of the profession. For more than a quarter of a century it has stood among the foremost periodicals of its class in the world. It will be better and brighter than ever in 1898, under the present new and progressive management. All the old features which have contributed so much to the Journal's popularity in the past will be retained, and new ones added. No progressive, up to date lawyer can afford to be without it.

THE GREAT LEGAL ROMANCE.

A LIVING DEAD MAN;

Or The Strange Case of Moses Scott,

Will be begun in November. It will be published as a supplement, book-size page, and can be bound separately. The story, besides being intensely interesting to every lawyer, will be well worthy of Permanent preservation. Don't miss it!

As an inducement for new subscribers, the JOURNAL will be sent FREE, until Jan. 1, 1898, to all who pay now in advance, \$3 for one year's subscription, beginning on that date.

Send in your subscription now, and get the benefit of this liberal offer.

The Albany Law Journal Co., ALBANY, N. Y.

## The Albany Law Journal.

A Weekly Record of the Law and the Lawyers. Published by THE ALBANY LAW JOURNAL COMPANY, Albany, N. Y. Contributions, items of news about courts, judges and lawyers; queries or comments, criticisms on various law questions; addresses on legal topics, or discussions on questions of timely interest are solicited from members of the bar and those interested in legal proceedings.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Subscription price, Five Dollars per annum in advance. Single number Twenty-Five Cents.

ALBANY, DECEMBER 25, 1897.

### Current Topics.

ON Friday, the 17th inst., Chief Judge Charles Andrews, of the New York Court of Appeals, retired from that tribunal, after a continuous service covering twenty-seven years. When the court adjourned for the day and the term he had completed his term of office by reason of having reached the constitutional age limit of 70 years. Judge Andrews will write the opinions in such cases as have been assigned to him during the concluding sittings of his term, and when they are handed in he will have finished his judicial labors, unless called upon by the governor to render service in the Supreme Court, Appellate Division. In the event of Judge Andrews requesting such assignments he will be a most valuable member of that court. He is entitled to draw his salary for eight years more, or the actual time for which he was elected. Judge Andrews was the fifth chief judge to occupy the bench of the highest court under the judiciary article of the Constitution which was adopted in 1869. It is a matter of historical interest at this time to recall the fact that the first opinion which he wrote as a judge of the Court of Appeals was that in the *People in Error v. Martin Allen*, defendant in error, which was argued October 12, 1870. The appeal was from a conviction of grand larceny in what is known in police circles as the "badger game" case. The trial court convicted Allen, but the General Term granted a new trial. The Court of Appeals,

however, reversed the General Term and affirmed the conviction. The promotion of Justice Alton B. Parker to the chief judgeship of the Court of Appeals, upon the bench of which he will take his seat on the 10th of next January, will leave a vacancy in the Supreme Court, Third Judicial District, which will be filled by appointment by the governor. In addition to these appointments the governor has several assignments to make in the Appellate Division. A vacancy also exists in the Second Appellate Division, caused by the retirement of Justice Geo. B. Bradley. Governor Black has designated Chester B. McLoughlin, of Port Henry, justice of the Supreme Court, Fourth Department, for a term of five years, and Justice Charles H. Van Brunt, of the Supreme Court, First Department, to act as presiding judge of the Appellate Division, First Department, during his term of office.

President McKinley, on the 16th inst., sent to the senate the nomination of Joseph McKenna, of California, at present at the head of the department of justice in the cabinet, to succeed Stephen J. Field, resigned. Ever since the acceptance by Judge McKenna of a place in President McKinley's cabinet this appointment has been counted upon as a practical certainty. When appointed to the cabinet place he was holding a life position—that of United States circuit judge—and it is hardly to be supposed that he would have given that up for four years' official work and life in the National Capital. Justice Field's intention to retire so soon as his ambition to surpass all previous records as to length of continuous service on the Federal bench had been realized was well known, and doubtless counted upon. Judge McKenna's qualifications for the high judicial office are undoubted and unquestioned. In saying this we are well aware of the somewhat extraordinary protest which was recently sent to the president by Federal judges in Portland, Ore., against the selection of the distinguished Californian. These protests, which appear to have been based either upon personal ill-will or sectional differences and jeal-

ousies, are likely to have about as much weight with the senate as they had with the president — and that is well represented by the zero mark.

We publish in full in this issue the opinion of the Court of Appeals of the District of Columbia in the case of *Lansburgh et al. v. The District of Columbia*, which involves the question of the legality of the so-called trading stamp business. The defendant had been convicted in the Police Court of the District of having violated the statute relating to gift enterprises, and this judgment the Court of Appeals affirms, Mr. Justice Shepard delivering the unanimous opinion of the court. The decision, in view of the wide spread of the trading stamp craze, is of considerable importance. The hope of obtaining something for nothing, which seems to be one of the inseparable features of so many different lines of business in these latter-day times — a feature which old-time merchants never cease to regret, but are apparently powerless to eliminate — rarely fails to appeal strongly to the average buyer. The trading stamp is, of course, a gift enterprise in a somewhat new guise, as Judge Shepard clearly shows in his well-reasoned and unquestionably sound opinion. As a precedent the case will undoubtedly be extensively quoted.

The constitutionality of Nebraska's so-called Anti-Deficiency Law, which, in effect, prohibits deficiency or surplus judgments in foreclosure sales, by providing that the purchase price at such sale shall extinguish the entire debt, no matter what the amount of the claim may be, is to be tested in the Supreme Court of the United States. The case is one wherein a New York corporation recently sold out the American Water Works Company, of Omaha, under mortgage foreclosure. The amount realized on the sale was something over \$4,000,000, but was about \$500,000 less than the amount of the indebtedness. The corporation now asks a deficiency judgment for the balance, contending that the Anti-Deficiency Law is void because it prohibits reasonable commercial

transactions and interferes with the freedom of contract and the pursuit of lawful business, besides being grossly inequitable and unjust. Whether or not the law referred to has been passed upon by the State courts we are not aware. It is gratifying, however, to know that the highest Federal court is to decide the case in point. This species of attempted repudiation of debts honestly contracted is not, unfortunately, peculiar to Nebraska, several other Western States having enacted, or sought to enact, legislation similar to that which has already been placed upon the statute books of Nebraska. It is very hard to see upon what principle such a law can be sustained, and we believe the Supreme Court of the United States will find no difficulty in reaching such a conclusion.

Judge Pennypacker, of Philadelphia, is being highly commended for his recent action in refusing to issue a charter to an alleged Faith Cure Christian Science Church in the City of Brotherly Love. While the question is one which has unnecessarily troubled the judicial mind in other States, Judge Pennypacker found no difficulty whatever in reaching a decision, and we are free to say that we believe that decision to be eminently sound and just. The Philadelphia Press, in commenting upon the decision referred to, makes some sensible and timely observations which are well worth reading. The Press says:

The befuddlement is usually the outgrowth of the use of the magic word "religion," which, like charity, is invoked to cloak all the fantasies that the disordered brain of man has ever evoked, and to excuse them. Of course, on plain issues of this kind, neither the humblest layman nor the least informed officer of the law is easily deceived. The gross immoralities of "Prince Michael" in Detroit, although committed in the name of religion, did not keep him out of the penitentiary, and even a complaisant judge would refuse to grant a charter to a sect that made arson, or suicide, or indiscriminate violation of the laws part of its doctrine.

When, however, the question of faith cure comes up, to many otherwise clear-headed it seems to belong to a different category, demanding sympathetic treatment. It professes all sorts of benevolent intentions and proclaims results beyond the dream of the greatest physicians and surgeons. This, however, deceives no one well balanced, and

did not deceive Judge Pennypacker, who saw through all obscurations to the real issue, and that is that faith cure and all its allied isms is an ill-concealed repudiation of all medical knowledge, which has been the growth of ages, and the advance of which in the way of preventive medicine in the last fifty years is one of the glories of modern civilization. Fortunately the laws of Pennsylvania regarding the practice of medicine gave Judge Pennypacker the opportunity of deciding against this society, and in so doing he not only prevented an intentional and continual technical violation of the laws, but a violation that would be a standing menace to public health, and which would thwart, and does elsewhere, the efforts of the public authorities to protect the community from preventable diseases. The result of Judge Pennypacker's decision should be far-reaching and wholesome. Such great civilized nations as England, Germany and France and the United States spend thousands annually for the advancement of preventive medicine. Everywhere the effort is making in city, State and nation to raise the standard of medical requirements, to protect the people against charlatanism. Pennsylvania has high standards. They cannot be lowered or undermined, and they would be by the official recognition of the right of faith-cure societies to a chartered existence. Cuba, with a death rate of 150 in 1,000, is the typical condition of a country where sanitary science is unknown, but the deaths there are the result of lack of effort, while under the free reign of Christian science the absolute repudiation of all known hygienic and sanitary laws would put every community back in the state of towns in the dark ages.

We have received the following letter from a distinguished member of the Rochester bar, in which he speaks in high terms of the tributes paid to Chief Judge Andrews in the *LAW JOURNAL* of the 18th inst., and of the article on the old Court of Appeals, by Mr. L. B. Proctor. He says: "I cannot if I would refrain from expressing the pleasure which I took in reading the *LAW JOURNAL* of the 18th inst., containing the admirable tributes to the retiring chief judge of the Court of Appeals paid him by his distinguished former associates and by that eminent jurist, Alton B. Parker, who will succeed him in the great office in which he has so long and learnedly pronounced the laws. The truthful and delightfully written estimate of the chief judge by ex-Attorney-General Simon W. Rosendale forms one of the most attractive features of the number.

It presents in natural, pleasing coloring the great judge who retires from the bench with the accumulated honors of a career which will enrich forever the history of our great court of last resort. Following Mr. Rosendale's article on the chief judge is a most striking and life-like portrait of that illustrious jurist, Rufus W. Peckham the elder, a finely executed and artistic portrait of the retiring chief judge, and a singularly perfect likeness of that eminent judge, Martin Grover, who lives in the pages of history as one of the most striking judicial characters in it. Nothing can be more delightfully entertaining than the personal tributes paid to the retiring judge by Chief Judge-elect Alton B. Parker, Mr. Justice Rufus W. Peckham, of the United States Supreme Court; the Hon. Francis M. Finch, ex-Chief Judge Robert Earl, ex-Judge Geo. F. Danforth, James C. Carter, Judge Edward Patterson, Joseph H. Choate and John G. Milburn. These generous and beautiful attestations of the estimation in which these eminent jurists and brilliant lights of the bar hold the services and career of Judge Andrews will form a delightful chapter in the future history of our Court of Appeals, and illumine the pages of the legal biographer.

"An interesting and delightfully written finale to the contents of the pages of the *LAW JOURNAL*, at which we have glanced, is found in the comparative view of those illustrious characters in the civil and legal history of the State, John C. Spencer and Nicholas Hill, by L. B. Proctor, author of the 'Bench and Bar of the State of New York.' If we find truthful and beautiful artistic portraits of the great jurist in the pages of the *LAW JOURNAL* to which we have referred, we find in Mr. Proctor's pen-and-ink portraiture of Spencer and Hill much that speaks eloquently of their majestic careers. He presents to the reader a striking view of the old Court of Appeals, in which Nicholas Hill, through a long professional career, won his historic triumphs at the bar. Among the assemblage of legal luminaries of the past is seen two at least of the great advocates who are so vividly pictured in Mr.

Proctor's article. On the whole, the *LAW JOURNAL* containing these eloquent and beautiful tributes to great judicial wisdom, and the striking sketches of the two great lawyers, Spencer and Hill, forms a chapter which I have read with ever-increasing interest."

### Notes of Cases.

In *Supreme Council of Golden Star Fraternity v. Conklin*, decided by the Court of Errors and Appeals of New Jersey in November, 1897 (38 Atl. R. 658), the following is the official syllabus:

"1. The declaration of his age, made by an applicant in his petition for membership in a beneficiary society, which has been accepted, and a beneficiary certificate issued, and the required payments made and received for a series of years, will be presumed to be correct until the presumption is overcome by competent proof.

"2. A Bible, in which the names and dates of birth of several members of the same family are recorded, without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, or that the persons whose names and dates of birth are written therein ever acknowledged it to be an authentic family record, and when the entries in the book are not shown to have been contemporaneous with the facts stated, is not competent proof of the age of any person whose name may be recorded therein."

The court said in part:

It will be perceived that the only evidence to impeach the correctness of the statement as to age made by Conklin in his application had its origin from the record made in the Bible. This book, judging by the proofs alone, does not possess the necessary characteristics to warrant its acceptance as an authentic family record. It falls far short of what is required to give it such a character. But the learned trial judge in the court below had the opportunity to personally inspect the book itself when offered, and, in the reasoning which led up to the ultimate finding to which the second exception under consideration applies, he uses the following language: "The Bible bears the appearance of age. Perhaps that is hardly correct. It is mutilated, and shows evidence of use for a long time; but the binding is not of a character one would expect to find in a very ancient volume. The title page being lost, it is impossible to ascertain the date of printing. The entries are certainly not contemporaneous with the facts stated. The names are written in one handwriting, and apparently at one time; the same pen and ink, apparently, having been used. It is also apparent that the dates of the birth of the children were written at the same time, but in a different

handwriting from the names, and with a different pen and ink. From the appearance of the ink and the writing, I think that the dates were appended long after the names were written. A correction has been made in one of the dates. \* \* \* The question is, Can this book, under the evidence, be regarded as a family record? I do not think there is proof in the case warranting me to so regard it. There is no evidence showing when the dates were placed in the book, or by whose authority, or what information the person making the entries had. That they were not made contemporaneous with the births of the children named is apparent." We find no error in the record, and the judgment should be affirmed.

In *Henderson v. Dade Coal Co.*, decided by the Supreme Court of Georgia in March, 1897 (28 S. E. R. 251), it was held that lessees of a penitentiary convict could not be held liable for damages for rape committed upon a female by such convict, who, while in such lessees' custody, had negligently been suffered to escape from their control, as it was not reasonably to be apprehended that such injury would result from the negligent act in permitting the convict to be at large.

The court said in part:

The case, at least, depends upon the question whether the custodians of such a convict as is described in the third head note are legally responsible in damages for the consequences of crimes committed by him while at large and in the unrestrained control of his own movements, by their permission, or because of their negligence in failing to keep him safely confined. We have no doubt that, as a general rule, a criminal tort committed by such a convict would be too remote a consequence of his keepers' misconduct in the premises to render them responsible to the person injured. While cases may arise in which this general rule should be varied—as where it appears that the custodians of the convict were in some way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed—nothing is alleged in the present declaration to bring this case within such an exception. The direct and proximate cause of the injuries inflicted upon Miss Henderson was the independent action of the convict himself. He, though vicious, brutal and infamous, was nevertheless an accountable human agent. While according to the plaintiff's averments, he was not restrained by any convictions of right and wrong, nor governed by any principles of morality, the declaration does not attempt to allege that he was not a rational person, fully amenable to the laws both of God and of man. That he was prone to a desire for sexual intercourse did not, by any means, render him an exception to a law of nature which universally prevails in the animal kingdom, whether as applied to human beings or animals of

lower orders. Vile as this man was, it cannot be held that the defendants could reasonably have anticipated that he would, upon the first opportunity, assault and ravish any defenseless woman whom he might encounter. He was equally liable to commit some other heinous crime; and they were not bound to presume that he would commit any crime at all. The State requires the lessees of convicts, at the expiration of their terms, to furnish them transportation to the counties in which they were convicted. Thus the law clearly contemplates that these criminals shall be set at liberty in the very communities whence they came. It can hardly be questioned that scores, perhaps hundreds, of convicts, just as bad as the one now under consideration, are, from time to time, set at large by the law's command. If there was reason to apprehend that convicts of this depraved type would, upon regaining their liberty, commit such crimes as that complained of in the present case, it would seem that the true policy of the law would be to keep them imprisoned during their lives. That such is not the policy of the law is due to the fact that reason for apprehending such outrages does not really exist.

In *Sawrie v. State of Tennessee*, decided by the United States Circuit Court, M. D. Tennessee, in September, 1897 (82 Fed. R. 615), it was held that a Tennessee statute entirely prohibiting the importation or sale of cigarettes is invalid, as an interference with interstate commerce, in so far as it applies to cigarettes brought into the State from other States or foreign countries, and sold in the original packages of importation.

The opinion concludes with the following language: "If the State enactment regulating traffic in a particular article be in fact a quarantine or an inspection statute, and, as such, is aimed at something uncommercial, by reason of its state or condition, such as articles infected, or disguised so as to be a cheat calculated to lead a purchaser into buying something he did not intend to buy, as in *Plumey v. Massachusetts* (155 U. S. 461, 15 Sup. Ct. 154), the enactment may be upheld as an exercise of the police power of the States, and not a regulation of commerce. But this Tennessee statute, in so far as it prevents importation and sales in the original package by the importer, is not a quarantine or inspection statute, and is not based upon the state or condition of the cigarette. *Hennington v. Georgia* (163 U. S. 299, 16 Sup. Ct. 1086) involved a statute of the State of Georgia prohibiting any operation of railroad trains on the Sabbath day. It was upheld as an exercise of the police power of the State, and not a regulation of interstate commerce. The opinion contains no language in any way modifying the doctrine of *Leisy v. Hardin* (135 U. S. 100), or that of the cases following and reasserting the doctrine of that case. There is no possible conflict between *Hen-*

*nington v. Georgia* and *Leisy v. Hardin*. It is but another of the class of cases like those considered and distinguished in *Bowman v. Railway Co.* (125 U. S. 465), *Leisy v. Hardin* and *In re Rahrer* (140 U. S. 545). The case at bar does not fall within that class, and is controlled by *Leisy v. Hardin*, from which it cannot be distinguished. The case reported in 69 Fed. 233, under the style of '*In re Minor*,' is not precisely in point, as the statute under consideration was purely a revenue enactment. In *Iowa v. McGregor* (76 Fed. 956), a police statute precisely like the Tennessee act, except for a proviso that the act should not apply to jobbers doing an interstate business with customers outside the State, was held to be invalid, so far as it applied to sale by the importer in original packages. The Tennessee statute is too broad, and is repugnant to the commercial clause of the Constitution of the United States, in so far as it inhibits the importation of cigarettes from foreign nations or other States, or their sale by the importer in the form in which they were imported. I reach this conclusion without any hesitation, though reluctant to even partially strike down a statute aimed at the suppression of an evil of most pronounced character. The detention of the petitioner under the commitment of the State court is illegal, and he must be set at liberty."

In a proceeding entitled *In re Hong Wah*, decided by the United States District Court, N. D. California, in September, 1897 (82 Fed. R. 623), it appeared that a city ordinance provided that it should be unlawful for any person to establish, maintain or carry on the business of a public laundry, where articles are washed and cleansed for hire, within the city, except in certain designated localities, and declared any such laundry established or carried on in violation of this provision a public nuisance, and the violation of the ordinance a misdemeanor, punishable by fine or imprisonment. It was held that the ordinance was in contravention of the Fourteenth Amendment of the Constitution of the United States.

The court said in part: "In *Ex parte Whitwell* (98 Cal. 73, 32 Pac. 870) the provision of an ordinance which prohibited the maintenance of a private asylum for the treatment of inebriates and persons suffering from mild forms of insanity within 400 yards of any dwelling or school was held to be invalid. In passing upon that particular provision of the ordinance the court said:

"A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety or comfort of the surrounding community requires its exclusion from that particular locality; and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly con-

ducted, such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools.'

"It will be observed that in the case just cited the decision of the court rests upon the broad proposition that the ownership of property, no matter where located, carries with it the right to use, and to permit the use of, such property in the prosecution of any legitimate business which is not a nuisance in itself, and that the exclusion of any such useful business from a particular locality can only be justified upon the ground that the health, safety or comfort of the surrounding community requires such exclusion. A moment's reflection will show that any rule less broad would fail to give full effect to this comprehensive declaration of the Fourteenth Amendment to the Constitution of the United States:

"'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the law.'

"The right to use property in the prosecution of any business which is not dangerous to others, nor injurious nor offensive to persons within its vicinity, is one of the legal attributes of the ownership of property, of which the owner cannot be deprived by the arbitrary declaration of any law of the State, or municipal ordinance; nor can the right of any person to engage in any useful occupation, not a nuisance *per se*, at such place as he may choose for that purpose, be denied by any law or ordinance. These are the fundamental principles underlying the decision in *Ex parte Whitwell*, before referred to, and the rule of law as thus declared is entirely inconsistent with the previous case of *In re Hang Kie* (69 Cal. 149, 10 Pac. 327), unless the business of conducting a public laundry is to be deemed and treated as a nuisance *per se*; and that such business cannot be so regarded was not only decided in the cases first cited in this opinion, but also by the Supreme Court of California in *Ex parte Sing Lee* (96 Cal. 354, 31 Pac. 245). It is certainly a matter of common observation that a public laundry is harmless in itself, and, if properly conducted with reference to sanitary and other conditions, which may easily be complied with, not offensive or dangerous to the health of the community in which it may be located; and, this being so, a person has, under the Constitution of the United States, the same right to engage in the business of conducting a public laundry as in any other, and has, equally with the grocer, the lawyer or carpenter, the right to select the particular locality in which he shall conduct such business.

The ordinance in question denies this right, and is for that reason in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States; and the conflict is not removed by the fact, alleged in the return, that there are within the limits of the city of San Mateo, outside of the district from which laundries are excluded, places equally as well suited for their location as any within the district from which they are excluded. As already stated, a person desiring to carry on such a business has the right to select his own location, and cannot be required to go elsewhere. It follows from these views that the prayer of the petition must be granted, and the said Hong Wah discharged from his imprisonment."

#### COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GUSTAVE LANSBURGH and JOSEPH A. SPERRY,  
Plaintiffs in Error, v. THE DISTRICT OF COLUMBIA.

#### TRADING STAMPS; GIFT ENTERPRISES.

An agreement between a number of merchants and a corporation that the latter shall print the names of the former in its subscribers' directory and circulate a number of copies of the book in this city, and that the merchants shall purchase of the corporation a number of so-called trading stamps to be given to customers with their purchases and by them preserved and pasted in the books aforesaid until a certain number had been secured, when they should be presented to the corporation in exchange for the customer's choice of certain articles kept in stock by the corporation, *held* to be within the prohibition of the act of February 17, 1873 (Secs. 1176, 1177, R. S. D. C.), prohibiting gift enterprises in the District of Columbia.

Decided December 7, 1897.

In error to the Police Court of the District of Columbia. Affirmed.

Mr. A. S. Worthington for the plaintiffs in error.

Mr. S. T. Thomas, Attorney for the District of Columbia, and Mr. A. B. Duvall, assistant, for the defendant in error.

Mr. Justice SHEPARD delivered the opinion of the court:

The plaintiffs in error were convicted in the Police Court of the District of Columbia and sentenced to pay fines of \$100 each, under an information charging them with having "engaged in the business of a gift enterprise." The trial was by the court, a jury having been waived, and the judgment of conviction was rendered upon evidence disclosing the following facts:

The defendant, Gustave Lansburgh, is a member of a partnership styled Lansburgh & Bro., engaged in business in the city of Washington, as retail merchants. Defendant, Joseph A. Sperry, is the managing officer of a private corporation, called Washington Trading Stamp Company, the principal office of which is in the city of New York.

On October 5, 1897, Lansburgh & Bro. entered into a written contract with the Washington Trading Stamp Company, in substance as follows:

"WASHINGTON, D. C., Oct. 5, 1897. 189-.

"This agreement, by and between the Washington Trading Stamp Co., of Washington, D. C., parties of the first part, and Lansburgh & Bro., of Washington, D. C., party of the second part.

"*Witnesseth*, That the said party of the first part, for the consideration hereinafter mentioned, agrees with the party of the second part to perform in a faithful manner the following: To print in the directory of their subscribers' book the name, business and address of the party of the second part. To deliver at the homes of the people of Washington 100,000 copies of said books, soliciting their trade, and to instruct and to explain — them how they are to use the same, and keep a correct list of the names and addresses of all persons to whom same are delivered; and in every way to use their best endeavor to promote the business interest and trade of the party of the second part. And the party of the second part agrees with the party of the first part, in consideration of the faithful performance of the foregoing, to receive from the party of the first part a sufficient amount of trading stamps to supply all persons who may call for them. The stamps to be given out as follows: One stamp to be given for each and every ten cents represented in a purchase; ten stamps for one dollar, etc., the stamps to be given when the purchases are paid for. To pay party of the first part fifty cents per hundred for all stamps thus used. To make weekly settlements for each page used or given out. And party of the second part further agrees not to sell any stamps, and to give them only to parties purchasing goods from their store. To co-operate in every way possible with party of the first part to promote the best interest of all the merchants named in the book. To display 'We give trading stamps' in a conspicuous place in their store.

"The parties of the first and second part mutually agree that this agreement shall remain in force for one year from above date."

On the back of said contract is the following endorsement: "Excludes all other dry-goods and department stores in Washington, D. C., except those now engaged in our plan."

The book referred to in the contract, 100,000 copies of which were to be distributed among the residents of Washington, is a small pamphlet of some forty pages, in a green paper cover bearing

the imprint of copyright secured. It bears the title, "Trading Stamp Book," in large letters on the first page of the cover, over a *fac simile* of the green stamp proposed to be used.

The first three pages contain the following printed words under the titles of "Explanation" and "Notice to Stamp Collectors."

#### EXPLANATION.

The Trading Stamp Company has established a permanent business in your city.

The object of this syndicate of merchants is to mutually benefit the buyer and the seller.

To this end we have contracted with the leading merchants of your city, so, if you trade with these merchants and collect stamps, you will be able to obtain beautiful and useful premiums absolutely free of any expense to yourself.

You will find, commencing on page 3 of this book, a directory of the merchants who give trading stamps.

These merchants give you a trading stamp for each and every ten cents' worth of cash goods you buy. For example, if you buy ten cents' worth of groceries you will receive one trading stamp; if your bill amounts to \$1.00 you will receive ten trading stamps, etc.

You will only receive stamps for the multiple of ten that is in your purchase. For instance, if your bill is twenty-five cents, you will only receive two stamps, etc.

Stick the stamps on the figures on the pages in this book. When you have filled the book you are entitled to your choice of over one thousand premiums, constantly kept in stock at our store, No. 423 Seventh street, N. W., a few of which are mentioned in the back of the book. Call at our store and see complete stock.

Ask for trading stamps. As a rule, merchants do not give them unless called for.

#### EXPLANATION.

The syndicate of merchants whose names appear in the accompanying lists, and who represent the leading and enterprising business men of their lines in the city, are anxious to secure new cash customers, and thus increase their trade, by giving trading stamps. And when received by the customer from the several merchants with whom he trades, to the amount of \$99.00 or more, from any or all the stores combined, will be exchanged for the customer's choice of a large variety of magnificent premiums carried in stock by The Trading Stamp Company, consisting of richest designs in quadruple-plated silverware, books, pictures, clocks, lamps, furniture, bicycles, opera glasses, cameras, musical instruments, gold rings, etc.

It is a strictly "up-to-date" idea being operated by a syndicate of "up-to-date" merchants who, through it, are making a notable effort to secure the trade of an "up-to-date" people.



*Bear in mind*, the merchants will make no advance in the price of their goods, but, on the contrary, the increase of trade by this new plan will enable them to sell closer than ever before.

If you do not care to take advantage of these privileges yourself, give some deserving person the benefit, or turn the stamps over to your children or servants.

*Be sure to ask for trading stamps.* As this plan is new to the merchants, they may unintentionally neglect to give you stamps. The remedy lies with the customer. You shall not hesitate to ask for trading stamps from any merchant in the directory.

#### NOTICE TO STAMP COLLECTORS.

Trading stamps make business hum, increase merchants' trade, and bring in the cash. For this reason you need not hesitate to ask for stamps. Merchants will not force stamps upon you. Ask for them.

If you trade only with merchants who can supply you with stamps, your book will soon be full. Remember you can obtain stamps for any article you may wish to buy.

When merchants give you the stamps willingly you will know they are anxious to please you and secure your patronage. Tell your merchant you are trading with him because he gives stamps.

The great advantage of *this* system is that you do not have to carry your book with you when shopping; simply ask for stamps. Do not lose them, but take them home and paste them in your book.

Should any merchant whose name is in our directory not treat you courteously or refuse to give you trading stamps, he is unworthy your patronage, having broken his contract with us, and you will do us a great favor by reporting the matter to us.

The foregoing are followed by a list containing several hundred names of merchants with the nature of their business, alphabetically arranged, and their respective locations by street and number under the following title: "Directory of leading enterprising merchants who give trading stamps." Thirty-three pages follow, each ruled so as to show thirty squares within which the stamps are to be pasted according to minute directions given.

The last two pages of the cover contain a list of part of the "over a thousand very attractive, valuable and useful premiums to select from," with the information that "these can be secured free," and further that "we are constantly adding new premiums to our stock."

The gifts or premiums are kept for exhibition and delivery at the store or wareroom of the Stamp Company. No gift or present is made except upon the presentation of one of the books aforesaid filled with stamps to the number of 900. Only one of the exhibited articles (to be selected by the

holder of the book) will be delivered upon the surrender of each book; but special notice is given that a \$100 bicycle will be exchanged for seven books, and a sewing machine for five.

It is indicated by the endorsement on the contract, and admitted on the argument, that the Trading Stamp Company limits its benefits to a particular number of dealers in each line of business carried on in Washington, whose names appear in the directory aforesaid.

2. It is not denied that the power of congress to legislate in respect of matters affecting the public health, safety, peace and morals within the District of Columbia is the same as that of the State legislatures within their several jurisdictions. It is neither greater nor less; for "all of the guarantees of the Constitution respecting life, liberty and property are equally for the benefit of all citizens of the United States residing permanently or temporarily in the District of Columbia, as of those residing in the several States of the Union." (*Kerr v. Ross*, 5 App. D. C. 241, 247, 248; 23 Wash. Law Rep. 86; *Callan v. Wilson*, 127 U. S. 640.)

The general nature of the police power of the State is nowhere more forcefully stated than in the eloquent words of Mr. Justice Field. He says: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property, what contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non ladas* is a maxim of universal application. For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost

infinite varying with the nature of the business." (Crowley v. Christensen, 137 U. S. 89.)

Speaking for the same court, some years before, Chief Justice Waite said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals." (Stone v. Mississippi, 101 U. S. 818.)

In a case involving a regulation of the trade of plumbing in the District of Columbia we had occasion to say: "It is not an easy matter to draw the line beyond which this power of regulation of trades and business may not be extended, in the interest of the public health and safety, without becoming an unwarranted invasion of private right. Each case must depend upon its own peculiar circumstances and conditions. Whilst much is left to the discretion of the legislature and its exercise thereof will not be lightly disturbed, yet the final question whether the trade or calling is of such a nature as to justify police regulation, and when conceded to be such the length to which such legislation may be rightfully extended, is unquestionably to be finally determined by the courts." (Kerr v. Ross, 5 App. D. C. 249; 23 Wash. Law Rep. 86.)

In matters of this nature the discretion of the legislature is very large, and every fair presumption is to be indulged in favor of power as exercised. (Powell v. Pennsylvania, 127 U. S. 678, 684, 685.)

It is only, therefore, in a case where the statute purporting to have been enacted for the protection of the public health, safety, peace and morals "has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law," that the courts will declare it void. (Mugler v. Kansas, 123 U. S. 623, 661; Yick Wo v. Hopkins, 118 U. S. 356, 373; Powell v. Pennsylvania, 127 U. S. 678, 684; City of Baltimore v. Radecke, 49 Md. 217.)

3. In the light of the doctrines above enounced, it remains to consider the nature and scope of the statute under which the information in this case was presented, with the objections thereto, in application to the facts hereinabove set forth.

Now, whilst the information charges the defendants with the offense, in general terms, of engaging in a "gift enterprise," we are, nevertheless, spared the consideration and determination of the common or technical meaning of the phrase because the act of congress under which the prosecution is maintained itself undertakes to define the character of acts comprehended therein.

With a view to raising revenue from this and other sources, the legislative assembly of the Dis-

trict of Columbia, on August 23, 1871, passed an act, the twenty-fifth section of which (said to have been copied from a revenue act of congress then in force) reads as follows:

"The proprietors of gift enterprises shall pay one thousand dollars annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise. *Provided*, That no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other tax imposed by law, and the license herein required shall be in addition thereto." (Laws of the District of Columbia, 1871-'72, part II, pp. 96, 97.)

After less than two years' experience of license there came a complete revolution of public policy as declared by congress. That which had been permitted and made a source of revenue was then prohibited as an offense. On February 17, 1873, an act was passed entitled "An act prohibiting gift enterprises in the District of Columbia" (17 Stat. 464). This was embodied in the Revised Statutes for the District of Columbia, becoming sections 1176 and 1177 thereof, as follows:

"Sec. 1176. So much of the act of the legislative assembly of the District of Columbia, entitled 'An act imposing a license on trades, business and professions practiced or carried on in the District of Columbia,' approved August 23d, 1871, as authorizes gift enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

'Sec. 1177. Every person who shall in any manner engage in any gift enterprise business in the District shall, on conviction thereof in the Police Court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

4. The first contention on behalf of the plaintiffs in error, in respect of the operation of the above statute, is that it is so general in its scope as, necessarily, to comprehend, and undertake to punish as offenses, acts that are matters of common, private right clearly beyond the power of congress to prohibit or to interfere with in any manner, under the guarantees of the Constitution: and that this forbidden purpose and operation are inseparable, save by construction only, from the

operation upon those acts which, with equal clearness, are within the power to prohibit and punish.

It is argued, therefore, that the forbidden operation being inseparable from that which is permissible, the whole act must be declared void in accordance with the doctrines of the Supreme Court of the United States in the following cases: *United States v. Resse* (92 U. S. 214, 221), *Trademark Cases* (100 U. S. 82, 95), *United States v. Harris* (106 U. S. 629), *Baldwin v. Franks* (120 U. S. 678, 685). With the exception of the *Trademark Cases*, those were all cases of criminal prosecutions under sections of the Revised Statutes relating to conspiracies to deprive citizens of the United States of certain legal rights, etc., and it was plain that congress had exercised powers not conferred by the Constitution and its amendments, and thereunder had undertaken to punish, as offenses against the authority of the United States, acts which, in general, were cognizable in the State courts only as crimes against the State. The court declined to limit the sections by construction, so as to make them embrace those acts only that would, when committed under certain conditions, come within the Federal jurisdiction. To do so it would have had, as was said in *Reese v. United States* (92 U. S., p. 221), "to introduce words of limitation into a penal statute;" and, as was said later in *Trademark Cases* (100 U. S., p. 98), "it is not within the judicial province to give to the words used by congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

In the case at bar there is no question of conflicting State and Federal jurisdictions, or of constitutional prohibition of any interference whatsoever in the subject-matter of legislation; but merely a question as to the degree or length to which an acknowledged power may be extended.

We think, therefore, that this case must fall within another rule of statutory construction equally well established as the former. Sections 102 and 103, Revised Statutes, providing a punishment for witnesses who refuse to answer questions propounded in the course of an investigation instituted by congress, afford an example.

In a case arising under those sections it was said by the chief justice in delivering the opinion of the court:

"It has been strongly urged in argument that the terms of the section, 102, are sufficiently broad and comprehensive to include a class of witnesses protected and exempted by the provisions of article V of the Constitution, and especially so when read, as urged it should be, in connection with the next succeeding section, 103, of the Revised Statutes; and therefore the section is void *in toto*. But it is not pretended that the appellant belongs to the class of witnesses contemplated by the article of

the Constitution referred to; and if the contention of the appellant were conceded to be correct as applied to a class of witnesses under different conditions, it would not follow necessarily that the statute should be stricken down in its entirety, because it may be susceptible of an unconstitutional application in certain cases that may possibly arise. This is not reasonable, nor is it in accordance with the rule of interpretation adopted by the Supreme Court of the United States, as applied to a statute good on its face, but where, by reason of its general and comprehensive terms, it may be made, by construction, to apply to objects forbidden by the Constitution. In such case the statute will be allowed its full force and operation, as applicable to all cases, rightfully and constitutionally within its provisions, but such application will be restrained as to those objects simply to which the statute is forbidden to extend. This is the rule, as we understand it, upon which the Supreme Court acted in the *State Freight Tax Case* (15 Wall. 232). *Supervisors v. Stanley* (105 U. S. 305, 313), *Virginia Coupon Cases* (114 U. S. 269), and other cases that could be cited." (*Chapman v. United States*, 5 App. D. C. 122, 131; 23 Wash. Law. Rep. 17; see also *In re Chapman*, 166 U. S. 661, 667.)

The comprehensive scope of the police power, as exercised in our day and under our form of constitutional government, has been developed by the process of evolution. Rapid increase in population, wonderful inventions, from time to time, followed by vast material development and advances in the arts of civilization, have introduced novel situations and begotten difficulties for the solution of one generation, that were unanticipated and undreamed of even by the most advanced minds of the generation next preceding. As a necessary consequence, the boundaries of the police power in its application to the property, business and personal liberty of the individual citizen have never been definitely settled so as to furnish a certain guide for all cases as they may present themselves for legislative or judicial determination. Hence, as we have seen above, in the quotation from the opinion of Chief Justice Waite, the want of success of the many attempts "to give an abstract definition of the power itself which will be in all respects accurate." Whilst the existence, or the absence, of power in the legislature to regulate, or to prohibit, is, in many instances, perfectly plain, there is a border line between the two, the accurate delimitation of which presents the difficulty. Special circumstances, under new or different conditions, give rise to new applications that must remain uncertain until settled by judicial determination in an actual case. If strict accuracy of definition and certainty of application be required in each exercise of the power by the legislature, so as to prevent the inclusion by possible construction, of something not within that power, there would be few laws creating new offenses in re-

sponse to newly-developed public needs that would escape condemnation.

It is the duty of the courts to take a liberal view of the situation presented to the legislature in such cases, and to give its acts providing therefor "a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." (*Law Ow Bew v. U. S.*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 667.)

5. We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of inducements by way of gift or premium may, and may not, be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain; and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to *bona fide* co-operative associations and the like. It is possible also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale in an attempt to evade acts regulating or prohibiting a particular traffic, as, for example, in the case of *Lauer v. The District of Columbia* (recently decided).

Some cases have been cited by counsel wherein such sales were either held not to be embraced in the statute, or, if comprehended, to render it void. The statutes involved were not, in all respects, like ours, but it is unnecessary to point out the differences, in the view that we take of the application of those cases to the grounds of decision in this case.

(1.) *Yellowstone Kit v. The State* (88 Ala. 196, [S. C.] 7 L. R. A. 599). In that case the defendant made a free gift of tickets entitling the holders to chances in a limited distribution of prizes as a means whereby to gather a crowd to whom he offered patent medicines for sale. The distribution of the tickets and the prizes had no connection with the sales and prices of the medicines; and the court held that the act did not constitute a lottery within the meaning of the statute, because there was no consideration demanded or received for the tickets.

(2.) *Long v. State* (74 Md. 565). In that case the Court of Appeals of Maryland reconsidered the conclusion reached on a former appeal (73 Md. 527), and declared the statute void because of its unwarranted interference with the liberty of the citizen. Long was a coffee dealer, and in order to

induce customers gave with each package of coffee sold a ticket entitling the purchaser to select a cup and saucer or a plate from a number displayed on a table for examination by intending purchasers.

(3.) *People v. Gillson* (109 N. Y. 395). The facts of that case were substantially the same as those in the case of *Long v. The State* (*supra*), and the statute which made it a crime for a merchant, in selling any article of food, to promise to give the purchaser something else in addition to the article sold, as a prize or reward for making the purchase, was denounced in vigorous terms and declared void.

(4.) *Commonwealth v. Emerson* (165 Mass. 146). There the statute declared that "no person shall sell, exchange or dispose of any property, or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange, is, or is to be, delivered or received, or in any way connected with or a part of the transaction." The defendant was a retail tobacco dealer. He displayed in his window a great number of photographs of distinguished people, and each purchaser of a package of tobacco was permitted to select one of the photographs without further consideration. Nothing was said in respect of the invalidity of such a statute; but the court held that the transaction was not within its prohibition, saying that the terms of the statute "were not intended and do not purport to forbid a sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale."

Without approving or disapproving the foregoing decisions, and reserving our opinion in respect of the application of our statute to the facts involved therein until such time as a case may be presented demanding it, we can pass them by as having no necessary bearing upon the case of these plaintiffs in error.

In like manner we think the case may be decided without reference to the numerous decisions cited by counsel for the District, in each of which the element of chance in the distribution of gifts and prizes was the controlling fact.

Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the Trading Stamp Company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of "gift enterprise."

Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently entirely novel, it could hardly have come more clearly within the scope of the statute had it been well known and expressly in

the contemplation of congress at the time of the enactment.

The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device.

With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant, who pays them in cash at the rate of \$5 a thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of the stamps, and other merchants and dealers who cannot enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency.

The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts at the assumed value of one dollar per hundred. Unless, therefore, the so-called premiums to be distributed among the diligent collectors of the stamps are grossly overvalued, the scheme cannot maintain itself, for in addition to the actual cost of the premiums it has to bear the cost of the books and stamps and the maintenance of its office and exhibition room.

If the premiums should have any fair value, then the Stamp Company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets — representing cash purchases of \$99.90 — shall be pasted in a book and produced at one time to entitle the holder to his premium. In this event the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectations of profit or gain.

There is not a shadow of rational foundation for the Stamp Company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons, or "middle-men," between producer and consumer, an increase of cost to the latter.

The prohibition of such a scheme is clearly within the power of congress, within this District, and the statute under which the prosecution has been maintained makes ample provision for its exercise.

6. The appeal of the defendant Lansburgh must abide the result of his co-defendants. Their cases are inseparable. Although a regular merchant of the city of Washington, he does not appear on this record as convicted of the offense of offering a discount, a premium or a gift to his own customers upon sales made to them in the course of his business, and he cannot make that defense. By his contract and its attempted performance he made himself the accomplice of the manager of the Washington Trading Stamp Company — an active party in the promotion of its unlawful scheme; and for that offense alone he has been convicted.

We find no error in the proceedings in the Police Court; and the judgment must be affirmed, with costs.

Affirmed.

---

#### THE FAREWELL TO CHIEF JUDGE ANDREWS.

---

THE formal farewell of the Albany bar to the Hon. Charles Andrews, the retiring chief judge of the New York Court of Appeals, took the form of a complimentary dinner tendered to the distinguished veteran jurist at the Fort Orange Club, Albany, on Thursday evening, the 16th inst. Covers were laid for thirty-six, and there sat at table many distinguished judges and lawyers, who vied with each other in paying their tributes of respect to the retiring jurist. Throughout the happiness and good cheer there was an undertone of sadness at the thought that the city of Albany, which had so long been the official home of Judge Andrews, was to know him no more in that capacity, and in this feeling the bar of the capital shared fully and unreservedly, for few if any jurists had so endeared themselves to the profession as Judge Andrews had done by his uniformly courteous, even generous treatment of them on all occasions.

The following judges of the court, former judges, State officials and personal friends of Judge Andrews were present: Alton B. Parker, John Clinton Gray, Celora E. Martin, Rufus W. Peckham, Denis, O'Brien, Edward T. Bartlett, Irving G. Vann, Francis M. Finch, Albert Haight, Robert Earl, David Bennett Hill, A. Blecker Banks, William J. Wallace, Dean Sage, Dudley Olcott, Hamilton Harris, John F. Rathbone, Frank S. Black, Walton W. Battershall, D. Cady Herrick, Simon W. Rosendale, William Crosswell Doane, Edmund H. Smith, Amasa J. Parker, Abraham Lansing, Edward G. Andrews, C. W. Andrews, J. D. Wasson, W. H. Shankland, Sam-

uel B. Ward, John T. Norton, William L. Learned, J. Newton Fiero, W. Andrews.

The grosser part of the occasion having passed, amid many compliments for the excellent *cuisine* of the club, Judge Clinton Gray, of the Court of Appeals, opened the "flow of soul" by making the formal address of farewell to the retiring chief on behalf of the tribunal which so reluctantly parts with Judge Andrews, to which the latter most felicitously and feelingly responded. Judge Gray said:

"The event which this evening's dinner commemorates is a notable one in the history of the State. Our guest, the venerated and (in the sense of our Constitution) venerable chief judge, is the sole survivor of the Court of Appeals as reorganized by the Constitution which was adopted in 1869. Over twenty-seven years have elapsed since he took his seat upon that bench, and now, while still in the plenitude of his intellectual and physical powers, he must retire, because the people, in what is conventionally termed their wisdom, have decided that the age of three score years and ten must incapacitate the man from being longer useful to the State in a judicial capacity. Truly, this wisdom has been singularly exemplified, when, in the past, to mention only one, but a particularly conspicuous instance, Chancellor Kent, retired by the people at sixty years of age, by his Commentaries on the Law produced the profoundest, clearest and most useful legal work of modern times, and in the present, when such men as our guest and my former associates, Judges Earl and Danforth, have been forced to retire, when their experience and abilities qualified them to render the best judicial services.

"Why are their minds not riper to judge in the disputes of men? And can we look upon their healthful and active forms without smiling at the legal presumption of their decay! Consider the case of that very accomplished jurist, Judge Danforth, who has, unfortunately, been prevented at the last moment from attending this evening, and who, by his absurd mental and physical vigor, persists in making the constitutional provision utterly ridiculous! So with that able, excellent and very wiry jurist from Herkimer; why will he be so continuously busy and useful when the fundamental law of his State pronounces him useless!

"This is no fitting occasion to review the long judicial career of Judge Andrews. I care only to speak of the respect which it has won for him, and to testify to the affection which his lovable character has installed into the hearts of his associates, and to the regret which a severance of our association with him causes us. To me, who have been the longer with him of my associates, the pang of this separation is severe, and I mourn his departure as that of a sympathetic friend and companion. I shall miss his wise counsels at the con-

sultation table, as I shall miss the daily association of ten years.

"Regretful as is this occasion in these respects, it is, in other respects, pleasingly memorable, when we think of the splendid record of the public life of our honored chief judge. Like a noble tree which has attained its fullest and highest growth, undeformed by any blemish, he towers over his contemporaries and from serene heights may overlook the fields of the world's struggle with a calmness of mind born of a long, pure and noble life.

"But his part in it has not ceased; or it should not cease. His fellow-citizens require the benefits of his magnificently equipped mind in many fields of usefulness, and I venture to express the sincere hope that he will not suffer it to lie fallow. The occasions of our political life are numerous where calm and wise counsels may be of service to preserve the integrity of our popular form of government. If the conclusions of his ripened mind can be at the command of his fellow-citizens they will have great cause for congratulation. In the ways of literature who can tread more surely or more brilliantly than he whose opinions have been as remarkable for the elegance and force of their style, and for the broadness of their views, as for the solidity of their composition! No; far be it from our thoughts that our friend will suffer his great talents to remain unproductive when no longer permitted to fill the office he has rendered illustrious by his splendid services.

"I should like, and it is my hope, to see some change in the Constitution of this State. If the mandate must stand which retires a judge at seventy years of age, then why not invest the governor of the State with the discretionary power to appoint the judge, thus only theoretically disqualified, to serve in his court for a further period of time? Indeed, the amendatory provision might be broad enough to cover all cases of ex-judges, where they are mentally and physically qualified and are willing to serve, and where the court certifies that a necessity exists for the exercise of the governor's discretion. There would thus be provided for those cases of illness, or of necessary absence, or of extraordinary pressure, which may burden and embarrass the court at any time.

"We can judge of a man's character, after long frequenting his society, by the tenor of his general bearing and conversation, and judged by that standard I have found the character of my long-time friend and associate to be limpid in its honesty of purpose and strong in its desire to do exact justice. Always admirable in his judicial work, Judge Andrews has never yielded to the clap-trap of sentiment or popularity. Though faithful to the traditions and principles of his party, he has won the general respect by the impartiality of his judgment when exercised upon political cases.

"A good and just man's life has an ever widen-

ing influence. Like those circles in bodies of water, which spread from the central point and reach indefinitely, so the influence of a noble life, beautifying the individual, extends its beneficent operation beyond the immediate environment and benefits others of mankind. I think the words not inappropriate which Cicero, that great Roman lawyer, so eloquently uttered, "*Gloria virtutem tanquam umbra sequitur*;" which, being interpreted freely, is to say, that glory accompanies the virtuous man like his shadow. So, my dear chief, the fame and good repute which have followed you like your shadow in the practice of the virtues of your character will follow you in your glorious retirement!

"We should like to have been able to give expression to our sentiments of regard and of regret this evening by a banquet proportioned to the importance of the event, but that would have been difficult of accomplishment under the circumstances. We have so endeavored to draw the line of invitation as to bring about our guest those who have known him best in his long official residence in Albany, and those who, by tie or by former association, are entitled to be present upon such an occasion. I ask you all to join me in pledging the retiring chief judge our wishes for his continued good health and our hopes that in his retirement he will not accept as final the arbitrary constitutional mandate with respect to his capacity for usefulness to that State which he has served so well and so long."

Following Judge Andrews' response, which was spoken from a heart so evidently overflowing with conflicting emotions as to bring the moisture to many eyes "unused to the melting mood," Justice Rufus W. Peckham, of the United States Supreme Court, indulged in some most interesting reminiscences of the Court of Appeals during the period of his membership therein. Incidentally, in speaking of the relations of the Federal court, of which he is now a member, to the State tribunals, he stated the well-known fact that the decisions of none are regarded by the Federal court as of higher authority than those of the New York Court of Appeals, adding that for much of this prestige the court is indebted to Judge Andrews. The Rt. Rev. William Crosswell Doane, bishop of Albany, spoke of the great loss the city of Albany sustains in the departure of Judge Andrews from the Capital City. The Hon. Francis M. Finch, former judge of the Court of Appeals, followed in an exquisite address. Governor Frank S. Black, as chief executive of the State, spoke of the strong, enduring work of Judge Andrews and the universal regret at his retirement. Former Senator David B. Hill spoke in somewhat the same vein, and "set the table in a roar" with his witty allusion to the fact that, although he (Hill) had been somewhat instrumental in securing the joint nomination of Judge Andrews by the two great politi-

cal parties, thus ensuring his election, one of his last official acts was to decide a suit in which the speaker was interested against his (Hill's) client. Senator Hill graciously added, however, that, after all, Judge Andrews was doubtless right. Addresses were also made by former judge of the Court of Appeals Robert Earl, and others.

One of the literary features of the dinner was a brief but beautiful poem by the Rev. Walton W. Battershall. It is a literary gem of "purest ray serene," which the LAW JOURNAL hopes to have the privilege of publishing in the very near future.

#### NEW YORK STATE BAR ASSOCIATION ANNUAL MEETING.

THE secretary of the New York State Bar Association, Mr. L. B. Proctor, furnishes the following notice of the forthcoming annual meeting, as provided by the constitution of that body: The association will convene on the evening of the 18th of January, in the assembly chamber, Capitol, Albany, N. Y., where the following exercises will take place:

Invocation. Annual oration by the distinguished statesman and orator, Hon. John G. Carlisle, late secretary of the treasury of the United States. Subject, "State Courts." At the close of the oration a reception will be tendered the distinguished speaker in the assembly parlors, at which time the members of the association and their friends will have the pleasure of becoming acquainted with Mr. Carlisle. At 10 o'clock A. M. of the 19th of January the association will convene in the common council chamber, City Hall, where the business of the association will be taken up, as follows: Address of the president, Hon. E. G. Whittaker; reading of papers by the following distinguished gentlemen:

Hon. Robert Earl, Herkimer, N. Y. Subject, "Excessive Legislation."

Hon. William C. De Witt, Brooklyn, N. Y., on "The Charter of Greater New York."

Hon. James W. Eaton, Albany, N. Y., on "The Negotiable Instruments Law of 1896."

Roger Foster, Esq., New York city, on "The New Constitutional Liberty."

Papers will also be read by other eminent members of the profession, whose subjects will be hereafter announced.

The proceedings under the head of miscellaneous business and the reports of the various standing committees will form an interesting part of the proceedings of the afternoon.

The anniversary occasion will close with a banquet, given by the association in honor of Mr. Justice Andrews, the retiring chief justice of the Court of Appeals of the State of New York, and Mr. Justice Alton B. Parker, chief justice-elect of that tribunal, who assumes the place occupied so

long and with such distinguished ability by Chief Justice Andrews.

It is pleasant to assure our fellow-members that the banquet will be the scene, not only of brilliant festivity and high intellectual enjoyment, but of delightful reunion with each other. It will be enlivened and honored by the presence of Governor Black, ex-Senator Carlisle, Judge Roger A. Pryor, of New York; St. Clair McKelway, the distinguished editor of the Brooklyn Eagle; James C. Carter, Joseph H. Choate, Walter S. Logan, of New York, and John G. Milburn, of Buffalo.

It is a matter of congratulation that the approaching anniversary of the association will occur under the most favorable circumstances. The organization has successfully carried into effect the great objects which called it into existence, and is recognized as standing first among all organizations of the kind in the Union.

Members are respectfully requested to call at the office of the secretary, Capitol, on their arrival in the city, and enter their names in the register of the association.

The secretary also furnishes the following from the Hon. J. Newton Fiero, chairman of the committee on law reform: The committee on law reform of New York State Bar Association proposes the following questions for discussion at the annual meeting, to be held in the city of Albany, on January 18th and 19th, 1898, pursuant to action of joint committee on that subject at meeting held December 2d, 1897:

*First.* What action should be taken to relieve the calendar of the Court of Appeals?

*Second.* Is it advisable to undertake the revision of the Code through the present commission of revision and on the plan heretofore presented by it to the legislature?

*Third.* Is it advisable to place the regulations relative to matters of practice under the control of the courts to be governed by rules formulated by the judges and lawyers, rather than to leave these matters open for annual legislative action?

*Fourth.* By whom and under what authority should the work of revising practice be carried on, if such revision is desirable?

*Fifth.* Should costs be abolished?

*Sixth.* Should cumbrous and antiquated proceedings relative to real estate, such as more than one trial in ejectment and redemption of real estate sold under execution, be revised and corrected?

#### NEW YORK COURT OF APPEALS DECISIONS.

THE New York Court of Appeals, on the 17th inst., handed down the following decisions:

John E. Walls v. Rochester Railway Company, appellant; Annete C. Herse v. Louis W. Simpson, appellant. Judgment affirmed, with costs.

National Park Bank of New York v. The Eldred Bank, appellant; Mary C. Corbett, appellant, v. The Brooklyn, Bath and West End Railroad Company. Judgment and order affirmed, with costs.

Alfred Lyman Darrow and Others, appellants, v. Lyman Darrow Calkins. Order affirmed and judgment absolute ordered against plaintiffs, with costs.

People v. Peter Gerrahan, appellant; People v. Isaac Zucker, appellant. Judgment affirmed.

Wesley J. Penny v. Rochester Railway Company, appellant. Judgment affirmed, with costs, and each question certified answered in the negative.

Excelsior Steam Power Company, appellant, v. The Cosmopolitan Publishing Company. Judgment of General Term reversed, and judgment entered upon report of referee affirmed, with costs.

In re Application of L. Henry Rosenberg for leave to file certificate. Denied.

In re Application of Ernest Willey McIntyre for admission as attorney and counselor. Granted.

In re Application of Edward W. Burdick to file *nunc pro tunc*. Granted.

#### HARD TO DECIDE.

AFTER the members of the jury had filed in and taken their seats the judge said:

"Am I to understand that you wish further instructions from the court?"

"Well, not exactly that, judge," answered the foreman. "The instructions are all clear enough, but we're a little in the dark in regard to some of the evidence."

"The court will be glad to lend you every proper assistance in clearing it up," said the judge.

"Well, it's just this way," explained the foreman. "As we understand it, there is no dispute as to the facts in the case. The defendant unquestionably took the goods, but her lawyers claim that it was a case of kleptomania, while the attorneys for the prosecution have endeavored to show that it was just a plain theft. Are we right so far?"

"Quite right," said the judge.

"Both sides have introduced experts," went on the foreman, "and we have had scientific explanations of the theory and cause of kleptomania until we are all confused, and would certainly disagree if we were foolish enough to pay any attention to the experts. But we have decided to cross their evidence off the slate and worry along as best we can without it."

"It is your privilege as jurors to attach as much or as little weight to the evidence as you may see fit," said the judge.

"Of course," returned the foreman. "And now we come to the real problem, which we are of the opinion has been sadly neglected by the lawyers on both sides. What is this woman's social position?"

"What!" exclaimed the judge.



"What is her social position?" repeated the foreman. "How can we tell whether she is a kleptomaniac or a thief without knowing that? If we are to reach a decision we must hear more evidence on that feature of the case, and if it is too late to have it introduced you might just as well call it a mistrial and start all over again. We never will be able to agree." — Chicago Post.

#### SPECIMENS OF GREEK WIT.

THE following are specimens of Greek wit: Philip, in passing sentence on two rogues, ordered one of them to leave Macedonia with all speed, and the other to try and catch him. Demonax was once heard to say to a lawyer: "Probably all laws are really useless; for good men do not want laws at all, and bad men are made no better by them." Alcibiades, when about to be tried by his countrymen on a capital charge, absconded, remarking that it was absurd, when a suit lay against a man, to seek to get off, when he might as easily get away. Socrates used to say the best form of government was that in which the people obey the rulers, and the rulers obey the laws. It was a saying of Cato the Elder: "Those magistrates who can prevent crime, and do not, in effect encourage it." Cicero, when one Nepos told him he had caused the death of more by his testimony than he had ever saved by his advocacy, replied: "That is because my credit exceeds my eloquence."

#### RULES FOR TRIAL TERMS IN ALBANY COUNTY, N. Y.

THE following is a correct copy of the rules for trial terms in Albany county, N. Y., adopted by the Albany bar March 4th, 1880, and revised by same December 15, 1897:

1. On Friday preceding the trial term there shall be a meeting of the bar held in the court-room at 3:30 P. M., at which the clerk of the court shall preside; the clerk shall mark the causes as announced by the attorneys. If the attorney for one party only responds, then such cause shall be marked as responded to by said attorney; in case of a disagreement between attorneys, then the cause shall receive the marking which will result in the earlier reaching of the case; the clerk's marking shall conclude the parties unless changed by the court on the first day of the term. The clerk shall then make a calendar for the first day of the term, putting on such calendar the first six causes announced ready for trial in their order. The clerk shall forthwith deliver to the justice who is to preside at the trial term a copy of the calendar as marked by him, and shall also, forthwith, send to the attorney of record in the cases placed upon the first day's calendar the number of such cases. The first two causes upon said day calendar may be called on the first day of the term.

2. The trial term shall be convened at 11 A. M. on the first day.

3. Upon the entrance of the presiding justice all persons in the court-room shall arise and remain standing until he is seated.

4. It shall be the duty of the clerk daily, immediately after the opening of the court, to call the roll of all sheriff's officers assigned to attend court, and keep a record of the attendance or absence of all such officers.

5. It shall be the duty of the sheriff, under-sheriff or a deputy sheriff especially appointed for that purpose, to be present during all the sessions of the court, to direct all officers under him, and to see that they are properly posted for duty and remain at their posts, and execute all orders of the court. Each officer shall wear a badge in plain sight, and shall occupy during the entire sessions of the court, unless otherwise assigned for duty, the post assigned him by the sheriff.

6. Any officer absent from his post, without permission from the court or the chief officer having the direction of sub-officers, shall be discharged for the term.

7. It shall be the duty of the court officers to exclude all persons from the bar of the court who are not either members of the bar, clerks in law offices, students at law, newspaper reporters, or parties in interest in a cause on actual trial; but clerks and students must not occupy seats within the bar to the exclusion of attorneys and counsel. This rule must be observed at all times, without exception.

8. It shall be the duty of the court officers to see that every one in court is seated, and to reserve the seats assigned to jurors, reporters and witnesses exclusively for them.

9. It shall be the duty of one of the court officers (to be especially designated by the court) to look after and regulate the heating and ventilation of the court-room; and such officer shall not be relieved from such special duty without the order of the court.

10. Causes on the general calendar marked for trial, if not responded to when called in the making up of the day calendar, shall be passed; when reserved, generally, they shall not be placed on the day calendar for trial, except upon notice of twenty-four hours in writing, and shall then be put upon the day calendar at such places as the court shall direct.

11. A cause upon the day calendar when reached must be tried or go to the foot of the general calendar for the term, unless cause be shown for a different disposition.

12. At the opening of the court on each day the day calendar shall be called through. Upon such call any cause not responded to by either party shall be passed for the term unless the case has been specially marked by the court on the day calendar as one to be retained thereon. If, on

such call, a cause be responded to by the plaintiff only, he may take judgment in default of the defendant. If, upon such a call, a cause be responded to by the defendant only, he may take a dismissal.

13. At 12:45 o'clock P. M. on each day the day calendar for the succeeding court day shall be made. The calendar shall consist of all the causes in the order in which they stand on the day calendar not disposed of, and after them, of such causes as shall be added, taken in the order in which they stand on the general calendar.

14. On a day and at an hour, at the close of each trial term, to be fixed by the court, of which notice to the bar shall be published, all causes upon the calendar not disposed of shall be called by the court for the purpose of reference or other disposition thereof.

15. In actions on contract, where the trial will not probably occupy more than one hour, either party may apply on the first day of the term, on a notice of four days, and on affidavits served, to set down the issue as a short cause, and the same may be so ordered in the discretion of the court.

Short causes shall be called on Friday of each week. If the trial shall occupy more than one hour it may be suspended in the discretion of the court, and the cause placed at the foot of the general calendar.

The following memoranda, presented by the committee to revise the rules, will undoubtedly be of interest to the profession:

ALBANY, N. Y., December 15th, 1897.

*To the Members of the Albany County Bar:*

GENTLEMEN. — On behalf of a majority of the committee appointed for that purpose, who have been able to give personal attention to this work of presenting the revised rules for approval to the bar of Albany county, we would say that in the week's time accorded to this work diligent effort has been made to obtain from our judges and from the most active and interested practitioners their views, criticisms and amendments, and we hope the result of our labors now before you will not only prove acceptable, but of the most practical use and satisfaction in their operation.

It may be best at this time to add that a number of facts and suggestions have been discussed by your committee growing out of the revision of these rules, which we beg leave to submit briefly, and informally hoping that they may be borne in mind, and that necessary action may be taken on the same in the near future.

*First* — We believe that our trial term calendars are unnecessarily large and unwieldy. Previous to 1890 there were five terms held in this county, averaging 281 causes on each calendar.

From 1890 to 1895, both inclusive, four trial terms per year were held in Albany county. During that period the largest calendar contained 387

causes and the smallest calendar 214 causes, and showing an average of 310 causes.

During the years 1896 and 1897 seven terms were held each year in Albany county. During that period the largest calendar contained 412 causes and the smallest calendar 295 causes, and showing an average of 340 causes. These terms have varied in length from two days to four weeks or more.

We believe that our calendars can be reduced and kept at about 130 causes.

*Second* — Too few cases are referred. It is clearly evident that the number of references made in this county and elsewhere in the State has greatly fallen off during the past five years or more, and the reason most usually assigned is the alleged excessive charges made by stenographers on references for services and copy testimony.

In many cases such charges by stenographers have far exceeded the fees of the referee in amount. Such charges do not seem right and justifiable in any view.

When the pay and fees of stenographers were established, many years ago, it is said that each stenographer transcribed his own minutes and personally compared same. Now it would seem the facilities are such that stenographers not only frequently act by deputy in the taking of testimony, but the minutes taken are transcribed and compared by a typewriter in duplicate or triplicate form.

A case wonderfully in point was decided by the Appellate Division, Second Department, April term, 1897, entitled *Halbert v. Gibbs*, which has been greatly appreciated and commented on throughout the State, in which "the excessive fees now made possible to stenographers were disapproved." Hatch, J., wrote the opinion in the case, and all concurred. (See 16 Appellate Division, 126.)

On page 130, referring to this branch of the case, Judge Hatch uses the following language: "For a long time the fees of referees led the procession of fees, and frequently amounted to more than the sums paid to counsel. But established order cannot always maintain itself. Stenographers looked with jealous eye upon this fatness of fees. Modestly, but with determination, pertinacity and legislation to aid, they crept up, desire ever keeping pace with opportunity, until it has brought them at the top, with appetites whetted and keen scent for more. It is the usual thing now that stenographers' fees are greater than referees' fees. We read in the present record: 'The referee has been paid about seventeen hundred dollars. The stenographer has received about nineteen hundred dollars.' And more is to come. The defendant surely can testify that the sentimental age, when honor and renown was the motive which brought men to devotion in the law, has passed away. He seems to have met only the

hardest kind of hard, practical facts, and he is at present being ground between the upper millstone of the plaintiff's active efforts and the lower millstone of his attorney's refusal to act, or to permit any one else to do so. It is these things which bring the administration of justice into disrepute. This practice courts should lay hold of with an iron hand, setting their stern disapproval upon such methods. The system impoverishes litigants, amounts to a denial of justice, and is the cause of just complaint by the people. It does seem fair and just that a reduction by one-half the pay and fees of stenographers would still leave them better paid than are the counsel or referee, who bestow ten times the labor upon the case."

*Third*—Apparently there are many cases on our trial term calendar now which will never be tried before a jury. We are of the conviction that there is much "dead wood" among the cases on the Albany trial term calendars, and that an open inquiry in court by the justice presiding at each term, upon notice to the bar, would enable the court to strike off and finally dispose of a considerable percentage of the calendar.

*Fourth*—Our County Court should try a certain class of cases now on our trial term calendars.

There certainly is a goodly number of cases on our trial term calendars which should for many reasons have been brought in the county and not in the Supreme Court.

With the increased jurisdiction of the County Court to two thousand dollars, and the frequency of the terms of that court in this county, and the excellent conditions of things in that court, it is to be hoped that our bar will avail themselves of these suggestions, and in future bring all their cases in the County Court which properly belong there.

As far as the judges of this court are concerned, when once a case is in this court and brought to trial which clearly might and should have been brought and tried in the County Court, they are powerless to correct the error, but it is submitted that such a condition should be taken into consideration on an application for additional allowance by counsel.

*Lastly*—In conclusion we have sought, in revising these rules now handed over to you for consideration and action, besides the matters above referred to and others of minor importance, to secure a little more formality in the conduct of the court, which can only be accomplished by the co-operation of the bar and the officers and the people in attendance on same.

### Before the Final Bar.

The bar of the State of New York, particularly of the western section, of which he was a most distinguished member, has been saddened by the news of the death of James Fraser Gluck, of Buf-

falo. Mr. Gluck, whose death occurred in New York city, from a complication of diseases, against which he had bravely but vainly struggled, leaves a void which will not soon be filled, for he was one of the brightest ornaments of the profession, in which he had reached high eminence. A more extended memoir of Mr. Gluck will be given in a future issue of the ALBANY LAW JOURNAL.

The Hon. Charles Daniels, who was stricken with paralysis in his office in Buffalo, N. Y., on the 20th inst., died shortly after 6 o'clock the same evening. Charles Daniels came of a Welsh family. He was born in New York city in 1826, and was apprenticed to a shoemaker at an early age. While working at his shoemaker's bench he studied law, and was admitted to the bar in Buffalo. His legal career was brilliant. He was first a county judge, and was elected to the Supreme Court in 1863. He was appointed by Governor Seymour to hold the office of justice of that court until January 1, 1864. He was twice re-elected, and held office until the last of December, 1891, a period of 28 years. After his retirement from the bench on account of age, Judge Daniels was twice elected member of congress from the Thirty-third district, serving with much distinction in both the fifty-third and fifty-fourth congresses. Since the close of his congressional career the judge has practiced law in Buffalo.

John J. Van Allen, a prominent citizen and the oldest member of the Schuyler county bar, died at his home in Watkins on the 20th inst., after an illness of three weeks. The deceased was born in Allegany county in 1826. He was the first district attorney appointed for Schuyler county. He was a Democrat and prominent in political circles.

### Legal Notes of Pertinence.

The Supreme Court of Ohio has just adopted the rule, which finds favor in most of the States, that death caused by accidental drowning is death through "external, violent and accidental means," within the meaning of a clause in an accident policy insuring against death by such means. (U. S. Mut. Acc. Association v. Hubbell, 47 N. E. R. 544.)

Announcement is made by Clerk Shankland, of the New York Court of Appeals, of the promotion of Capt. Richard M. Barber from the position of remittitur clerk to the more responsible one of deputy clerk, at a salary of \$3,000. Capt. Barber is the oldest attache of the court, his connection with it dating back thirty years. He has risen, successively, from the lowest position in the office to the responsible one whose duties he now assumes. Capt. Barber is a veteran of the Civil War, and lost his right arm in the charge on the

works in front of Petersburg. The appointment is in all respects an admirable one. Another appointment in the line of promotion is that of William M. Honig from the position of chancery clerk to that of remittitur clerk. Mr. Honig's connection with the Court of Appeals also dates back many years.

In the New York courts a motion has been made to set aside the verdict of a jury on the ground that the plaintiff's lawyer winked at a juror while making his plea, and the juror winked back at him, says the Boston Herald. The court allows that this is a serious offense, but it appeared in the course of the evidence introduced on the subject that both the lawyer and the juror are afflicted with a facial trouble that involuntarily causes the muscles of the face to twitch. The court still has the subject under consideration.

### English Notes.

The other day, at the London Sessions, a young man was convicted upon an indictment for obtaining the sum of one penny by a false pretense. He was selling newspapers in the street, and by crying false news of a sensational character induced the prosecutor to buy one of his papers. The Solicitors' Journal thinks that to set in motion the elaborate and costly procedure by indictment in order to punish a wretched child who sells a half-penny journal by telling some trumpery lie as to its contents, "is very like using a steam-hammer to crack a walnut." It seems, however, that there is no other way of obtaining the desired end, and that even this heavy engine can be used only where the person defrauded of his half-penny is willing to undergo all the trouble and loss of time in appearing before a magistrate, grand jury and petit jury. The conclusion is reached that it ought to be made an offense, punishable summarily, with some small penalty, for news-vendors to cry news which they have no reason to believe is contained in their papers, whether they obtain money thereby or not.

Referring to long judicial careers, a correspondent of the Pall Mall Gazette says that the late Sir Alfred Stephen, chief justice of New South Wales, was appointed a puisne judge on the 30th of April, 1839, and chief justice on the 7th of October, 1844, which office he held continuously until the 6th of November, 1873, when he resigned, thus occupying a seat on the judicial bench for upwards of thirty-four years, and exceeding by five years the occupation of the bench by Lord Esher. The late Sir Alfred Stephen did not die until twenty-one years after his resignation.

The appointment of first deemster of the Isle of Man, vacant by the resignation of Sir William

secretary, on the recommendation of the lieutenant-governor, upon Sir James Gell, attorney-general. The post of attorney-general has been offered to, and accepted by, Mr. George Alfred Ring, a leading member of the Manx bar.

### Legal Laughs.

The prisoner was making his appearance before the magistrate for the hundredth time.

"Well," said the magistrate, "you here again?"

"Yes, your lordship," responded the prisoner.

"What's the charge?"

"Vagrancy—same as before, your worship."

"It seems to me you are here about half your time."

"Rather more than less, your worship."

"Well, what do you do it for? Why don't you work?"

"I do, your worship, more than half my time."

"Ah, now," said the magistrate, surprised; "if you can tell me where you have ever worked I'll let you off."

"In prison, your worship," smiled the prisoner, and the court kept its word.

"Well, prisoner," said the judge, "if you have anything to say the court will hear you."

"I'd rather be excused, your honor," replied the prisoner. "If I said what I'd like to say I'd be committed for contempt of court, and I've got trouble enough without that."

### Notes of Recent American Decisions.

**Innkeeper's Lien — Property of Third Person.**—In *Brown Shoe Co. v. Hunt*, decided by the Supreme Court of Iowa in October, 1897 (72 N. W. R. 765), it was held that a lien given by a statute of Iowa to hotel-keepers, on all property "belonging to or under the control of their guests, which may be in such hotel," etc., attaches to sample goods carried by a traveling salesman, though the hotel-keeper knows, when he receives the salesman as a guest, that the goods belong to his employer. It was further held that such statute is not unconstitutional as depriving the actual owner of his property, without due process of law, since it makes no provision as to how the lien shall be enforced.

**Storage of Dangerous Substances — Liability for Injury by Explosion.**—One who takes and keeps upon his own premises material or substance which in itself is dangerous and liable to explode, and do injury to person or property on adjoining premises, or on premises in the neighborhood or vicinity, and it does explode, such person is liable in damages for the injury directly caused there

by such explosion without proof of negligence in storing or caring for such material or substance. (St. Mary's Woolen M'fg Co. v. The Bradford Glycerine Co., Hancock, Ohio, Circuit Court, and decision in full in Ohio Legal News, Nov. 29, 1897.)

Vendor and Vendee — Breach of Warranty. — A vendee holding under an executed contract of sale is not entitled to an abatement of the purchase price for breach of the covenants of warranty, unless he repels the presumption that at the time of the sale he knew of the defect, and intended to assume the risk. (Elder v. First Nat. Bank of Galveston [Tex.], 42 S. W. Rep. 124.)

### New Books and New Editions.

Engineering and Architectural Jurisprudence; A Presentation of the Law of Construction, for Engineers, Architects, Contractors, Builders, Public Officers and Attorneys at Law. By John Cassan Wait, M. C. E., LL. B. First edition. 1898. John Wiley & Sons, New York; Chapman & Hall, London.

The need of a work on the subject of architectural and engineering jurisprudence will be apparent to any reflecting person. While it is true that the subject is not an entirely new one, the works devoted to it are comparatively few, and the growth and development of the industrial professions since the appearance of these works has made the need of later and fuller treatment a real one. The author of the present work truly says, in speaking of engineers and architects, that "their duties are no longer confined to designing and supervising the construction of works, but they have become counselors and advisers in the investigation and promotion of enterprises, in the examination of experts and the rebuttal of their testimony. European engineers have long since enjoyed this practice, while the general employment of American engineers in such capacity in this country is comparatively recent." One of the objects of the author of the present work has been to enlarge this practice, and to create a better understanding between attorneys and engineers or architects. The author by no means falls into the error of supposing that an engineer can, by a few weeks or months of study of law books, undertake the practice of the law, or conduct his own cases in court, or even give advice in regard to matters of law. He expressly urges the lay reader to keep constantly in mind the fact that the work is not intended for any such purpose, but is written primarily to assist him in avoiding trouble and litigation, and to aid him in protecting his employer's and his own rights when they are assailed. It is also one of the purposes of the book to guide and strengthen the younger and less experienced members of the industrial professions in

a proper understanding and appreciation of business and business relations, as well as to assist engineers and architects in successfully undertaking contract work. Such examination as we have been able to give to the volume satisfies us that it will certainly prove a very valuable treatise covering a comparatively untouched field. The arrangement is excellent, and the number of cases cited quite large, exceeding 5,000. The author, besides having had a good preliminary training in engineering at Cornell University, and having acted as instructor for some years at Harvard University, is a graduate of Harvard Law School. His qualifications for the difficult work undertaken were therefore exceptionally good. He has produced a treatise which cannot fail to prove of the greatest value.

The Law of Railway Bonds and Mortgages in the United States; with Illustrative Cases from English and Colonial Courts. By Edward Lyman Short, of the New York Bar. Boston: Little, Brown & Co. 1897.

The author, in his preface to this work, states that the idea of arranging the reported cases relating to railway bonds and mortgages on the plan here followed, grew out of a collection of the Federal cases on the subject made by him in 1884 for use in his private practice. Such collection was gradually added to by including the State cases, and subsequently illustrative cases from English and other non-American courts were woven into the book. Cases involving questions arising out of trust mortgages for the benefit of holders of bonds of gas and water and other miscellaneous companies, have also been inserted. In the development of the plan the author has produced a complete and exhaustive work containing in its more than one thousand pages a practical treatment of the law of corporate bonds, trust mortgages and similar securities, clearly stated and logically arranged. The cases cited number twenty-five hundred. Pertinent statutory provisions of the several States have also been added. Among the questions fully and exhaustively treated are these: Issue of Bonds; Rights of Coupon-Holders; Guaranty; What Constitutes a Mortgage; Validity of Mortgage; Priority of Obligations; Trustees; Statutory Liens; Rolling Stocks and Trusts; Fixtures; Foreclosures and Sale; Questions of Jurisdiction; Parties to Suits; Appointment, Removal and Discharge of Receivers; Duties and Title of Receiver; Suits During Receivership; Preferred Debts; Back Claims; Operation of Roads by Receivers; Receivers' Certificates; Foreclosure Decrees; Railway Reorganizations; etc. In plan, scope and treatment the work is admirable, and cannot fail to prove of great assistance to the practitioner in the branches treated.

My given name, Moses, is not without historical significance. Many of my readers have doubtless read or heard of the first Moses. He was an estimable gentleman in many respects, though some of his transactions were somewhat shady, especially when he slew the Egyptian and hid his body in the sand. I think he was the grandson of Jacob, who put up a job on his father-in-law, Mr. Laban, who had a big cattle ranch, and got a whole lot the better of him on the round up, when they separated the brands. Laban did think of going to law about it, but as he lived in another county, the judge required security for costs. Instead of going about it in a business-like way, and putting up a good bond, Laban came the pauper act, and got caught at it. As at the present time, if a man would make an affidavit that he was too poor to put up the costs of the sheriff for serving the papers on the defendant, and for witness and clerk fees, the court adjudged that he might prosecute the case *in forma pauperis*. Laban, being avaricious, made this application, and probably would have succeeded, but Jacob was too swift for him. He put the judge on to the scheme, and told him that Laban had a nice lot of steers herding out up in the mountains, and had plenty of money to put up for costs; and although Laban tried to wriggle out of it by saying the steers were chattel mortgaged up to their full value, yet Jacob clearly proved that the mortgage was fraudulent and given with intent to cheat and defraud his creditors. So the judge denied Laban's application, and came very near binding him over to the next grand jury for false swearing.

A long time after this Moses is said to have had some idea of coming to life again, and he must have tried it enough to look the ground over; at least, several reputable witnesses say they saw him. But he probably did not have as much confidence in judges and juries as I had, and concluded his show of getting his property back wouldn't pay for what it would cost him. I am half inclined to think I would be better off had I followed his example.

I am a little uncertain as to what Moses' other name was, but from the best information I have, it was Scott. My reason for it is this: Some 2000 years ago or more Scotland was founded by my ancestors, the McScotts, and *they* claimed to be the direct descendants of Moses. Some of them wrote their names M. Scott, some Mac Scott, and some Mos Scott. Being careless about their autographs, the family name has gone a little astray. This is not at all surprising. Take the case of Mr. Shakespeare, who adorned life in the sixteenth century. He is variously called "Shake," Shagspar, Shaksper,

Immortal Bill, etc., etc. Probably he wrote as many books as Mose did, though of a somewhat different character; and it is also quite probable that he was not as efficient in the frog and locust and boil business as the original Moses, but just see what history has done with his name! It is said that only one authentic signature of Shakespeare remains, and even that was not discovered until they applied the same key to it which is used in deciphering the Egyptian hieroglyphics. Is it any wonder, then, that I have only *one less* undoubted signature of the original Moses who antedated him some 4000 years? I am sorry I didn't have this fact brought out on the trial; I wanted to, but my lawyers said it was immaterial. If it had been brought out I am almost certain the Supreme Court of the State of Washington wouldn't have gotten so muddled over my case.

Something like the above at Mose-phere surrounded my early happy days. I worked and played; I studied and idled. I lived near to nature's heart, wherever or whatever it is; I hunted and fished; I became acquainted with the gentle, beautiful, bow-legged, clam-eating Siwash, and learned to patter their Chinock lingo. I built me a log castle on the classic shores of Skookumchuck, and I pulled the long-necked goeduck from the sands of Budd's Inlet; but still I was not happy; an unseen hand was beckoning me away. The migratory instinct so readily observable in certain species of birds and animals seems also to exist in man, and often manifests itself strongly with no apparent reason therefor. There is a restless longing for change, for motion, for travel, which can neither be compromised nor satisfied, save by surrender to its behest. Reason as we may with this intangible spirit, present unanswerable arguments against it, still the unsatisfied longing exists and torments us until we obey its inexorable mandate. I verily believe that in certain instances it has manifested itself so strongly that individuals have voluntarily, deliberately and sanely severed their physical existence, in order to satisfy and gratify their desire to explore the realms of the unknown world. I am aware that it is generally thought and believed that the love of life is so strong that, if it were in our power, we would eternally prolong our earthly life rather than face the mysteries of death, or the shuddering possibility of being absolutely snuffed out of existence. Notwithstanding this teaching and theory there comes at times to all philosophic and reflecting minds an intense longing to explore the mysteries of another life, and our very feet seem shod with impatience. Could we our "quietus make," without the use of a "bare bodkin," and be assured of escap-

ing the pain which we naturally associate with dissolution; could we "with the wink of an eye" or the "draught of a breath" bridge this yawning chasm, myriads of mortals would disappear, not impelled thereto by disappointment or other ills of life, but purely and simply in obedience to a natural desire interwoven with every fiber of our existence. The faint "honk, honk" wafted back to us from the wedge-shaped flight of the wild birds, as they disappear from sight on their confident journey toward an unknown country, is but typical of the final farewell of many a mortal who, with equal confidence, has launched himself into eternity, in search of a realm which attracts him with irresistible force. The spirit will as surely reach its abiding place as the wild bird its home in the north. It is but the operation of a mysterious law, which we cannot now, but some day will, understand; and "whence it comes, or whither it goes, we know not."

Something of this migratory spirit invaded me in the spring of 1881, although no reason in the world existed why I should change my place of abode. However, there was nothing to prevent my doing so, nor would my interests in any way suffer. Therefore, without any well-defined idea of my destination, I wandered up to Seattle. Here I met an old acquaintance, Captain Reefer, whose ship, the *Golden Horn*, was then in port, and just ready to depart on a tramp toward the southern seas. In an aimless way, and prompted by his friendly invitation, I accompanied him on board, thinking I would stop off somewhere down the coast. Our journey was very pleasant down the Sound, through the Straits of Fuca, and thence southerly along the coast. On the second day out we encountered a storm, but nothing serious was apprehended. About midnight I had gone to my room, when a tremendous lurch of the ship occurred, accompanied by a terrific sound. I somewhat hastily ascended to the deck, and was instantly swept into the air and swallowed by the hurricane of darkness, wind, noise and water. I must have lost consciousness within a few seconds, but how long I so remained, or my surroundings, is only a matter of speculation. When I came to myself I was neither on the ship, nor in the sea, nor on land; in fact, I never saw the earth, nor any of its belongings, for many years afterwards. Just where I was or what my surroundings it is not necessary to relate. Suffice it that I was contented and happy, and my longing for change was abundantly, though somewhat unexpectedly, satisfied.



## CHAPTER III.

## I AM DEAD.

I cannot truly say that I was wearied with my labors, for I was living in the land where the weary are said to be at rest, but I was indulging in what would be more properly termed relaxation, an enjoyment somewhat passive in its nature. I had stepped into a light shallop, pushed it off from shore, and was lying prone on my back in its velvet interior, watching the shifting lights in the azure atmosphere, gently lulled by the lapping of the waters and the undulating movements of the boat, when I heard some one call from the shore. Arising slowly and dreamily, I looked in the direction of the call, and saw a youth beckoning me. I gently propelled the boat toward shore, while the youth amused himself by gathering up the diamonds on the beach by the handful, tossing them one by one into the limpid water, and watching the circling ripples which widened and chased each other across its placid face. When I drew near I noticed that he was in slight uniform, and I waited to learn what he wanted.

"Is your name Scott?"

"Yes."

"Moses Scott?"

"Yes."

"Well, you are wanted down to the telephone."

"Which office?"

"The central."

"Very good, I will be there directly."

Stepping out of the shallop, I passed slowly down a beautiful avenue until I came to a large circular building and passed through into the interior. Stopping for a moment, I looked at the inscriptions over the doors of the several departments, until I found the one I wanted, and passed within. Addressing the operator, I said:

"I have just been notified that some one wants to talk with me."

"Your name is Scott?"

"Yes."

"The earth wants you; step right in there."

As I stepped into a small inclosure I heard the "Central" say: "All right; he is here."

I sat down in a chair before a very brilliant mirror, and placed the 'phone at my ear.

Right here I desire to say that the celestial telephone, by some process which I do not understand, enables one not only to hear what is said, but also to see perfectly in the mirror, not only the face of the person talking, but all within the room, and all the surroundings, just as plainly as though sitting face to face. I rang the bell and said:

"Hello."

"Hello."

"Is this the earth?"

"Yes."

"This is Scott, Moses Scott; what is wanted?"

"There is something taking place in Washington which you ought to know."

"Which Washington?"

"Territory of Washington, at Olympia, the capital."

"What is it?"

"Well, I will just connect you with the court-house and you can see for yourself. Please be as expeditious as possible, as there is a good deal of work over the line just at present, and beside, the wire is liable to go down any time."

"How is that?"

"Oh, some of Satan's imps are loose again down in the atmosphere close to the earth, and they just delight to dance on the wire and melt it off."

"I thought they had all been cleaned out of that territory?"

"So did I; but there has just been a change of administration, and they are thicker than ever."

"All right; I'll hurry."

I looked in the mirror and instantly seemed to be transferred to earth. There was the old court-house on the hill; the air was redolent with the perfume of flowers, while in the distance grand old Mt. Rainier reared its triple crest, bathed in a halo of crimson and azure. To the northwest lay the majestic Olympic range, snow-clad, silent and solemn, nature's most beautiful cameo framed in the northern sky. It reminded me of celestial scenery.

Within the court-room still stood the high desk in the corner, with the same patriarchal clerk with flowing whiskers. A new man to me was on the bench, while a few attorneys and witnesses were down in front. The judge of probate sorted out some papers and remarked:

"This is the day set for hearing the petition for letters of admin-

istration in the case of Moses Scott, deceased. The evidence was submitted this morning, and while the proof of death is not conclusive, still it does show an unexplained absence of over seven years, from which death may be presumed. The petition seems to be in due form; notice has been given, and no objection having been made, letters of administration will be granted as prayed for."

Here the judge signed a paper and passed it to the clerk. Continuing, he said:

"Read the petition and letters, and if no objection is heard the order of the court will be entered of record." I listened intently and heard the clerk read as follows:

"In the Probate Court in and for the County of Thurston, Territory of Washington:

In the Matter  
of  
the Estate of Moses Scott, Deceased. }

*To the Honorable M. A. Root, Judge of the above court:*

Mary Scott, your petitioner, respectfully shows:

1. That one Moses H. Scott, heretofore a resident of the above-named county and Territory, mysteriously disappeared some time during the month of March, A. D. 1881, and more than seven years ago.
2. That careful inquiry made by relatives and friends of said Moses H. Scott at different times since his said disappearance has failed to give any trace or information of his whereabouts, or any evidence that he is still living.
3. That your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance.
4. That said Moses H. Scott was never married, and left no last will or testament yet heard of.
5. That said Moses H. Scott left real estate in his own right, in Thurston County, Territory of Washington, of the value of six hundred dollars, more or less.
6. That the heirs of said Moses H. Scott, to the best of your petitioner's knowledge and belief, are: Samuel Scott, aged about 18 years; Anna Rebecca Scott, aged about 16 years; and Fannie Elizabeth Scott, aged about 14 years, the three living children of a deceased brother of said Moses H. Scott.

7. That your petitioner is a judgment creditor of said Moses H. Scott, and holds an unsatisfied judgment against him.

8. That R. H. Milroy, of Olympia, Washington Territory, is a suitable and proper person to act as administrator of the estate of said Moses H. Scott, deceased.

WHEREFORE, your petitioner prays that letters of administration upon the estate of Moses H. Scott, deceased, be issued to said R. H. Milroy, and your petitioner will every pray, etc.

MARY SCOTT."

STATE OF CALIFORNIA, }  
County of Santa Clara. } ss.:

Mary Scott, being by me first duly sworn, upon her oath deposes and says: That she is the petitioner above named; that she has read the foregoing petition and knows the contents thereof, and believes the same to be true.

As witness my hand and seal of.

MARY SCOTT.

Subscribed and sworn to before me {  
this 2nd day of April, 1888. }

H. F. DUSEY,  
*Notary Public.*

#### PROBATE NOTICE.

IN THE PROBATE COURT OF THURSTON COUNTY, W. T.

Mary Scott having filed in this court a petition praying the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock A. M., at the office of the undersigned.

April 7, 1888.

M. A. ROOT,  
*Probate Judge.*

TERRITORY OF WASHINGTON, }  
County of Thurston. } ss.:

I, V. A. Milroy, being first duly sworn, on oath say: That I am a citizen of the Territory of Washington, above the age of 21 years, not interested in the estate of Moses H. Scott; that I posted three

copies of the within notice in three of the public places of the County of Thurston, W. T., as by law required, on the 7th day of April, 1888.

V. A. MILROY.

Subscribed and sworn to before me }  
this 20th day of April, 1888. }

GEORGE M. SAVAGE,

[SEAL]

Notary Public.

IN THE PROBATE COURT OF THURSTON COUNTY.

In the Matter }  
of }  
the Estate of Moses H. Scott. }

The petition of Mary Scott for the appointment of R. H. Milroy as administrator of the above-named estate, coming on this day to be heard, and due proof having been made that due notice of said hearing had been posted in three public places, as required by law, at least ten days before this day; George M. Savage and Francis Henry giving evidence before the court, and it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings when last seen (about eight years ago), and the circumstances of that time, and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county;

Now, therefore; *the court find that the said Moses H. Scott is dead to all legal intents and purposes*, having died on or about March 25, 1888; and no objection having been filed or made to the said petition of Mary Scott, and the guardian *ad litem* of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of administration issue to him upon his filing a good and sufficient bond in the sum of one thousand dollars.

M. A. ROOT,  
Probate Judge.

Dated April 20, 1888.

# GENERAL INDEX.

	PAGE.	CURRENT TOPICS — Continued.	PAGE.
AMERICAN BAR ASSOCIATION, Annual Meeting .....	84, 168	Bad form at the bar.....	146
AN AMERICAN JURIST'S IMPRESSIONS OF A FAMOUS ENGLISH COURT .....	334	Bequests for masses declared invalid in Wisconsin .....	345
ARIZONA JUDGE WHO RAN HIS COURT TO SUIT HIMSELF.....	247	Bicycle as luggage.....	311
BEFORE THE FINAL BAR.....	137, 178, 194, 232, 339, 500	Boycott not a legal weapon.....	379
BE PUNCTUAL IN COURT.....	391	Bribery in legislatures.....	21
BOYCOTT NOT A LEGAL WEAPON....	390	Brooklyn's grand old man.....	235
CEREMONY OF OATH-TAKING.....	428	Canada and the Alaska gold fields.....	109
CHARLES O'CONOR, Incidents in the Professional Career of.....	113	Can a judge be guilty of contempt of court? .....	202
"CHEAP" LAW MAY BE DEAR.....	320	Candidates for office on duplicate ballots..	274
CHIEF JUDGE ANDREWS AND THE COURT OF APPEALS.....	433	Capital punishment in New York.....	93
CIRCUMSTANTIAL EVIDENCE.....	317	Case of irregular practice.....	183
CLARK BELL — Right or left-handedness in the detection of crime.....	154	Causes of action, survival of.....	165
COMPANY LAW AND THE QUEEN'S REIGN .....	51	Champerty, what constitutes.....	146
CONFIDENTIAL COMMUNICATIONS TO JOURNALISTS.....	48	Change in a well-known law publishing firm .....	4
CONTEMPT BY PUBLICATION.....	61	Charles Coudert will contest.....	167
CONTINGENT FEE.....	134	Checks sent by post at risk of sender....	113
COURT ORDER EXTRAORDINARY....	302	Chicago's Bicycle Tax Law unconstitutional .....	129
CORRESPONDENCE.....	144, 304, 339	Chief Judge Andrews' retirement.....	433
CURIOUS PROCEDURE.....	100	Citizenship of a person born in the United States of Chinese parents.....	217
CURRENT TOPICS:		Clarence A. Seward, death of.....	93
Admissions to the bar in England.....	95	Close of a notable judicial career in Maine .....	361
Admissions to the bar in West Virginia..	128	Codification of the laws of New Jersey...	129
Alleged Newspaper Trust.....	163	Codification of the public statutes of Massachusetts .....	415
Alleged violation of "Weekly Payments" Law .....	415	Constitutionality of Nebraska's Anti-Deficiency Law.....	484
American lawyers and their unmaking....	37	Conviction for murder of attempted suicides .....	382
A midsummer Appellate Court.....	38	Copyrights and how to secure them.....	221
Anarchy, how to deal with.....	184	Criminal appeal in England.....	199
An admirable libel law.....	20	Dangerous expedition in criminal trials..	145
An excellent judicial appointment.....	237	Death of the oldest practicing lawyer in New York.....	93
An exciting scene in an English criminal court .....	434	Decision in a celebrated boycotting case..	397
Annual meeting of the New York State Bar Association.....	344	Delays in criminal procedure.....	186
Anomaly in the right of appeal.....	184	Development of the law with respect to bicycles .....	148
An orthographical issue.....	310	Disbarment of corrupt attorney.....	254
Another excellent judicial appointment by Governor Black.....	273	Docket for October term of the United States Court.....	222
Another judicial appointment at the Disposal of Governor Black.....	344	Dr. Talmage's compliment to lawyers....	40
Anti-Ticket Scalping Law.....	200	Election of Judge Parker to the New York Court of Appeals.....	325
Anti-Trust Law decision in New York...	94	English courts and the Betting Act.....	74
Apartment-houses, liability of owners of..	39	English judicial statistics.....	167
Appraisal of Jay Gould's estate.....	19	Engrossment of legislative bills.....	2
A radical labor law.....	56	Expert testimony.....	165, 343
Are lawyers gregarious?.....	236	First term of the Supreme Court in Western New York.....	346
Attorney rebuked for abusive language toward judiciary.....	327	Flood of legal products.....	185
Authority of a police court judge to remit fine and costs.....		Governor who favors lynch law.....	128
		Governor Griggs' appointment as United States attorney-general.....	435
		Governor Griggs on the making of laws..	181
		Government by injunction.....	218

CURRENT TOPICS — Continued.	PAGE.
Habitual Criminal Act in Ohio to be tested .....	5
Honors for a distinguished Maine jurist..	220
Howard C. Benham, trial and conviction of .....	92
How far may judges be criticized?.....	235
Husband's right to sue for loss of <i>consortium</i> .....	23
Hypnotism in law courts.....	145, 185
Illegality of the so-called trading stamp business .....	484
Illinois State Bar Association, annual meeting .....	56
Important decision as to what constitutes a manufacturing corporation.....	328
Imprisonment for debt in England.....	40
Incompetence of legislators.....	39
Increase of the suicide mania in Europe..	257
Indifference of American electors to the referendum .....	291
Infernal activity of the gas meter.....	363
Insurance Commissioner McNall, of Kansas, squelched.....	257
Interesting question pertaining to the Law of Libel.....	203
Is an adjudication by a court of the Roman Catholic Church a bar to a civil action?..	398
Is mustard a food?.....	292
Is what a jury sees evidence when making a view of premises?.....	57
Jurisdiction of Federal and State courts defined .....	272
Jury attending church, not reversible error .....	59
Justice Field, incidents in the career of...	91
Kidnapping case.....	164
Klondike gold-mining regulations.....	237
Lawyers' tears.....	59
Liability of inn-keeper for loss of bicycle..	399
Liability of railway company for injuries to employees.....	380
Life insurance not firm property.....	291
Neutralization of submarine telegraphic cables .....	73
New era in the history of the Supreme Court of Illinois.....	291
New Jersey Court of Errors and Appeals.	127
New Jury Law again criticized.....	2
New Tariff Law, when did it take effect?..	111
New trial granted because of the incompetence of counsel.....	22
No extra hazard in riding bicycles.....	110
Nomination of Joseph McKenna to the bench of the United States Supreme Court .....	483
Non-partisanship in the selection of judges .....	274
Notable breach of promise case in the Pine Tree State.....	274
Notable case in California.....	255
Notable damage suits against a railway corporation .....	271
Notable divorce decision.....	3
Noted "Strike Case" in London.....	418
Novel phase of the "Woman Question" ..	2
Ohio Lynch Law unconstitutional.....	21
Ohio Medical Registration and Examination Law constitutional.....	345
Opening of the October term of the United States Supreme Court.....	272
Ought legislative bodies to be smaller?...	292
Paper v. Parchment.....	363
Pardoning power, abuse of.....	112, 164
Payment for accepted newspaper articles..	21

CURRENT TOPICS — Continued.	PAGE.
Peculiar legislation in Pennsylvania.....	19
Pennsylvania's Alien Tax Law unconstitutional .....	182
Plethora of lawyers in India.....	291
Poetry in pleadings.....	38
Poll parrot on the witness stand.....	236
Power of racing associations to exclude persons who violate their rules.....	275
Power of removal from office incident to power of appointment.....	238
Prerogatives of State executives.....	58
Prison-made goods, disposition of.....	112
Proceedings against the alleged Coal Trust dismissed .....	362
Proctor, L. B., on the trial of Aaron Burr.	22
Professional services rendered to corporation under certain circumstances.....	433
Promotion of Attorney-General McKenna to the United States Supreme Court....	397
Proposed changes in the criminal laws of Georgia .....	381
Recent English decisions affecting bicyclists .....	328
Recent judicial appointments in England.	364
Refusal of charter to Faith Cure Christian Science Church.....	484
Regulation of trusts in Europe.....	220
Remarkable decrease of crime in Great Britain .....	222
Retirement of Chief Judge Andrews.....	483
Retirement of Justice Field from the United States Supreme Court.....	289
Review of the Luetgert murder trial.....	307
Right of a city to enforce an agreement between private parties as to the dedication of a street.....	434
Right of gas companies to use public streets includes new streets subsequently opened .....	309
Rights of non-travelers in railroad stations .....	130
Right of State legislature to fix the duration of a working day.....	327
Right to apply for liquor license.....	147
Right to name the baby.....	76
Rule against "poor person" litigants....	364
Second trial for the same offense.....	310
Shall the grand jury system be abolished?..	326
Shall the National Guard wear prison-made uniforms?.....	256
Should angels have wings?.....	221
Should a prisoner ever testify in his own behalf?.....	1
Skimmed milk, what constitutes.....	58
Simplification of criminal pleadings in Massachusetts .....	346
Spectacular feature of a murder case.....	127
Statutes against Sunday baseball unconstitutional .....	202
Status of an employe of a railroad while being carried as a passenger.....	361
Status of expert witnesses as to compensation for testifying.....	381
Supreme Court Justice Field's record....	145
That "unpublished" letter from Chancellor Kent.....	73
Theoretical v. Practical Polygamy.....	398
The "Striking Lathers' Case".....	416
Thomas M. Cooley, illness of.....	109
Travesty on justice in California.....	55
Trial of Banker Spalding in Chicago.....	1
Valuable plan for recruiting a law journal editorial staff.....	381

CURRENT TOPICS — Continued.	PAGE.		PAGE.
Value of the legal profession as a stepping-stone to preferment.....	253	LAW-MAKERS IN JAPAN.....	356
Voting on constitutional amendment, a lesson .....	254	LAWYER MARKS IN CHICAGO.....	193
William M. Evarts, incident in the career of .....	75	LAWYERS AND POLITICS.....	313
X-ray photographs as evidence.....	309	LAWYERS' CLERKS—Their duties, pay, and many discouragements.....	12
Youthful criminals in England, punishment of.....	76	LEGAL CRUELTY.....	157
DANIEL WEBSTER — Carl Schurz's estimate of.....	423	LEGAL LAUGHS.....	17, 35, 54, 69, 86, 105, 121, 140, 159, 195, 215, 232, 249, 285, 303, 320, 358, 374, 394, 412, 430, 501
DAVIS, JOSEPH M. — Is insurance a gambling contract?.....	188	LEGAL NOTES.....	17, 34, 53, 70, 88, 104, 123, 140, 160, 179, 195, 215, 232, 250, 266, 286, 303, 321, 337, 357, 375, 393, 411, 428, 501
DEFECTS IN THE LAW OF MURDER.....	408	LEGAL REMUNERATION — Methods of.....	9
DISBARMENT — LAW OF.....	14	LIEBER, G. NORMAN — Jurisdiction of the United States over places held for public purposes .....	245
DISREGARD OF TESTATOR'S INTENTIONS .....	389	LIABILITY OF BANKERS FOR BREACHES OF TRUST BY CUSTOMERS WHO ARE TRUSTEES.....	409
DUTIES OF THE BENCH AND BAR.....	66	LINCOLN'S HUMOR IN THE LAW.....	302
DUTY AND LIABILITY OF ATTORNEY AND CLIENT.....	132	LITERATURE IN BLACKSTONE.....	354
EDWARDS, PERCY L. — International Arbitration .....	151	LORD ESHER'S RETIREMENT.....	330
EDWARDS, PERCY L. — Public policy and the law.....	298	LYNCHING — One way to stop it.....	35
ENGLISH NOTES.....	16, 35, 52, 87, 103, 122, 159, 178, 196, 216, 231, 248, 266, 287, 304, 322, 338, 358, 375, 412, 430, 501	LYNCH LAW AND WHAT IT MEANS... ..	213
EVARTS' JOKE ON DEPEW.....	50	MAGAZINES.....	18, 107, 268, 306, 340, 422
EVIDENCE OF BLOOD STAINS.....	248	MADE THE COURT SMILE.....	294
EVIDENCE OF PRISONERS.....	392	MADE LEARNED BY THE LAW.....	86
EXPERT TESTIMONY.....	209	MARRIAGES AT SEA.....	208
FAREWELL TO CHIEF JUDGE ANDREWS .....	494	MAYER, ARTHUR C. — Contempt by publication .....	61
FEDERAL PROCEDURE — Instruction in.....	85	MASSACHUSETTS' NEW LIBEL LAW.. ..	33
FIRST TERM OF THE SUPREME COURT IN WESTERN NEW YORK... ..	349	MILLER, WALTER L. — James Louis Petigru .....	101
GERMAN CRIMINAL COURTS.....	284	MILLER, WALTER L. — Lawyers and Politicians .....	313
GOOD ADVICE TO LAW GRADUATES.....	318	MILLER, WALTER L. — What should lawyers read?.....	279
HARD TO DECIDE.....	497	MILLINERY — A question of.....	50
HILL, DAVID B. — No poll tax for voters.....	406	MORSE, ALEXANDER PORTER — Neutralization of sub-marine telegraphic cables.. ..	42
HILL, NICHOLAS.....	447	MURPHY, J. A. — The contingent fee.....	134
HIRSCHBERG, ALEXANDER — The remedy of "quasi-contract".....	259	NEUTRALIZATION OF SUB-MARINE TELEGRAPHIC CABLES.....	42
HOW TO STUDY LAW.....	68	NEW BOOKS AND NEW EDITIONS.....	126, 144, 162, 198, 216, 270, 305, 324, 341, 398, 414, 432, 502
HUMORS OF SPECIAL PLEADING.....	213	NEW YORK COURT OF APPEALS DECISIONS .....	497
INSTRUCTING THE JURY.....	157	NEW YORK COURT OF APPEALS VACANCY.....	120, 209, 241, 322
INTERNATIONAL ARBITRATION.....	151	NEW YORK STATE BAR ASSOCIATION — Annual meeting.....	496
IS INSURANCE A GAMBLING CONTRACT? .....	188	NON-PARTISANSHIP IN THE SELECTION OF JUDGES.....	244
PETIGRU, JAMES LOUIS.....	101	NO POLL TAX FOR VOTERS.....	406
SPENCER, JOHN C., AND NICHOLAS HILL .....	447	NOTED ADVOCATES — Personal Peculiarities of.....	121
JUDICIAL COSTUME — Origin of the black cap — Appellation of "reverend".....	392	NOTEWORTHY CASES OF THE JUDICIAL YEAR IN ENGLAND.....	226
JUDICIAL WIT — Some of the best of ancient and modern instances.....	333	"OBITER DICTA".....	206
JURIES — Something new in.....	67	O'CONNELL AS A LEGAL RACONTEUR .....	46
JURISDICTION OF THE UNITED STATES OVER PLACES HELD FOR PUBLIC PURPOSES.....	245	ODD CRIMINALS BEFORE THE COURT .....	11
JUSTICE FIELD'S RESIGNATION.....	295	ORAL INSTRUCTIONS TO JURIES.....	35
KERR, JAMES M. — Riparian owners.....	7	ORIGIN OF CHANCERY COURTS IN NEW YORK.....	173
KIND WORDS OF CONTEMPORARIES.....	34	PERSONAL TRIBUTES TO RETIRING CHIEF JUDGE CHARLES ANDREWS.....	441
KNEW HOW TIME FLEW.....	84		
LAW AND CHRISTIANITY.....	265		



	PAGE.		PAGE.
POKING FUN AT AMAZONIAN BLACK-STONES .....	214	RIPARIAN OWNERS — Rights in land under water.....	7
PORTRAIT WITH AN INTERESTING HISTORY .....	405	ROSENDALE, SIMON W. — Chief Judge Andrews and the Court of Appeals.....	436
PREFERRED CREDITORS.....	426	RULES FOR TRIAL TERMS IN ALBANY COUNTY, N. Y.....	498
PRICES PAID TO MODERN AUTHORS. 395			
PRIVATE TRIAL OF DIVORCE CASES. 265			
PROCTOR, L. B. — Incidents in the professional career of Charles O'Connor.....	113	SEWARD, WM. H. — Incident in the career of .....	125
PROCTOR, L. B. — John C. Spencer and Nicholas Hill.....	449	SLIP OF THE TONGUE.....	85
PROCTOR, L. B. — Origin of Chancery Courts in New York.....	173	SNAP-SHOTS AT BENCH AND BAR OF ALBANY, RENSSELAER AND ONEIDA COUNTIES.....	458
PROCTOR, L. B. — The first term of the Supreme Court in Western New York.....	349	SNEEZES IN COURT.....	67
PROCTOR, L. B. — William Wirt at the trial of Aaron Burr.....	23	SPECIMENS OF GREEK WIT.....	498
PUBLIC POLICY AND THE LAW.....	298	STANDING MUTE ON ARRAIGNMENT. 427	
PUNITIVE DAMAGES — Disposition of... 49		STEVENSON, MORTON JOHN — Duty and liability of attorney and client.....	132
		SUCCESS AT THE BAR, Requisites of... 214	
"QUASI-CONTRACT" .....	335	SUNDAY LAWS.....	246
"QUASI-CONTRACT" — Remedy Inefficacious when applied to the recovery of money paid under mistake as to the validity of a patent right.....	259		
READ THE STATUTES.....	425	THE LAST EXPERTS IN COURT.....	355
RECENT PROCEEDINGS INVOLVING PROFESSIONAL CONFIDENCE.....	11	THE LAW AND THE LAYMEN.....	283
REFERENDUM IN NEBRASKA.....	33	TRUE TEST OF THE CRIMINAL RESPONSIBILITY OF THE INSANE.....	263
REMEDIES GOVERNING THE RIGHT TO FOLLOW PROPERTY WRONGFULLY TAKEN OR CONVERTED AS AGAINST THE WRONGDOER'S ESTATE .....	420		
RIGHT OR LEFT-HANDEDNESS IN THE DETECTION OF CRIME.....	154	UNIFORM DIVORCE LAW.....	246
		WHAT SHOULD LAWYERS READ?... 279	
		WHAT THE LAW DECIDES... 319, 336, 374, 388	
		WHEN DOES "ISSUE" MEAN "CHILDREN?" .....	393
		WHEN LAWYERS WERE SCARCE.....	320
		WILLIAM WIRT AT THE TRIAL OF AARON BURR.....	28
		WINE V. WATER.....	190

# INDEX-DIGEST

TO

## ABSTRACTS, CASES IN FULL AND NOTES OF CASES.

	PAGE.		PAGE.
ABATEMENT .....	59	CARRIER — duty to warn passenger of danger	17
ACCIDENT INSURANCE — classification..	395	misdelivery of property.....	413
does not cover case of death during quarrel .....	30	CARRIER OF GOODS — alleged exorbitant charges — conversion.....	277
policy — disability benefits.....	124	CARRIERS OF PASSENGERS — injury — negligence .....	413
waiver of condition.....	186	round-trip tickets — conditions.....	233
modification — when complete.....	141	ticket as evidence of contract.....	413
when policy takes effect.....	413	CHECK — delay in presentation.....	161
“wholly disabled”.....	141	forged indorsement.....	377
ACTION FOR PERSONAL INJURIES — competence of evidence.....	223	CLOSING OF HIGHWAY — damages claimed to business.....	41
ADMINISTRATOR — agreement to act without compensation.....	187	COMMON CARRIER — articles as baggage.....	410
ADULTERY .....	359	contract to indemnify for losses occurring from injury to passengers.....	96
AGREEMENT IN RESTRAINT OF TRADE .....	72	injury to passenger — contributory negligence .....	259
ALIENS — right to inherit lands.....	59	injury to passenger — negligence.....	312
ASSAULT — ejectment — rights of colored citizens .....	116	not bound to ascertain real owner of goods, but must follow directions.....	197
ASSIGNMENT FOR BENEFIT OF CREDITORS — preferences .....	233	COMPANY — debentures — no profits.....	360
ASSIGNOR AND ASSIGNEE — banking.....	348	CONDITIONAL GIFT OF MONEY.....	151
ASSIGNMENTS PENDENTE LITE — effect .....	396	CONSTITUTIONAL LAW — insurance in unauthorized company.....	36
ATTACHMENT .....	311	liability of city for damage by mob.....	234
jurisdiction — service.....	124	licensing of medical practitioners.....	328
ATTORNEY AND CLIENT — equitable cause of action.....	294	qualification as to service as juror.....	409
privileged communications.....	233	unjust discriminations.....	413
ATTORNEYS — authority — ratification....	377	CONSTRUCTION OF SECTION 2555, NEW YORK CODE OF CIVIL PROCEDURE .....	155
BAILER AND BAILEE — grain destroyed by fire — question of negligence.....	96	CONTEMPT .....	78
BANKING CHECK — time within which it must be presented.....	70	injunction .....	70
BANKING LAW — construction of.....	29	interference with property in custody of court .....	396
presentation of check during banking hours — due diligence.....	418	judgment .....	333
teller's liability for moneys stolen.....	241	what constitutes — newspaper article reflecting on judge.....	369
BANKS AND BANKING — fraud by agent — knowledge .....	396	CONTEMPT OF COURT — marching in street .....	224
knowledge of bank officer.....	89	CONTRACT — breach — application for injunction to restrain.....	17
BANKS — insolvent bank — deposit of check.....	377	breach — guessing contest.....	96
BENEVOLENT ASSOCIATION — action by members.....	124	breach — responsibility.....	78
BICYCLES — exaction of toll illegal.....	151	employment — breach of.....	360, 396
BID TO DO CERTAIN PUBLIC WORK — mistake in bid.....	251	interpretation — receivers.....	124
BILLS AND NOTES — fraud.....	396	no consideration — gambling debt.....	130
fraudulent representation.....	413	public policy.....	179
BOARD OF EDUCATION — removal of school-house .....	36	rescission — damages.....	223
BOARD OF HEALTH — power to destroy buildings .....	312	speculative damages.....	414
BOYCOTT — not a legal weapon.....	400	validity .....	60
BROKERAGE .....	131	validity — restraint of trade.....	323
BROKER'S COMMISSIONS.....	29	CONTRACTS IN RESTRAINT OF TRADE .....	150
CANCELLATION OF DEED — enforcement of lien for purchase money.....	267	CONTRACT TO LEND MONEY — contract to take debentures of company — breach — remedy — damages.....	36

	PAGE.		PAGE.
CONVICT-MADE GOODS—State statute to exclude unconstitutional.....	5	HOLOGRAPHIC WILL—construction of.....	60
COPYRIGHT—dramatic composition.....	251	HUSBAND AND WIFE.....	258
CORPORATIONS—injury to person crossing track—contributory negligence.....	168	agreement to release dower.....	293
officers—assignment for benefit of creditors.....	377	deed of separation.....	90
payment of wages of employes.....	78	non-liability for maintenance of adulterous wife.....	72
stock—negotiability.....	197	parol agreement to convey land.....	179
validity of act limiting fares.....	167	separate business.....	71
CRIMINAL EVIDENCE—murder—confession.....	414	restraint on anticipation.....	431
CRIMINAL LAW—accomplice.....	223	verbal injury as ground for separation....	293
instructions—Rape.....	216	INDICTMENT—validity.....	77
robbery.....	141	INFANTS—deed of trust—disaffirmance....	268
use of dangerous weapon.....	89	INJURY EN VENTRE SA MERE.....	276
CRIMINAL PRACTICE—fornication—indictment.....	377	INJURY TO PERSON ON RAILROAD TRACK.....	288
grand juries—presence of other parties..	89	INNKEEPERS' LIEN.....	501
DAMAGES—liability for gratuitous medical services.....	340	INSANITY—lunatic—contract.....	396
measure of, in executory contract of sale.	339	INSURANCE—assignment of policy as collateral.....	198
DANGEROUS SUBSTANCES—storage of—liability for injury by explosions.....	501	INSURANCE LAW—policy not void.....	36
DEED—community property.....	179	INSURANCE POLICY—clause—construction.....	384
conveyance to wife—fraud.....	396	INTEREST—mortgage—redemption—costs.....	142
DESCENT AND DISTRIBUTION—slaves.....	198	INTOXICATING LIQUORS—police powers of States.....	198
DIVORCE—Dakota decree—validity....	385	JEOPARDY—when attaching.....	323
judgment when not admissible.....	17	JOINT VERDICT—judgment against only one of several defendants.....	54
practice—alimony <i>pendente lite</i> .....	197	JURISDICTION OF FEDERAL AND STATE COURTS.....	277
DOG LAW—constitutionality of.....	96	JURY—misconduct.....	71
DOMICILE—when acquired.....	330	view of <i>locus in quo</i> .....	419
EASEMENT—adverse possession.....	89	LANDLORD AND TENANT—holding over.....	89
implied reservation.....	89	tenant's duty to rebuild.....	71
ELECTRIC LIGHT WIRES—contributory negligence.....	70	LANDS SOLD FOR TAXES.....	17
EMINENT DOMAIN—taking of water-works.....	17	LEAD BULLION—duty on.....	29
ESTOPPEL—purchaser of mortgage note..	89	LEASE—violation of covenants.....	167
EVIDENCE—illegitimacy—Burden of proof.....	431	LIBEL—malicious defamation.....	384
EXAMINATION BEFORE TRIAL—business of corporation affected by public use..	118	requisites of publication—privileged matter.....	30
EXECUTORY CONTRACT—when may be avoided.....	118	LIFE INSURANCE—availability of reserve funds for payment of death losses.....	95
EXPRESS MESSENGER A PASSENGER FOR HIRE—contract exempting common carrier from liability void as against public policy.....	268	cancellation of policy.....	324
EXTRADITION—evidence.....	71	effect of warranty that the assured is in good health.....	180
FEDERAL AND STATE COURTS—conflicting jurisdiction.....	323	waiving of immediate payment by agent..	6
FEDERAL COURTS.....	396	LIMITATIONS—claim for money collected by an attorney.....	161
FIRE INSURANCE.....	36	MAILS—property right in use of.....	258
policy—limitation of action.....	124	MARITIME LAW—duty of master of tug..	117
FOREIGN CORPORATIONS—jurisdiction—internal management.....	142	MARRIAGE—breach of promise.....	377
FOREIGN SAVINGS BANK—assessment for taxation.....	340	MARRIED WOMAN—debts of husband..	71
FORGED CHECK GIVEN IN PAYMENT OF GOODS—recovery of goods.....	142	restraint on anticipation.....	90
FRAUDS—statute of.....	396	right to hold bank stock in another State..	60
FRAUDULENT CONVEYANCES—evidence.....	234	MASTER AND SERVANT—assumption of risk.....	396
GARNISHMENT—property subject.....	161	fellow-servant.....	143
GENERAL AVERAGE—contribution against steam tugs.....	137	liability of master.....	203
GIFT—perpetuities.....	431	liability to third person.....	304
GRADE CROSSINGS.....	71	negligence—defective machinery.....	161
HABEAS CORPUS—grounds of remedy....	323	responsibility of clerk for injuries.....	117
HIGHWAY—towns—notice.....	143	right of latter to demand clearance card..	6
		vicious animal—knowledge of.....	346
		wrongful discharge—measure of damages.....	234
		MECHANICS' LIEN STATUTE.....	239
		MECHANICS' LIENS—when attach.....	161
		MESSENGER ACTING AS NOTARY—compensation.....	17

	PAGE.		PAGE.
MORPHINE HABIT—inducing cause of kleptomania	5	RIGHT OF ACTION	150
MORTGAGE—fixtures—trover—damages	142	RIPARIAN OWNERS—rights of	238
satisfaction of record	234	RIPARIAN RIGHTS	198, 348
securing several notes— <i>pro rata</i> application	198	navigable waters—rights of hunters	359
subrogation	124	SALES	359
MUNICIPAL CORPORATION—authority—ratification	234	SALVAGE	359
MUNICIPAL ORDINANCES—regulation of vocations	118	SELF-DEFENSE—when killing of assailant is justified	29
MURDER IN FIRST DEGREE—evidence	385	SERVICE OF SUBPENA—acceptance	117
NATIONAL BANK DIRECTORS—duties of	41	SETTLEMENT—power of appointment by deed or will among children	161
NATIONAL CURRENCY ACT—not a revenue bill	72	SHERIFF—unwarranted arrest—liability	359
NEGLIGENCE	324	SHIP—collision—damages to dredger—remoteness	162
freight elevators—safety appliances	340	SHIPPING—charter party—exceptions	126
landlord and tenant—corporations—leases	143	SLANDER—privileged communications	203
NEWLY DISCOVERED EVIDENCE	359	STATUTE OF LIMITATIONS	78
NUISANCE—measure of damages	161	STREET RAILWAY COMPANY—condemnation proceedings	324
OFFICE AND OFFICERS—city treasurer—loss of funds	234	statute limiting fare	117
ORDINANCE PROHIBITING SPEAKING ON PUBLIC GROUND	36	SUMMONS—returnable on Saturday—“holy time”	347
OSTEOPOTHY—practice of in Illinois	72	TAXES ASSESSED ON PERSONAL PROPERTY—attachment and execution before acquirement of special lien	316
PARTNERSHIP	150	TELEGRAPH COMPANY—delay in transmitting message	223
assignments	377	TENANCY IN COMMON	132
corporation as partner— <i>ultra vires</i> —accounting	216	THAMES—conservators—bed of river—raising sand or gravel	144
what constitutes	234	TORRENS LAND TITLE ACT UNCONSTITUTIONAL	54
PERPETUAL SCHOLARSHIP—not subject to execution	383	TORTS—deceit	340
PERSONS—infancy estoppel	340	injury to plaintiff's business	89
mortgage by infant—disaffirmance	340	TRADE-MARK—“Kynite”—explosives—invented word—registration	197
POST-NUPTIAL AGREEMENT	431	TRADE NAME—imitation	162
PRACTICE—discovery—information—production of documents	377	TRADING STAMPS—gift enterprises	488
summons served on Sunday	275	TRANSFER PASSENGER—rights of	77
PREFERENCE FOR WAGES—employees of corporation for which receiver has been appointed	324	TRIAL—waiving of right to have questions of fact submitted to jury	61
PRESUMPTION OF TIME OF DEATH	205	TRUSTS—special deposit—insolvent bank	340
PRINCIPAL AND AGENT—agent's authority	131	UNNAVIGABLE STREAM—pollution of	348
apparent authority	161	UNPROFESSIONAL CONDUCT	61
authority to sell property	311	VERBAL GIFT—when not valid	240
parties to actions	54	VERDICT BY LESS THAN ALL THE JURORS	36
principal bound by untrue representations of his agent	149	VERDICT SIGNED BY ONE WHOSE NAME DID NOT APPEAR AS JUROR	36
PROFESSIONAL COMMUNICATIONS—disclosure	28	VENDOR AND VENDEE—breach of warranty	502
PUBLIC OFFICERS— <i>de facto</i> —mayor's approval—compensation	143	VENDOR OF DRUGS—responsibility for mistake	418
PURCHASE-MONEY LIEN	304	VENDOR'S LIENS	125
RAILROAD CORPORATION—injury to passenger—contributory negligence	131	WATER COURSE—drains—liability of municipality for insufficient sewer	304
damages for failure to land passenger at specified station	6	WILL—agreement to pay contestants to withdraw contest	186
use of dangerous elements	130	construction	413
RAILWAY COMPANY—negligence	431	construction—illegitimate child comprised in “issue”	90
responsibility for accident	60	contribution corporation—insolvency—antecedent debt	206
responsibility for noises made by passengers	41	married women—will not revoked by death of husband and her subsequent marriage	282
RAILROAD RATES—power to fix and regulate	418	promise by one of three devisees—contribution	143
REMOVAL FROM OFFICE—civil service act—regulations—injunction	260	trust	89
		WITNESS—impeachment of	329







1

